DEVELOPMENTS REGARDING THE ATTORNEY-CLIENT PRIVILEGE AND LAW FIRM COMMUNICATIONS WITH IN-HOUSE COUNSEL

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Recently, there have been developments in the law regarding the attorney-client privilege and law firm attorney communications with in-house counsel. Specifically, recent case law has upheld and an ABA Resolution has supported the privilege with regard to law firm attorney communications with in-house firm counsel concerning potential adversity with current clients. This recent law has also reassessed the applicability of the so-called "exceptions" to the privilege based on a law firm's claimed conflicts of interest with a current client and the firm's fiduciary obligations to a current client. This article considers the most recent cases and the ABA Resolution, which together put the attorney client privilege for such communications on a more solid footing, and set forth the steps that law firms should take to attempt to avail themselves of the privilege.

By way of background, there had been a line of cases in which courts declined to recognize the privilege when law firm communications to in-house counsel involved adversity to current clients of a firm. This so-called "current client" exception to the application of the attorney-client privilege has been found by courts in some jurisdictions to be based on conflict of interest principles when a law firm and its client have differing interests. In addition, some courts have held an exception to the privilege to be evoked on account of a firm's fiduciary duties to current clients.

A thorough and comprehensive survey of the cases establishing these doctrines can be found in the article *The Scope of In-Firm Privilege,* Elizabeth Chambliss, 80 Notre Dame L. Rev. 1721 (2005). Two cases decided after the publication of the article illustrate the doctrines. In *Thelen Reid & Priest LLP*, v. *Marland* , 2007 WL 578989 (N.D.Cal.), the United States District Court for the Northern District of California held certain internal law firm communications pertaining to the firm's ethical duties to a current client, including the firm's potential adverse interests to a client, were excepted from the attorney-client privilege based on conflict of interest principles. In *In re SonicBlue, Inc.*, 2008 WL 170562 (Bkrtcy.N .D. Cal. 2008), the United States Bankruptcy Court for the Northern District of California similarly held that "a law firm cannot assert the attorney-client privilege against a current outside client when the communications that it seeks to protect arise out of self-representation that creates an impermissible conflicting relationship with that outside client." 2008 WL 170562 at 9. The court also found that "the scope of [the law firm's] fiduciary duties were broad-ranging and prohibited [the law firm] from engaging in any activity that was adverse to [the current client's] interests. …

[The law firm] cannot invoke the privilege as to any matter within that broad scope of fiduciary activities." Id.

The United States District Court for the District of Massachusetts reached a similar conclusion in *Burns ex rel. Office of Public Guardian v. Hale and Dorr LLP*, 242 F.R.D. 170 (D.Mass.2007), The court held that, because a law firm owed a fiduciary duty to a plaintiff trust beneficiary, the purposes of the attorney-client privilege would not be served by allowing the firm to withhold disclosure of internal communications and related documents concerning an internal investigation of the beneficiary's claim against the firm. 242 F.R.D. at 173.

Recently, however, the premises of these prior cases were rejected by the Massachusetts and Georgia Supreme Courts. In both cases, the attorney-client privilege was upheld as to law firm attorney communications with in-house counsel involving adversity to current clients if certain conditions were met.

In *RFF Family Partnership, LP v. Burns & Levinson, LLP*, 465 Mass. 702 2013) the Massachusetts Supreme Judicial Court considered "whether confidential communications between law firm attorneys and a law firm's in-house counsel concerning a malpractice claim asserted by a current client of the firm [were] protected from disclosure to the client by the attorney-client privilege." Id. at 703. The facts of the case were that a corporate client hired defendant law firm with regard to a commercial loan. The law firm was to conduct appropriate due diligence, research title, draft required documents and, subsequently represent the client in foreclosure proceedings. During the foreclosure proceedings, a third party alleged it had a superior mortgage. As a result, the client, which was still represented by the law firm in connection with the foreclosure and post foreclosure sale, filed through other counsel a notice of claim against the law firm and two individual attorneys alleging legal malpractice and breach of contract. Id. at 703-704.

