

# Measures to take following 'RFF Family Partnership'

By Debra Squires-Lee  
and R. Victoria Fuller



SQUIRES-LEE



FULLER

In *RFF Family Partnership, LP v. Burns & Levinson, LLP, et al.*, the Supreme Judicial Court ruled that confidential communications between a law firm's in-house counsel and the firm's attorneys concerning a potential malpractice claim were privileged and not subject to disclosure to the client in a later malpractice suit if four factors were met.

Massachusetts is the first court of ultimate jurisdiction to consider the issue. The SJC provided clear guidance to law firms about when and under what circumstances the privilege would apply. Under the *RFF* four-factor test, the privilege attaches when:

---

*Debra Squires-Lee is a partner at Sherin and Lodgen LLP in Boston, where she co-chairs the firm's professional liability practice group. She defends lawyers and law firms in the defense of legal malpractice matters. R. Victoria Fuller is an attorney at Boston's Rose, Chinitz & Rose. Her practice focuses on legal malpractice defense, business litigation, and employment litigation and counseling.*

- (1) The law firm has designated, either formally or informally, an attorney or attorneys within the firm to represent the firm as in-house or ethics counsel;
- (2) The in-house counsel did not perform any work on the particular client matter at issue or a substantially related matter;
- (3) The time spent by the attorneys in the communications with in-house counsel is not billed or charged to any outside client; and
- (4) The communications are made in confidence and kept confidential.

Thus, while the SJC's opinion provides comfort to law firms and to lawyers seeking legal advice from their in-house counsel, given the specificity of the *RFF* test, firms should take certain measures to ensure that the privilege attaches and that communications are protected.

## Practice management pointers

- **Clearly designate in-house ethics counsel.** Although the SJC indicated that a law firm may "informally" designate ethics counsel, firms should unambiguously identify their designated ethics counsel both internally and externally. For example, include the attorney's role as ethics counsel on his or her internal and external bio. That ensures that the firm's attorneys know who to turn to for legal advice and may forestall future challenges to the privilege by potentially adverse clients based on the role of the attorney consulted. Also, when there are time pressures presented by a potential

claim of malpractice, for example a request for a tolling agreement, having a previously clearly designated in-house counsel avoids uncertainty and delay.

- **Designate multiple in-house ethics counsel.** Under the second prong of the *RFF* test, the in-house ethics counsel cannot have performed any work on the client matter or a substantially related matter. Most in-house counsel at law firms are not exclusively firm counsel and continue to practice in their fields, and there is a real possibility in-house counsel worked on the client matter at issue. Thus, if there is only one designated in-house ethics counsel, a firm runs the risk that he or she will be conflicted out of providing privileged legal advice. While the firm can specially designate another lawyer to provide advice in that circumstance, it may be more efficient, and safer, for the firm to have designated a deputy in-house general counsel. Having a designated deputy will avoid confusion; loss of the privilege if someone inadvertently communicates with in-house counsel who did work for the client; and delay in getting necessary advice.
- **Establish a billing code specific to discussions with in-house ethics counsel.** Law firms should create a billing code used only for (a) discussions with in-house ethics counsel; and (b) the provision of legal services and advice to the firm by in-house counsel. Separate tracking will ensure that time spent consulting with in-house counsel was not billed to a client, and there will

be no question that the third prong of the *RFF* test is met.

- **Maintain strict confidentiality.** Like any privileged relationship, consultation with a firm's in-house ethics counsel should be kept in the strictest of confidence. Only firm attorneys who need to know should be involved in the communications, and the firm should ensure that the in-house ethics counsel is present for all communications concerning the matter. For example, if another attorney with expertise in a particular substantive area of law must be consulted, ethics counsel must be present for all conversations with that lawyer and copied on all written communications. Similarly, in-house ethics counsel's paper files should be segregated from the firm's main client files and kept in a locked file drawer. In-house counsel's electronic files either should not be kept on the firm's shared document management system, or should be password protected. Finally, to avoid an inadvertent loss of the privilege, it

would be good practice to include a confidential/privileged notation on all written work product generated by in-house counsel, and to include the same tag on emails sent to or from in-house counsel concerning a potential claim.

- **Train, train, train.** Law firms should develop a procedure to follow when a potential client conflict arises, and should hold periodic trainings for all attorneys on that procedure. Younger attorneys, in particular, should be trained to go directly to in-house counsel with any concerns about a potential conflict (and not to a mentor with whom they feel comfortable). If a younger lawyer approaches his or her mentor, the mentor should recognize the need to involve in-house counsel. Likewise, attorneys should be trained to maintain strict confidentiality even within the firm, since the privilege attaches only to communications with in-house counsel and not with other lawyers.
- **Jurisdictional considerations.** *RFF Family Partnership* applies only in Mas-

sachusetts, and it remains unclear in many jurisdictions whether the attorney-client privilege protects discussions with in-house ethics counsel (or worse, some courts have held that no privilege attaches). As a result, law firms and their in-house ethics counsel should keep in mind and consider the potential that the client might pursue its grievance in any jurisdiction other than a Massachusetts court and act accordingly — perhaps even by consulting outside counsel immediately and including outside counsel in all discussions.

The SJC's decision in *RFF Family Partnership* will result in the provision of better legal services both to clients and the law firms that serve them. It should also provide some relief to lawyers who have to balance their ethical and fiduciary obligations. The four-part formula appropriately balances the concerns of clients and attorneys and, hopefully, will be adopted by other jurisdictions in time.

MLW

SHERIN  
AND  
LODGEN

www.sherin.com