

Law Firm In-House Ethics Consulting

Section III: Attorney-Client Privilege

A Resource Guide

National Teleconference Program
Sponsored by the Legal Publishing Group of Strafford Publications
February 11, 2009

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Mark Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past chair and a current member of the Washington State Bar Rules of Professional Conduct Committee, is a past member of the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Professionalism & Ethics Section. Mark is co-editor of the WSBA's Legal Ethics Deskbook and the OSB's Ethical Oregon Lawyer. He also writes the quarterly Ethics & the Law column for the WSBA Bar News and the monthly Ethics Focus column for the Multnomah (Portland) Lawyer and is a frequent contributor on law firm risk management issues to the Defense Research Institute For the Defense, the Idaho State Bar Advocate and the Oregon State Bar Bulletin. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is also a member of the Association of Professional Responsibility Lawyers and the ABA Center for Professional Responsibility. Mark is a graduate of UCLA School of Law. Before co-founding his current firm in 2005, Mark was the ethics partner and worked in law firm risk management for a large Northwest regional law firm.

The trend in recent years for law firms to designate internal ethics and claims management counsel has been coupled with the increasing recognition by courts of the attorney-client privilege for such internal consultations similar to that accorded consultation with in-house counsel at corporations. At the same time, there is an as yet small but identifiable group of cases recognizing a “fiduciary exception” to internal law firm privilege. As stated by those cases, a law firm’s fiduciary duty to then-current clients “trumps” the law firm’s internal privilege and can lead to the production, if relevant, of otherwise privileged communications in subsequent legal malpractice or related lawyer civil liability litigation by the client against the firm.

The fiduciary exception is discussed further in the accompanying article reprinted with permission of the Defense Research Institute:

“Inside Counsel: The Attorney-Client Privilege within Law Firms”
Mark J. Fucile, 49 *For the Defense* 78 (November 2007).

In addition to this article, the following resources are commended for further research on the development of in-house ethics counsel at law firms, the recognition of the attorney-client privilege for such advice and discussions and applications of the fiduciary exception:

The Development of In-House Ethics Counsel at Law Firms

- Elizabeth Chambliss & David B. Wilkins,
The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms,
44 Ariz. L. Rev. 559 (2002)
- Douglas R. Richmond,
Essential Principles for Law Firm General Counsel,
53 U. Kan. L. Rev. 805 (2005)
- Peter R. Jarvis & Mark J. Fucile,
Inside an In-House Legal Ethics Practice,
14 Notre Dame J. L. Ethics & Public Pol’y 103 (2000)

Recognition of the Attorney-Client Privilege for In-House Ethics Advice

- *United States v. Rowe*,
96 F.3d 1294 (9th Cir. 1996)
- *Hertzog, Calamari & Gleason v. Prudential Ins. Co. of America*,
850 F. Supp. 255 (S.D.N.Y. 1994)

- *Nesse v. Shaw Pittman*,
206 F.R.D. 325 (D. D.C. 2002)

Discussion and Application of the Fiduciary Exception

- Elizabeth Chambliss,
The Scope of In-Firm Privilege,
80 Notre Dame L. Rev. 1721 (2005)
- ABA Formal Ethics Op. 08-453 (2008)
- New York State Bar Association Committee on Professional Ethics
Op. 789 (2005)
- *In re Sunrise Securities Litigation*,
130 F.R.D. 560 (E.D. Pa. 1989)
- *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*,
220 F. Supp.2d 283 (S.D.N.Y. 2002)
- *Koen Book Distributors, Inc. v. Powell, Trachtman, Logan, Carrle,
Bowman & Lombardo, P.C.*,
212 F.R.D. 283 (E.D. Pa. 2002)
- *VersusLaw, Inc. v. Stoel Rives, LLP*,
111 P.3d 866 (Wash. App. 2005)
- *Thelen Reid & Priest LLP v. Marland*,
No. C 06-2071 VRW, 2007 WL 578989 (N.D. Cal. Feb. 21, 2007)
(unpublished)
- *Burns v. Hale and Dorr LLP*,
242 F.R.D. 170 (D. Mass. 2007)
- *In re SONICblue Inc.*,
No. 07-5082, 2008 WL 170562 (Bankr. N.D. Cal. Jan. 18, 2008)
(unpublished)
- *Asset Funding Group, LLC v. Adams & Reese, LLP*,
No. 07-2965, 2008 WL 4948835 (E.D. La. Nov. 17, 2008)
(unpublished)