The two individual attorneys as well as a third attorney who was the recipient of the notice of claim thereafter sought advice on how to respond to the claim from a "partner designated to respond to ethical questions and risk management issues." Following the consultation, the law firm advised the client that, in light of the client's contemplated action against the firm, the law firm was withdrawing from the representation. In response, however, the client denied that its other counsel had authority to threaten the law firm with the filing of a suit, confirmed the same in writing, and requested that the law firm continue with its representation of the client in efforts to sell the property. As a result, the law firm resumed its representation of the client. Id at 705.

However, on completion of the sale, the client filed suit against the law firm and the two individual attorneys alleging legal malpractice and other claims—and noticed the deposition of firm attorneys. The defendant firm and attorneys "moved for a protective order to preserve, among other things, the confidentiality of what they contended were privileged communications" with the in-house lawyer regarding how to respond to the notice of claim. The lower court granted the motion. The client filed an interlocutory

appeal and the case was transferred to the Massachusetts Supreme Judicial Court. Id. at 705-706.

Onappeal, the client claimed that it was entitled to discover communications between the attorneys and the law firm lawyer that occurred between the time of the law firm's receipt of the notice of claim and the law firm's first withdrawal from representation. The client argued that the communications were not protected from disclosure "unless the law firm, *before* seeking the advice, has either withdrawn from the representation or fully disclosed to the client that the law firm and client have a conflict of interest and obtained the client's informed consent for the law firm to seek legal advice." Id. at 706.

In beginning its analysis, the Supreme Judicial Court cited commentary on the necessity in practice for law firm attorneys to be able to seek advice on complex issues and ethical obligations. The Court noted that law firms often appoint an individual lawyer or a committee to provide such advice and concluded:

> "Where a law firm designates one or more attorneys to serve as its in-house counsel on ethical, regulatory, and risk management issues that are crucial to the firm's reputation and financial success, the attorney-client privilege serves the same purpose as it does for corporations or governmental entities: it guarantees the confidentiality necessary to ensure that the firm's partners, associates, and staff employees provide the information needed to obtain sound legal advice."

Id. at 709-710.

The Court acknowledged that the applicable conflict of interest rules prevent a lawyer from representing "a client whose interests will be adverse to the law firm's own interests without such client's informed consent." However, the court stated that it was not always clear when the interests of the client and the firm have become adverse and at what point a withdrawal is required. And the Court commented that "in-house counsel whom the law firm has designated to help its attorneys comply with all applicable ethical rules is the logical counsel to turn to for advice as to how the firm may best comply with [the conflict of interest rules] especially where time is of the essence." Id. at 711. The Court dismissed as dysfunctional the client's contention that the attorney-client privilege did not protect internal law firm communications once the law firm has been threatened with a malpractice claim "unless the law firm first either withdraws from the representation or fully advises the client about the conflict of interest and obtains the consent of the client to engage in such communications." Id. at 712.

In addition, the Court rejected the client's contention that the Court should follow the law adopted in other jurisdictions which had adopted the "fiduciary" and "current client" exceptions to the attorney-client privilege. As to the claimed fiduciary exception, the Court stated that it need not decide whether Massachusetts should adopt the fiduciary exception as it would not apply to the facts of the case even if the Court were to adopt it. Id at 715. The Court held that "[t]he attorney-client communications whose discovery is at issue in this case were 'for the [law firm's] own defense' in the litigation threatened in

the [notice of claim]. The attorneys' time was not billed to [the corporate client] because [the law firm and not the corporate client] was the 'real client' of the in-house counsel whose legal advice was sought." (citations omitted). Id.

The Court rejected the corporate client's argument that where a law firm continues to represent a client despite being threatened with a claim of legal malpractice, all attorney-client communications are discoverable by the client under the fiduciary exception, including communications made for the law firm's *own defense in litigation,* because the duties owed by a law firm to its current client are 'paramount to its own interests.'" Id. The Court concluded that upholding the privileged nature of the internal law firm communications at issue would "not affect a law firm's duty to provide a client with 'full and fair disclosure of *facts* material to the client's interests.'" (citations omitted) (emphasis added by the Court). Id. at 715-716.

