

CHAPTER 3

**KEEPING COUNSEL:  
THE ATTORNEY-CLIENT PRIVILEGE WITHIN LAW FIRMS  
AND ITS SIGNIFICANCE TO LAW FIRM RISK MANAGEMENT**

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**MARK J. FUCILE** of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark is a past chair and a current member of the Washington State Bar Association Rules of Professional Conduct Committee, is a former member of the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark was also a member of the WSBA's Special Committee for the Evaluation of the Rules of Professional Conduct that developed the new Washington RPCs adopted in 2006. He writes the quarterly Ethics & the Law column for the Washington State Bar News and the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer. Mark is a contributing author/editor for the current editions of the WSBA's *Legal Ethics Deskbook* and the OSB's *Ethical Oregon Lawyer*. He is admitted in Washington, Oregon, Idaho, Alaska and the District of Columbia. Mark received his B.S. from Lewis & Clark College and his J.D. from UCLA.

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KEEPING COUNSEL:  
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THE ATTORNEY CLIENT PRIVILEGE WITHN LAW FIRMS  
(Reprinted from Mark's January 2006 Ethics & the Law column in the WSBA *Bar News*)
- II. PRESENTATION SLIDES

I. KEEPING COUNSEL:  
THE ATTORNEY CLIENT PRIVILEGE WITHN LAW FIRMS  
(Reprinted from Mark's January 2006 Ethics & the Law column in the WSBA *Bar News*)

Imagine this scenario: You are handling a hard-fought case. The client begins to question your decisions as things don't go the client's way. You start to suspect that the client may be considering a malpractice claim if the case doesn't turn out to the client's liking. You discuss the case with one of your partners who is designated as your firm's inside claims counsel. The two of you prepare a series of memos analyzing and documenting your firm's position vis-à-vis the client while you continue to handle the case. The case resolves, but the client isn't happy and later sues your firm. During discovery, the client learns about the memos and moves to compel their production. Does the attorney-client privilege apply to those memos and, if so, does your firm's fiduciary duty to your client "trump" the attorney-client privilege?

In a case that is drawing increasing national attention, the Washington Court of Appeals ruled in *VersusLaw, Inc. v. Stoel Rives LLP*, 127 Wn. App. 309, 111 P.3d 866 (2005), that the attorney-client privilege *does* attach to communications with in-house claims counsel *but* the firm's fiduciary duty to the client can "trump" the privilege and require disclosure of internal law firm communications that took place while the firm was still representing the client.

In *VersusLaw*, the law firm was handling litigation that arose over a set of agreements it drafted for the client that contained an agreed limitation period for claims that was shorter than the time otherwise permitted by statute. A question arose during the litigation over whether the law firm had asserted a counterclaim within the contractual limitation period. One of the lawyers involved discussed the case with the firm's in-house claims counsel and two memos resulted. *VersusLaw* later sued the law firm for malpractice. During the lawyer's deposition, the two memos came to light. *VersusLaw* sought the memos, but the law firm resisted their production

under the attorney-client privilege. *VersusLaw*'s motion to compel was pending at the point the trial court granted the law firm's summary judgment motion. The Court of Appeals reversed and in remanding the case addressed *VersusLaw*'s motion to compel.

The Court of Appeals began by affirming that the attorney-client privilege applies to internal law firm communications with claims or ethics counsel: "Lawyers in a law firm seeking legal advice from another lawyer in the same firm can assert the attorney-client privilege." 127 Wn. App. at 332.<sup>1</sup> Consistent with privilege law generally, the Court of Appeals put the burden of showing the privilege applies on the defendant law firm. *Id.* At that point, the Court of Appeals turned to the nub of *VersusLaw*'s argument: the firm's fiduciary and ethical duties to its client "trumps" the attorney-client privilege if the communications took place while the firm was representing the client<sup>2</sup>:

"The question is whether a law firm can maintain an adverse attorney-client privilege against an existing client. *Stoel Rives* cites a number of cases where the attorney-client privilege applies to in-house law firm communications. \* \* \* But while these cases recognize the attorney-client privilege can apply to intra-firm communications, none of the cases *Stoel Rives* cites and relies on address whether the attorney-client privilege can be asserted against a law firm's then-current client. In addition, *Stoel Rives* does not cite any case where the attorney-client privilege protects communications in these circumstances. *VersusLaw*, however, cites authority from other jurisdictions that communications between lawyers in a firm that conflict with the interest of the firm's client may not be protected from disclosure to the client by the attorney-client privilege. \*\*\*" *Id.* at 333-34 (citations omitted).<sup>3</sup>

In applying *VersusLaw*, it is important to keep two key points in mind.

