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November 2016 *Multnomah Lawyer Ethics Focus*

Internal Law Firm Privilege at Small(er) Firms

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One of the most significant trends at law firms over the past 20 years has been the designation of specific lawyers within the firm to act as the firm's internal counsel. Many larger firms today have general counsel, ethics or claims counsel or an equivalent committee. Along with this increasing "institutionalization" of ethics and claims advice within firms has also come the increasing recognition of the attorney-client privilege for this internal advice—with Oregon joining the states recognizing internal law firm privilege two years ago with the Oregon Supreme Court's decision in *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 355 Or 476, 326 P3d 1181 (2014). (The Ninth Circuit had earlier recognized internal privilege under federal law in *United States v. Rowe*, 96 F3d 1294, 1296-97 (9th Cir 1996). *Loop AI Labs v. Gatti*, 2016 WL 730211 (ND Cal Feb 24, 2016), discusses the parameters of the federal rule.)

For small and mid-sized firms, titles like "general counsel" and concepts like "internal law firm privilege" may seem to be the exclusive domain of large firms. But, small(er) firms can also benefit from having a designated point-person for internal ethics and claims advice and from the protection afforded by privilege. In this column, we'll look at both the benefits of having someone in this role and the requirements for establishing privilege.

Internal Advice

When facing difficult issues of professional responsibility or potential claims, one of the most important steps an individual lawyer can take is talking the matter through with a trusted colleague. Someone who has broad experience and seasoned judgment will often bring a perspective to an issue that a firm lawyer who is in the middle of a difficult situation cannot.

In many small and mid-sized firms, this role is often played by the managing partner or a senior litigator. Although litigation experience is helpful in assessing claims-related issues, business lawyers can certainly fill this role with equal success if they have the requisite judgment and trust of their colleagues. The person chosen does not necessarily need to be an expert in legal ethics or legal malpractice. Many questions turn more closely on sound practical judgment than the technical aspects of the RPCs or substantive malpractice law. Further, for those situations that do require that kind of specialized expertise, the internal lawyer can often coordinate that with outside counsel or the PLF.

In many instances, firms creating a formal position simply need to look at who within the firm lawyers and staff already turn to for advice. That person likely has both the judgment necessary and, equally important, the "bedside manner" that will encourage firm lawyers and staff to seek out advice proactively.

Internal Privilege

One of the benefits of internal advice is that—if properly structured—it should be protected by the attorney-client privilege.

Applying its longstanding analysis under OEC 503, the Supreme Court in *Crimson Trace* found (335 Or at 486) that privilege will apply to internal law firm communications if three requisites are met: "First, the communication must have been between a 'client' and the client's lawyer . . . Second, the communication must have been a confidential [one] . . . Finally, the communication must be 'made for the purpose [of] facilitating the rendition of professional legal services to the client.'" We'll examine each in more detail.

The Supreme Court in *Crimson Trace* noted that in the law firm setting the firm itself is the holder of the privilege as the "client." In that sense, the internal law firm privilege is very similar to the privilege held by any other business or governmental entity. As with our in-house colleagues in business and government, it is important for the lawyer providing advice internally at a law firm to remind the recipients that internal counsel is the "firm's lawyer" rather than their personal attorney. On the "lawyer" side, it can be essential for the firm if challenged later to show that the firm had taken the affirmative step of

designating a particular lawyer or group of lawyers within the firm to play this role rather than trying to do it after-the-fact.

In rendering the advice, the same considerations on confidentiality that we would use when discussing a sensitive matter with a firm client should also be used when we are providing advice on an equally sensitive matter for a firm lawyer. The standard of who "needs to know" within a firm will vary with the circumstances, but lawyers rendering advice will want to review *State ex rel OHSU v. Haas*, 325 Or 492, 942 P2d 261 (1997), for its extended discussion of the parameters of sharing attorney-client communications within an entity client.

The "purpose" requirement highlights two related considerations. First, privilege will most likely be upheld where the lawyer rendering the advice is not a participant in the underlying matter. With a clear line of demarcation, it will be much easier to demonstrate to a court if privilege is challenged (for example, in a subsequent legal malpractice case as in *Crimson Trace*) that the advice was rendered on behalf of the firm rather than the client in the underlying matter. Second, for the same reason, privilege will most likely be upheld when the client in the underlying matter is not billed for internal counsel's time.

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.