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**Inside Counsel:
The Intersection of Internal Law Firm Privilege
and Duties to Clients**

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In recent years it has become increasingly common for a designated lawyer or committee within law firms to handle malpractice avoidance and claims management. With small to mid-size firms, the job often falls to the managing partner or a senior litigator. Many large firms, in turn, now have general counsel or ethics/claims committees. The trend makes good sense. As the practice of law has grown more complex, lawyers within firms need seasoned advice about managing difficult issues and client relationships.

Is that advice protected by the attorney-client privilege if a client later sues the firm? The answer is a classic “Yes, but . . .” The “yes” part is relatively clear: most courts examining the issue have concluded that legal advice rendered by designated internal claims or ethics counsel to law firm lawyers is covered by the attorney-client privilege.¹ The “but” part is more problematic: a small and controversial series of cases developing around the country have concluded that *if the advice was given while the law firm was still representing the client in the matter involved* the firm’s fiduciary duty to the client “trumps” the law firm’s internal attorney-client privilege and the client is entitled to discover what was discussed with internal counsel in subsequent malpractice litigation.

A recent case from Washington illustrates both parts.

In *VersusLaw, Inc. v. Stoel Rives LLP*, 127 Wn App 309, 111 P3d 866 (2005), the law firm was handling litigation that arose over a set of agreements it drafted for a 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 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* argued that because the memos were written while the law firm was still representing it the firm's fiduciary duty to it should prevail over the attorney-client privilege. *VersusLaw's* motion to compel was pending at the point the trial court granted summary judgment for the firm. The Washington Court of Appeals reversed and in remanding the case addressed *VersusLaw's* motion to compel.

The Washington Court of Appeals agreed with the firm that internal law firm communications with claims or ethics counsel generally fall within the attorney client privilege.² It agreed with *VersusLaw*, however, that a firm's fiduciary duty to a client "trumps" the attorney-client privilege when the advice was rendered while the firm was still representing the client:

“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. ***”³

VersusLaw echoes (and relied on) several other comparatively recent decisions around the country, including *Koen Book Distrib. v. Powell, Trachtman, Logan, Carrie, Bowman & Lombardo*, 212 FRD 283 (ED Pa 2002), and *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 220 F Supp2d 283 (SDNY 2002). The cases recognizing what is sometimes called the “fiduciary exception” to the privilege generally turn on the position that as long as the law firm continues to represent the client that it can act only in the client’s best interest, not its own.

The “fiduciary exception” cases have generated significant discussion and debate in law firm risk management circles. The contrary view is that law firms ought to be able to seek internal advice about compliance with the ethics rules in light of law firms’ general duty to take reasonable steps to ensure that their lawyers and staff meet their professional obligations. A recent ethics opinion from the New York State Bar, for example, took this position. The opinion, No. 789, argued that consultation with in-house counsel was encouraged under the professional rules and did not, in and of itself, create a conflict with a client requiring disclosure. At the same time, even the New York opinion conceded that the conclusion reached by the firm’s internal deliberations may warrant disclosure to the client involved and that the attorney-client privilege and its exceptions are ultimately matters of substantive evidence law.⁴

These cases also put law firms in a very difficult practical position for a number of reasons.

When lawyers become (or should be) aware that they have committed malpractice in an on-going representation, they have a duty to inform their client and seek a waiver before proceeding.⁵ Most such waivers, however, do not include specific language to the effect that the firm will be conducting internal analysis vis-à-vis the client and will seek to shield that analysis from the client in the event of a claim. Frankly, if they did, most clients probably wouldn’t sign them (which, ironically, underscores the nature of the conflict).

Similarly, because the “fiduciary exception” has only been applied to discussions and memoranda generated while the firm is still representing the client, some commentators have suggested that a firm withdraw at the first sign of a problem so that it is free to review the situation without the fear that its own analysis will be used against it in a later malpractice case.⁶ To state this approach is to highlight its practical problems for both lawyers and their clients.

Finally, it is often precisely when law firms are handling difficult matters for “difficult” clients that advice from internal claims or ethics counsel will be of greatest benefit.⁷ The specter of *VersusLaw* and similar cases likely won’t prevent that advice altogether. They may, however, make that advice more circumspect and discourage lawyers from communicating openly in any documented form.

Oregon has yet to address this issue. Oregon RPC 1.7(a)(2), though, includes as a category of conflicts those between a client and the lawyer’s (or law firm’s) own interest. Moreover, the representation of clients here has long been defined in fiduciary terms under cases such as *Kidney Association of Oregon v. Ferguson*, 315 Or 135, 843 P2d 442 (1992). Therefore, it is certainly possible that courts here could, like the Washington Court of Appeals in *VersusLaw*, find that those fiduciary duties “trump” a law firm’s own attorney-client privilege.

ABOUT THE AUTHOR

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¹ See generally Elizabeth Chambliss, "The Scope of In-Firm Privilege," 80 Notre Dame L Rev 1721 (2005); Douglas R. Richmond, "Essential Principles for Law Firm General Counsel," 53 Kansas L Rev 805 (2005); see, e.g., *United States v. Rowe*, 96 F.3d 1294 (9th Cir 1996).

² 127 Wn App at 333-34 (citations and footnote omitted).

³ *Id.* at 333-34 (citations omitted).

⁴ New York State Bar Ethics Opinion 789 is available on the New York State Bar's web site at www.nysba.org. Although they are not as expansive as their ABA Model Rule counterparts on a law firm's duty to ensure compliance with the ethics rules, Oregon RPCs 5.1-5.3 certainly suggest that law firm partners at least have a duty to prevent, remedy and mitigate violations of the ethics rules by other firm lawyers or staff of which they are aware.

⁵ For two recent Oregon cases discussing the duty to disclose, see *In re Obert*, 336 Or 640, 89 P3d 1173 (2004), and *In re Knappenberger*, 337 Or 15, 90 P3d 614 (2004).

⁶ See, e.g., Daniel M. Lechleiter, "Intra-Firm Consultation Adverse to a Client: An Easy Way to Lose the Protection of the Attorney-Client Privilege and Work Product Doctrine," *Chicago Bar Record* (May 2005) at 48.

⁷ Communications between lawyers simply working on a case where malpractice is alleged to have occurred, by contrast, are likely "fair game" even without *VersusLaw* and its contemporaries. The internal privilege would only attach to communications with lawyers seeking legal advice, not simply to contemporaneous communications between lawyers working on a matter that became the subject of a later legal malpractice claim.