Do Ask, Do Tell: Are Intrafirm Communications Privileged?

BY ELLEN A. PANSKY

Already stressed and pressed for time because trial in the law firm's biggest case is quickly approaching, Senior Partner SR is annoyed to receive a call from Junior Partner JR. "JR, this better be important!"

JR stammers. "Sorry, SR. We have a situation and I need your advice. Lucrative Client, Inc. has a rock solid $200M claim against Deep Pockets Consolidated, and (gulp), it's pretty clear we blew the statute."

SR took a deep breath: "OK. Prepare a memo and email it to me and your supervising partner. Let's schedule a call for tomorrow."

If you practice law long enough, it is inevitable that you will have a disagreement with a client. Maybe the client accuses you of colluding with the opposing party. Maybe your client loses their case after rejecting your sound advice. Maybe a serious fee dispute has arisen that threatens the relationship. Maybe you've discovered the client has misrepresented the facts. Maybe your new associate has a substance abuse problem and has "overbilled" the case. The possibilities are endless.

Your law firm does not have outside legal ethics counsel. You are confident that, with 25 years of experience and a big brain, you are fully competent to navigate the minefield that confronts your firm, and that you can strategize, evaluate and advise your firm toward a sound plan for resolution.

But things don't work out. Client sues your firm and seeks all internal communications among the lawyers in your firm regarding the alleged breach of duty owed by the firm to the client. Can the intrafirm communications be shielded from disclosure? Or does fiduciary duty to the client require that all communications between members of the firm to a current client be disclosed to the (now former) client?

First off, it is generally accepted that, when a lawyer or law firm seeks advice from independent, outside legal ethics counsel, the communications are protected by the attorney-client privilege. But not all jurisdictions apply a similar rule when the lawyers within a firm consult with one another. Particularly where the intrafirm communications concern a *current* client, some courts have concluded that the fiduciary duty owed to the current client supersedes the firm's own privilege to confer with in-house ethics counsel. And, unfortunately, lawyers often label an interim disagreement with a client as a "conflict."

While some courts have concluded that the fiduciary duty owed to a current client warrants production of otherwise privileged intrafirm writings, many require a predicate of a conflict of interest, such as the firm's concurrent representation of clients whose interests are adverse, as opposed to a bare malpractice issue. Even then, many courts recognize that, "a firm need not disclose communications reflecting consultations between the firm's lawyers regarding the firm's legal and ethical obligations to its client." *See Loop AI Labs Inc. v. Gatti*, 15-798 (N.D. Cal. Feb. 24, 2016), *citing Thelen Reid & Priest LLP v. Marland*, 6-2071 (N.D. Cal. Feb. 21, 2007), and *In re SonicBlue*, 3-51775 (Bankr. N.D. Cal. Jan. 18, 2008).

But is it necessarily true that internal communications to address the law firm's ethical duties to a current client give rise to a conflict of interest? Is it a per se breach of duty for lawyers within a firm to consult with one another to figure out how best to address a potential or actual legal malpractice situation?

The California Court of Appeal in *Edwards Wildman Palmer LLP v. Superior Court*, 231 Cal. App. 4th 1214 (2014), concluded otherwise, as have other states. Edwards Wildman notes

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that, of course, there must actually be an attorney-client relationship between the in-house ethics counsel and other lawyers in the firm. The court acknowledged a multifactor test earlier set forth in *RFF Family Partnership LP v. Burns & Levinson LLP*, 991 N.E.2d 1066 (2013): "the privilege will attach only when a genuine attorney-client relationship exists."

RFF held that four factors must be present in order for the attorney-client privilege to apply to confidential communications between law firm attorneys and the firm's in-house counsel concerning a malpractice claim: (1) the law firm previously must have designated, either formally or informally, an attorney or attorneys within the firm to represent the firm as in-house or ethics counsel; (2) when a current client has threatened litigation against the law firm, the in-house counsel must not have performed any work on that particular client matter or a substantially related matter; (3) the time spent on the in-house communications was not billed to the client; and (4) the communications were made in confidence and kept confidential.

Edwards Wildman also noted that the *RFF* factors are not prerequisites to establishment of an attorney-client relationship under California law, and that a trial court may consider other factors as well.

Edwards Wildman went on to observe: "As a practical matter, it is not a foregone conclusion that an attorney's consultation with in-house counsel regarding a client dispute will always be adverse to the client. A law firm is not necessarily disloyal to a client by seeking legal advice to determine how best to address the potential conflict, regardless of whether the legal advice is given by in-house counsel or outside counsel." The attorney's and client's interests are likely to dovetail insofar as the attorney seeks to resolve the dispute to the client's satisfaction or determine through consultation with counsel what his or her ethical and professional responsibilities are in order to comply with them: "[A]n attorney's or a law firm's duty of loyalty to a client is not always painted in bright lines. It may not always be clear when the interests of the client and the law firm have become so adverse that withdrawal is required in the absence of client waiver, and even when it is clear that withdrawal is necessary, a law firm may need to consider how to minimize the potential adverse consequences of withdrawal to the client."

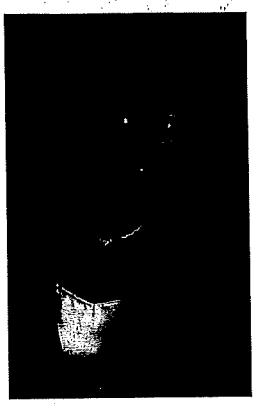
Moreover, once the attorney-client relationship has substantially broken or ended completely, should there be a continuing fiduciary duty to the former client that prohibits lawyers from shielding their communications with their colleagues within the firm? The American Bar Association, in formal Resolution 103 adopted by its House of Delegates in 2013, urged all federal and state courts to uphold the application of the attorney-client privilege to communications between a firm's attorneys and the firm's in-house counsel on issues arising from the representation of a current client — recommending, in effect, that the current client exception to attorney-client privilege be rejected. In the view of the ABA, law firms should be encouraged to engage in internal communications regarding their ethical duties owed to clients and such communications should be privileged.

In addition to the attorney-client privilege, the in-house counsel should be able to assert the work product doctrine to preclude disclosure of the attorney's thought processes, analysis, legal theories, strategies, and the like. See California Code of Civil Procedure Section 2018 and Federal Rule of Civil Procedure 26(b)(3). Evidence of such thought processes that are not communicated to the client, and therefore not subject to the attorney-client privilege, is not discoverable.

Additionally, it must be noted that even if attorney-client privilege or the work product doctrine protects from intrafirm disclosure, communications regarding an analysis of the law firm's duties to a client have been breached, the fact of the breach cannot be concealed. It is generally accepted that a lawyer or law firm must notify a client that malpractice has occurred (although

there is no duty to advise the client regarding the pursuit of a civil claim). As *RFF* held, "Preserving the privileged nature of [the] communications does not affect a law firm's duty to provide a client with 'full and fair disclosure of facts to the client's interests.'"

In conclusion, law firms who do not use outside legal ethics counsel should designate in house counsel to serve in that role and follow the other three factors approved by the *Edwards Wildman* case. Communications regarding the law firm's duty to clients, whether current or former, should be encouraged rather than discouraged by the threat that the disclosure of such communications could be compelled. It does not matter if the advice regarding remediation and/or ethically addressing the alleged breach of duty is given by independent legal ethics/malpractice defense counsel or by in-house counsel: the legal advice and communications surrounding it are entitled to be privileged from disclosure.



Ellen A. Pansky is an attorney at Pansky Markle. You can reach her at epansky@panskymarkle.com.