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<sup>1</sup> See, e.g., *U.S. v. Rowe*, 96 F3d 1294 (9th Cir. 1996).

<sup>2</sup> See generally *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992), and *Kelly v. Foster*, 62 Wn. App. 150, 155, 813 P.2d 598 (1991), for a discussion of lawyers' fiduciary duties.

<sup>3</sup> Among the cases *VersusLaw* cited were *Koen Book Distrib. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283 (E.D. Pa. 2002), and *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 220 F. Supp.2d 283 (S.D.N.Y. 2002). For a comprehensive survey of this area, see Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 Notre Dame L. Rev. 1721 (2005).

First, *VersusLaw* involved a situation where the memos analyzing the law firm’s position regarding that client were written *while the law firm was representing the client*. *VersusLaw* does not suggest that it would extend to attorney-client communications or work product materials developed *after* the client terminated its relationship with the firm.

Second, the lawyer being consulted in *VersusLaw* was the firm’s designated internal claims counsel. The Court of Appeals noted that the privilege only applies (subject to possible “trumping” by the law firm’s fiduciary duties to its client) to communications involving lawyers *seeking legal advice* from another lawyer in the same firm. It is unlikely, by contrast, that the privilege would apply to contemporaneous communications between lawyers simply *working on* a matter that later became the subject of a legal malpractice claim.

Since it was released, *VersusLaw* has generated considerable discussion in law firm risk management circles and was recently cited in a New York State Bar Association ethics opinion. The New York opinion, No. 789<sup>4</sup>, distinguished *VersusLaw* by reasoning that the consultation with in-house claims or ethics counsel in and of itself does not necessarily trigger disclosure obligations to a client (although the conclusions reached may) and is consistent with other provisions in the professional rules requiring firms to take reasonable efforts to ensure that firm lawyers and staff meet ethical standards.<sup>5</sup> Even the New York opinion concedes, however, that in the final analysis the application of the attorney-client privilege is for the courts and not bar associations to decide.

*VersusLaw* puts law firms in a quandary. Cases involving “difficult” clients are precisely the situations where law firms can benefit most from internal counsel’s advice. At the same

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<sup>4</sup> New York State Bar Ethics Opinion 789 is available on the New York State Bar’s web site at [www.nysba.org](http://www.nysba.org).

<sup>5</sup> *See, e.g.*, RPCs 5.1-5.3.

time, memos and e-mails generated in providing that advice may now be subject to discovery if a claim arises later.<sup>6</sup>

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<sup>6</sup> For another recent Northwest case involving internal law firm ethics memoranda that became at issue—and were eventually produced—during the course of a subsequent legal malpractice case, see *Spur Products Corporation v. Stoel Rives LLP*, \_\_\_ Idaho \_\_\_, \_\_\_ P.3d. \_\_\_, 2005 WL 2398275 (Sept. 30, 2005).


## II. PRESENTATION SLIDES

Slide 1

**KEEPING COUNSEL:  
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WITHIN LAW FIRMS AND ITS  
SIGNIFICANCE TO LAW FIRM RISK  
MANAGEMENT**

Washington State Bar Association CLE  
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Slide 2

**INTRODUCTION**

1. Attorney-Client Privilege within Firms
2. The "Fiduciary Exception" Recognized
3. Boundaries of the Exception
4. Practical Impacts of the Exception

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Slide 3

**PERSPECTIVE & DISCLOSURE**

- ▶ *Perspective*
- ▶ *Disclosure*

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Slide 4

**THE ATTORNEY-CLIENT  
PRIVILEGE WITHIN LAW FIRMS**

- ▶ *VersusLaw, Inc. v. Steel Rives LLP*,  
127 Wn. App. 309, 111 P.3d 866 (2005)
- ▶ *United States v. Rowe*,  
96 F.3d 1294 (9th Cir. 1996)

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Slide 5

**THE ATTORNEY-CLIENT  
PRIVILEGE WITHIN LAW FIRMS**

*When does the privilege apply?*

- ▶ The "standard" requisites for privilege must be present
- ▶ The conversation must be with either a designated internal ethics or claims attorney or the equivalent

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Slide 6

**THE ATTORNEY-CLIENT  
PRIVILEGE WITHIN LAW FIRMS**

*When does the privilege not apply?*

- ▶ The "standard" requisites for privilege aren't present
- ▶ Simply a conversation between firm lawyers whose conduct is at issue

