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Recent Ruling Reinforces Need to Protect Documents When Employees Leave in Order to Preserve Confidentiality and Privilege

A recent ruling from the federal district court in Minnesota reinforces the idea that an employer needs to take active steps to assure that an employee does not take otherwise confidential or privileged documents when the employee leaves the company, or the confidentiality or privilege is likely to be waived. In today's world of electronically stored information and documents, this becomes increasingly difficult.

An employer needs a policy, and reasonable enforcement of that policy, to avoid waiver. Because confidentiality is a common prong of privilege, the court's reasoning will extend beyond Minnesota. Moreover, the court's reasoning may rationally be extended beyond questions of privilege to other areas requiring confidentiality to maintain a claim or defense (*e.g.,* intellectual property and trade secrets).

In July 2012, in a matter in which Chapman and Cutler LLP represented a lender seeking certain documents in support of its claim for repayment of debt obligations, Chief Magistrate Judge Arthur J. Boylan of the District of Minnesota held that employers must exercise care to protect confidential and otherwise privileged documents in the hands of a former employee, if the employer wants to maintain that privilege. Judge Boylan's decision was upheld in September by the Chief District Judge Michael J. Davis. *Bank of Montreal v. Avalon Capital Group, Inc.*, No. 10-591 (MJD/AJB) (July 10, 2012), *aff'd* (Sep. 6, 2012).

Following Minnesota law, and guided by Magistrate Judge Paul Trevor Sharp's decision in *O'Leary v. Purcell Co., Inc.,* 108 F.R.D. 641 (M.D.N.C. 1985), the Minnesota court held that an employer that terminated a senior employee and allowed him to take documents with him, waived any privilege with respect to those documents when it failed to take steps to protect the confidentiality of the documents; and also when it failed to take reasonable steps to keep the employee from producing the documents to a third-party in response to a subpoena.

In *O'Leary*, the former president of a company turned over documents to a third person which the company later sought to claim as privileged. There was some dispute as to how the former president came into possession of the documents, and whether he was expressly authorized by the company to have them after the term of his employment. But, it was apparent to the court that the company knew that the former president had some documents after he left the company, and that the company made no efforts to retrieve the documents at issue. In holding that the company had waived privilege with respect to the documents, the court noted that it was the company's burden to show that the documents had been maintained as confidential, and said:

> Although many of the facts relating to plaintiffs' acquisition of the documents are disputed by the parties, several undisputed facts lead the Court to conclude that defendant Purcell and its corporate predecessor treated the documents here in issue so loosely that they should not be considered "confidential" for purposes of the attorney-client privilege.
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> Defendants have shown no evidence of procedures or policies which were followed by [the company] to insure confidentiality of the documents.

In *Avalon*, the former senior employee left with his laptop and several boxes of documents. There was evidence that the company knew that the employee had documents, if not exactly which or what documents the employee had in his possession. The employee was subpoenaed in the captioned litigation, and the company was provided notice of the subpoena. The former employee turned over some documents, and withheld others, without intervention or objection by the company's counsel. The company later sought to assert privilege as to both sets of documents.

An absolute requirement of privilege in Minnesota is that to be privileged a communication must have been made in confidence and maintained in confidence. Minnesota is not unusual in this regard. Accordingly, the Minnesota court had little trouble finding that the company had waived its privilege as to both sets of documents, and denied a

protective order as to the turned-over documents, and ordered the withheld documents to be produced. The court noted that the company had made no efforts to retrieve the documents from the employee, and that the employee was not bound to maintain confidentiality of the documents. The court said:

> [T]his court does find that such waiver occurred, first when [the former employee] was permitted to leave with the documents, and again when the [former employee] produced the documents in response to subpoena.

The court noted that upon his termination the employee became a third party, and absent a contract or other legal obligation to maintain the confidentiality of the documents, there was "disclosure" and the company could not maintain the confidentiality prong of privilege under Minnesota law.

In light of *O'Leary,* and more recently *Avalon*, employers should examine or reexamine their policies and efforts to protect confidential and otherwise privileged documents in the hands of former employees. The policy should be geared to prevent employees from taking documents or information when leaving the company and/or bind the employee to maintain the documents in confidence where there is an inability to assure recovery of all documents or information, or a need for the employee to retain documents for a period of time (*e.g.,* a consulting agreement).

As in most areas of law, a policy alone will not suffice, some effort to enforce the policy will be necessary to protect the confidentiality or privilege of the documents or information. In many cases a simple exit-interview form signed by the employee might suffice.

For more information on this topic or to learn more about Chapman's Special Litigation Department please contact either of the attorneys below or visit Chapman.com.

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