

***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*,
127 Wn. App. 309, 111 P.3d 866 (2005)

- ▶ *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,
130 F.R.D. 560 (E.D. Pa. 1989)

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)

THE FIDUCIARY EXCEPTION RECOGNIZED

***The Fiduciary Exception
Comes to the Northwest***

***VersusLaw, Inc. v. Stoel Rives LLP,
127 Wn. App. 309, 111 P.3d 866 (2005)
(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)
- ▶ *Burns v. Hale and Dorr LLP*,
242 F.R.D. 170 (D. Mass. 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

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

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?