

October 2016 DRI *For the Defense*

Internal Law Firm Privilege and the Continuing Duty to Disclose Conflicts

By Mark J. Fucile
Fucile & Reising LLP

The recognition of internal law firm privilege has been a major development in law firm risk management in recent years. Most large firms now have general counsel or ethics partners who provide advice to firm members on professional rule or loss avoidance issues. Many smaller firms, in turn, provide similar advice through their managing partners or other senior lawyers. The ability to cloak their conversations in the attorney-client privilege affords firms and their lawyers the same unvarnished guidance that clients enjoy generally under the privilege. As courts began to recognize internal law firm privilege, however, some also created an exception—usually described as the “fiduciary” or “current client” exception—that made such internal discussions discoverable in subsequent malpractice litigation with a client if the otherwise privileged conversations were adverse to the client and took place at a time the client remained a current client of the firm. More recently, that pendulum has begun to swing in the opposite direction as other courts refused to recognize an exception—with *Stock v. Schnader Harrison Segal & Lewis LLP*, ___ N.Y.S.3d ___, 2016 WL 3556655 (N.Y. App. Div. June 30, 2016), a recent example. Regardless of the eventual outcome of that lively and unresolved debate, lawyers and their firms need to remember that they have a continuing duty to disclose

malpractice-related conflicts to clients when arising in the course of ongoing work for the client concerned.

Internal Law Firm Privilege

Internal privilege traces its lineage to the analogous right held by other entities and their in-house counsel articulated in the seminal case of *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). Internal privilege has been recognized for both large firms with specifically-designated general counsel (see, e.g., *Nesse v. Shaw Pittman*, 206 F.R.D. 325 (D. D.C. 2002)) and smaller firms using a senior lawyer or others specially-detailed to perform that function (see, e.g., *United States v. Rowe*, 96 F.3d 1294 (9th Cir. 1996)). The key in either setting is meeting the classic test outlined in *Upjohn* for privilege to attach: a confidential communication between a lawyer and a client to secure legal advice. In the law firm context, this usually means that the advice involved should be from a firm lawyer specifically tasked with that role, the legal advice should relate to the firm's interest and should be provided to another firm member in a confidential setting.

Exceptions (or the Lack Thereof)

With the emergence of internal law firm privilege, courts also began considering its application when the advice involved was rendered by a firm lawyer adverse to a current firm client. In a typical scenario, a firm lawyer who may have committed malpractice consulted with the firm's in-house counsel.

Later, the by-then former client sued the firm and sought the otherwise privileged internal communications that took place while the client was with the firm. Some courts, principally in jurisdictions in which exceptions to the attorney-client privilege are created through case law, began to recognize a so-called “fiduciary” or “current client” exception (see, e.g., *VersusLaw v. Stoel Rives LLP*, 111 P.3d 866 (Wash. App. 2005)). Under that exception, the firm’s fiduciary duty to the client at the time the advice was rendered “trumped” the firm’s privilege and required production to the client in the subsequent malpractice case. More recently, other courts, principally in jurisdictions in which exceptions to the attorney-client privilege are statutory, refused to recognize the “fiduciary” exception (see, e.g., *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 326 P.3d 1181 (Or. 2014)). The application of the exception remains a source of heated debate and, as the cases to date illustrate, may ultimately yield a state-by-state patchwork dependant largely on whether privilege exceptions in a particular jurisdiction are court or legislatively created.

Continuing Duty to Disclose Conflicts

Even in those jurisdictions that reject the “fiduciary” exception, it is important for firms to keep in mind that they still have a duty to disclose a malpractice-related conflict between the firm and the client and obtain an appropriate waiver if the firm is continuing on the case. ABA Formal Opinion 08-453 (2008) and New York State Bar Opinion 789 (2005) offer useful counsel on

this point. Under ABA Model Rule 1.4 (and state equivalents), lawyers have a duty to communicate material events concerning a client's matter to the client within a reasonable period of time. Under ABA Model Rule 1.7(a)(2) (and state counterparts), a conflict arises between the business interest of a law firm and the client if asserted malpractice takes place during the course of the firm's work for the client. Depending on the circumstances, the conflict may be waived by the client under ABA Model Rule 1.7(b) (and state variants), but the nature of the conflict needs to be explained to the client for the waiver to be effective.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB *Ethical Oregon Lawyer*, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.