The Court also analyzed and rejected the so-called "current client" exception to the attorney-client privilege finding it "a flawed interpretation of the rules of professional conduct that yields a dysfunctional result." Id. at 722. As such, the Court also declined to adopt the current client exception to the attorney client privilege in Massachusetts. Id.

The Court concluded by affirming the lower court's decision and holding that confidential communications between law firm attorneys and a law firm's in-house counsel can be protected by the attorney-client privilege from disclosure to a client who has asserted malpractice claims. However, the Court held that the rule had its limits as "not every attorney in a law firm is its in-house counsel and not every communication within a law firm is privileged." Id. at 723.

In order for the privilege to apply, the Court held that four criteria must be met: (1) the law firm has designated in-house or ethics counsel; (2) the in-house counsel has not performed work on the matter that the suit is based upon or for a substantially related matter; (3) the client is not billed for the communications; (4) the consultations are kept confidential. The Court found that, in the case before it, the law firm had met all four conditions. Id.

One day after the Massachusetts decision in *RFF Family Partnership, LP v. Burns & Levinson, LLP*, the Georgia Supreme Court came to a similar conclusion. In *St. Simmons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn*, 293 Ga. 419 (Ga. 2013) the Court considered whether the attorney-client privilege and the work product doctrine applied to attorneys' communications (as well as related documents) with their in-house general concerning a client's allegations of wrongdoing against the firm. The facts were that a corporate client hired defendant law firm in connection with a condominium development project. The law firm was retained to draft purchase form contracts which would be utilized during the pre-selling of condominiums in a development project planned for construction. Subsequently, citing defects in the purchase contracts, numerous purchasers rescinded their purchase contracts. After a client conference call regarding the problems with the purchase contracts, during which call the client appeared to be blaming the firm for the recissions, the firm's participating attorneys contacted the firm's in-house general counsel seeking advice. Shortly thereafter, the firm also sought

advice from outside counsel. 293 Ga. at 420. The firm continued to represent the client for a period of time. The client thereafter retained other counsel to take over its representation as to the rescinding purchasers and to pursue potential claims against the law firm. However, new counsel requested that the firm still handle the ongoing closings which the law firm did for a period of time. Id.

The client later filed suit against the defendant law firm for malpractice. During discovery, the client sought to depose the firm's in-house general counsel and outside counsel and obtain documents from both. The firm objected and sought protective orders based on the attorney-client privilege and work product doctrine. The trial court granted the motion to compel, except as to the firm's communications with outside counsel, based on a claimed abrogation of the privilege due to the firm's conflict of interest with the plaintiff client. Id. at 420-421.

An interlocutory appeal was taken by both parties to the Georgia Court of Appeals. The Court of Appeals vacated the trial court's ruling and created a new framework to address the issues in conformity with the Georgia Rules of Professional Conduct. Further appellate review was sought and certiorari was granted by the Georgia Supreme Court which vacated the Appeals Court's decision. Id. at 421. In reaching its decision, the Georgia Supreme Court restructured the framework "to fit within the parameters of Georgia's general law on privilege and work product" and removed the Georgia Rules of Professional Conduct from the analysis. Id.

In its analysis, the Court determined that that intra-firm communications should be treated like any other potentially privileged communications. As in the Massachusetts *RFP Family Partnership* decision, the Georgia Supreme Court examined what circumstances might determine whether an attorney-client relationship exists between law firm attorneys and in-house counsel for purposes of establishing the privilege. The Court noted that such things as the formality associated with the position of "firm in-house counsel," the maintenance of a separate file for the intra-firm communications, and the existence of billing procedures for matters addressed to the firm's in-house counsel would figure into the calculus of whether the privilege could be invoked. Id. at 423-424.

