THE INTERSECTION OF ATTORNEY-CLIENT PRIVILEGE & LAW FIRM RISK MANAGEMENT

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INTRODUCTION

1. Attorney-Client Privilege within Firms

2. The “Fiduciary Exception”

3. Boundaries of the Exception

4. Practical Impacts of the Exception
PERSPECTIVE & DISCLOSURE

► Perspective

► Disclosure
THE ATTORNEY-CLIENT PRIVILEGE WITHIN LAW FIRMS

► *VersusLaw, Inc. v. Stoel Rives LLP*,

► *United States v. Rowe*,
  96 F.3d 1294 (9th Cir. 1996)
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
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
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,
THE FIDUCIARY EXCEPTION RECOGNIZED

A Short History Continued...

► The quiet period following *Sunrise Securities*

► *Bank Brussels Lambert v. Credit Lyonnais*,

► *Koen Book Distributors v. Powell, Trachtman*,
THE FIDUCIARY EXCEPTION RECOGNIZED

The Fiduciary Exception Comes to the Northwest

VersusLaw, Inc. v. Stoel Rives LLP,
(Division 1, SC review denied)
THE FIDUCIARY EXCEPTION RECOGNIZED

VersusLaw

► The Facts
► The Procedural Posture
► The Holding
THE FIDUCIARY EXCEPTION RECOGNIZED

Cases Nationally Since VersusLaw

► Thelen Reid & Priest v. Marland, 2007 WL 578989 (N.D. Cal. 2007)

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)
THE FIDUCIARY EXCEPTION RECOGNIZED

Does the Exception “Prove the Rule”?

- Nationally
- Northwest
BOUNDARIES OF THE EXCEPTION

Consultation Doesn’t Automatically Equal Conflict

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
BOUNDARIES OF THE EXCEPTION

After the relationship ends

- Boundary defined by the rationale for the exception

- Withdrawal as (an imperfect) solution
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
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
SUMMING UP

- The importance of internal counsel

- The importance of educating firm lawyers (and firm management) about the exception
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
QUESTIONS?