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Slide 7

**THE FIDUCIARY EXCEPTION  
RECOGNIZED**  
*A Short History*

- ▶ Not a new concept generally:  
Concept goes back to English trust law
- ▶ Not a new concept as applied to law firms either:  
*In re Sunrise Securities Litigation*,  
130 F.R.D. 560 (E.D. Pa. 1989)

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Slide 8

**THE FIDUCIARY EXCEPTION  
RECOGNIZED**  
*A Short History Continued...*

- ▶ The quiet period following *Sunrise Securities*
- ▶ *Bank Brussels Lambert v. Credit Lyonnais*,  
220 F. Supp.2d 283 (S.D.N.Y. 2002)
- ▶ *Koen Book Distributors v. Powell, Trachtman*,  
212 F.R.D. 283 (E.D. Pa. 2002)

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Slide 9

**THE FIDUCIARY EXCEPTION  
RECOGNIZED**  
*The Fiduciary Exception  
Comes to Washington*

*VersusLaw, Inc. v. Stoel Rives LLP*,  
127 Wn. App. 309, 111 P.3d 866 (2005)  
(Division 1, SC review denied)

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Slide 10

**THE FIDUCIARY EXCEPTION  
RECOGNIZED**  
*VersusLaw*

- ▶ The Facts
- ▶ The Procedural Posture
- ▶ The Holding

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**THE FIDUCIARY EXCEPTION  
RECOGNIZED**  
*Cases Nationally Since VersusLaw*

- ▶ *Thelen Reid & Priest v. Marland*,  
2007 WL 578989 (N.D. Cal. 2007)
- ▶ *Burns v. Hale and Dorr LLP*,  
242 F.R.D. 170 (D. Mass. 2007)

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Slide 12

**THE FIDUCIARY EXCEPTION  
RECOGNIZED**  
*More Cases Nationally . . .*

- ▶ *In re SONICblue Inc.*,  
2008 WL 170562 (Bankr. N.D. Cal. 2008)
- ▶ *Asset Funding Group v. Adams & Reese, LLP*,  
2008 WL 4948835 (E.D. La. 2008),  
2009 WL 1605190 (E.D. La. 2009)

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Slide 13

**THE FIDUCIARY EXCEPTION**  
**RECOGNIZED**  
*Does the Exception*  
*“Prove the Rule”?*

- ▶ Nationally
- ▶ Washington

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Slide 14

**BOUNDARIES OF THE**  
**EXCEPTION**  
*Consultation Doesn't*  
*Automatically Equal Conflict*

- ▶ ABA Formal Ethics Op. 08-453 (2008)
- ▶ NY State Bar Ethics Op. 789 (2005)

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**BOUNDARIES OF THE**  
**EXCEPTION**  
*Internal v. Outside Counsel*

- ▶ “Self-Representation” and RPC 1.10(a)  
(the “firm unit rule”)
- ▶ Application to date
- ▶ *VersusLaw* on remand

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Slide 16

**BOUNDARIES OF THE  
EXCEPTION**

*After the relationship ends*

- ▶ Boundary defined by the rationale for the exception
- ▶ Withdrawal as (an imperfect) solution

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Slide 17

**PRACTICAL IMPACTS OF THE  
EXCEPTION**

*Importance of establishing  
privilege in the first place*

- ▶ Formally designating internal counsel
- ▶ Don't mix the "attorney" and "client" sides
- ▶ Bill internal time to the firm, not the client
- ▶ Giving and keeping the advice confidential

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Slide 18

**PRACTICAL IMPACTS OF THE  
EXCEPTION**

*Giving Advice in the Face of Likely  
Waiver Claims*

- ▶ Recognize that advice may become "public"
- ▶ The practical impacts of email
- ▶ Conflict waivers and discovery
- ▶ Procedural posture of privilege disputes

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**SUMMING UP**

- ▶ The importance of internal counsel
  
- ▶ The importance of educating firm lawyers (and firm management) about the exception

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**FOR FURTHER READING**

- ▶ "Keeping Counsel: The Attorney-Client Privilege within Law Firms"  
*January 2006 WSBA Bar News*
  
- ▶ "Inside Counsel: The Attorney-Client Privilege within Law Firms"  
*November 2007 DRI For the Defense*
  
- ▶ "The Double Edged Sword: Internal Law Firm Privilege and the "Fiduciary Exception""  
*July 2009 IADC Defense Counsel Journal*

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