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**Keeping Counsel:
The Attorney-Client Privilege within Law Firms**

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Imagine this scenario: You are handling a hard-fought case. The client begins to question your decisions as things don't go the client's way. You start to suspect that the client may be considering a malpractice claim if the case doesn't turn out to the client's liking. You discuss the case with one of your partners who is designated as your firm's inside claims counsel. The two of you prepare a series of memos analyzing and documenting your firm's position vis-à-vis the client while you continue to handle the case. The case resolves, but the client isn't happy and later sues your firm. During discovery, the client learns about the memos and moves to compel their production. Does the attorney-client privilege apply to those memos and, if so, does your firm's fiduciary duty to your client "trump" the attorney-client privilege?

In a case that is drawing increasing national attention, the Washington Court of Appeals ruled in *VersusLaw, Inc. v. Stoel Rives LLP*, 127 Wn. App. 309, 111 P.3d 866 (2005), that the attorney-client privilege *does* attach to communications with in-house claims counsel *but* the firm's fiduciary duty to the client can "trump" the privilege and require disclosure of internal law firm communications that took place while the firm was still representing the client.

In *VersusLaw*, the law firm was handling litigation that arose over a set of agreements it drafted for the 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 claims 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's* motion to compel was pending at the point the trial court granted the law firm's summary judgment motion. The Court of Appeals reversed and in remanding the case addressed *VersusLaw's* motion to compel.

The Court of Appeals began by affirming that the attorney-client privilege applies to internal law firm communications with claims or ethics counsel: "Lawyers in a law firm seeking legal advice from another lawyer in the same firm can assert the attorney-client privilege." 127 Wn. App. at 332.ⁱ Consistent with privilege law generally, the Court of Appeals put the burden of showing the privilege applies on the defendant law firm. *Id.* At that point, the Court of Appeals turned to the nub of *VersusLaw's* argument: the firm's fiduciary and ethical duties to its client "trumps" the attorney-client privilege if the communications took place while the firm was representing the clientⁱⁱ:

“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. ***” *Id.* at 333-34 (citations omitted).ⁱⁱⁱ

In applying *VersusLaw*, it is important to keep two key points in mind.

First, *VersusLaw* involved a situation where the memos analyzing the law firm’s position regarding that client were written *while the law firm was representing the client*. *VersusLaw* does not suggest that it would extend to attorney-client communications or work product materials developed *after* the client terminated its relationship with the firm.

Second, the lawyer being consulted in *VersusLaw* was the firm’s designated internal claims counsel. The Court of Appeals noted that the privilege

only applies (subject to possible “trumping” by the law firm’s fiduciary duties to its client) to communications involving lawyers *seeking legal advice* from another lawyer in the same firm. It is unlikely, by contrast, that the privilege would apply to contemporaneous communications between lawyers simply *working* on a matter that later became the subject of a legal malpractice claim.

Since it was released, *VersusLaw* has generated considerable discussion in law firm risk management circles and was recently cited in a New York State Bar Association ethics opinion. The New York opinion, No. 789^{iv}, distinguished *VersusLaw* by reasoning that the consultation with in-house claims or ethics counsel in and of itself does not necessarily trigger disclosure obligations to a client (although the conclusions reached may) and is consistent with other provisions in the professional rules requiring firms to take reasonable efforts to ensure that firm lawyers and staff meet ethical standards.^v Even the New York opinion concedes, however, that in the final analysis the application of the attorney-client privilege is for the courts and not bar associations to decide.

VersusLaw puts law firms in a quandary. Cases involving “difficult” clients are precisely the situations where law firms can benefit most from internal counsel’s advice. At the same time, memos and e-mails generated in providing that advice may now be subject to discovery if a claim arises later.^{vi}

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.

ⁱ See, e.g., *U.S. v. Rowe*, 96 F3d 1294 (9th Cir. 1996).

ⁱⁱ See generally *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992), and *Kelly v. Foster*, 62 Wn. App. 150, 155, 813 P.2d 598 (1991), for a discussion of lawyers' fiduciary duties.

ⁱⁱⁱ Among the cases *VersusLaw* cited were *Koen Book Distrib. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283 (E.D. Pa. 2002), and *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 220 F. Supp.2d 283 (S.D.N.Y. 2002). For a comprehensive survey of this area, see Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 Notre Dame L. Rev. 1721 (2005).

^{iv} New York State Bar Ethics Opinion 789 is available on the New York State Bar's web site at www.nysba.org.

^v See, e.g., RPCs 5.1-5.3.

^{vi} For another recent Northwest case involving internal law firm ethics memoranda that became at issue—and were eventually produced—during the course of a subsequent legal malpractice case, see *Spur Products Corporation v. Stoel Rives LLP*, ___ Idaho ___, ___ P.3d. ___, 2005 WL 2398275 (Sept. 30, 2005).