The Court acknowledged that the arrangement where an in-house law firm attorney represents the firm against a current firm client may appear "inconsistent with the Georgia Rules of Professional Conduct to the extent the Rules prohibit conflicts of interest and impute individual attorney conflicts to all attorneys within a law firm." Id. at 425. Yet, the Court concluded that, while the imputation of conflicts might present ethics problems for law firms, such potential ethics violations were not relevant to the assessment of the applicability of the attorney-client privilege. In fact, the Court noted that the Preamble to the Georgia Rules of Professional Conduct specifically stated that the Rules "are not intended to govern or affect judicial application of either the attorney-client or work product privilege." (citations omitted). Id. As such, the Court held that the existence of a potential imputed conflict of interest between in-house counsel and a firm client did not abrogate the attorney-client privilege between in-house counsel and a firm's attorneys. Id.

It should be noted that the Court did acknowledge that there were "thorny ethical issues" for law firms in handling the conflicts of interest that arise when a law firm believes that a current client is considering legal action against the firm. Such issues concern duties of disclosure, informed consent, and withdrawal. Yet, the Court stated that its opinion was not intended to resolve the ethical issues but only to address the questions of the attorney-client privilege and work-product. Id at 426.

In addition, as in *RFP Family Partnership*, the Georgia Supreme Court declined to adopt a "fiduciary" exception to the attorney-client privilege in the law firm context. The Court disagreed that an attorney's duty of loyalty to a client trumped the attorney-client privilege and found that such an approach would discount "the importance of the distinct duty of loyalty owed by the in-house counsel" to the law firm. Id. at 429.

The Court held that the attorney-client privilege applied to communications between in-house counsel and firm attorneys regarding a client's claim against the firm if:

> "(1) there is a genuine attorney-client relationship between the firm's lawyers and in-house counsel; (2) the communications in question were intended to advance the firm's interests in limiting exposure to liability rather than the client's interests in obtaining sound legal representation; (3) the communications were conducted and maintained in confidence, and (4) no exception to the privilege applies."

Id.

As to the work product issue, the Court concluded that "once an attorney-client relationship has been established between firm in-house counsel and the firm for purposes of defending against perceived or actual legal action by the firm's outside client, the materials generated by in-house counsel in connection with those efforts should enjoy work product protection vis-a-vis the outside client just as in any other context." Id. at 430.

The Court remanded the case to the trial court for a determination of whether the law firm could carry the burden of proving the elements needed to establish the privilege and work product protections.

It should be noted that, in addition to the two 2013 decisions in *RFP Family Partnership* and *St. Simmons Waterfront*, in 2011 in *Tattletale Alarm Systems, Inc. v. Calfee, Halter & Griswold, LLP* (*"Tattletale"*), 2011 WL 382627 (S.D.Ohio 2011), the United States District Court for the Southern District of Ohio, interpreting Ohio law, upheld the attorney-client privilege for law firm in-house counsel and rejected that any exception applied on the facts before the Court.

The *RFP Family Partnership, St. Simmons Waterfront*, and *Tattletale Alarm Systems* are powerful and well-reasoned precedents for other courts facing similar issues. In addition, in line with the approach taken by these courts, the ABA House of Delegates addressed

the same topic at its 2013 Annual Meeting in San Francisco-and adopted Resolution 103, which states:

> "RESOLVED, That the American Bar Association urges all federal, state, tribal, territorial, and local legislative, judicial and other governmental bodies to support the following principles that:
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> (a) the attorney-client privilege applies to protect from disclosure confidential communications between law firm personnel and their firms' designated in-house counsel made for the purpose of facilitating the rendition of professional legal services to the law firm (including any legal advice provided by such counsel) to the same extent as such confidential communications between personnel of a corporation or other entity and that entity's in-house counsel would be protected;
>
> (b) any conflict of interest arising out of a law firm's consultation with its in-house counsel regarding the firm's representation of a then-current client and a potentially viable claim the client may have against the firm does not create an exception to the attorney-client privilege;
>
> (c) the 'fiduciary exception' to the attorney-client privilege (for a fiduciary's communications seeking legal advice regarding ordinary affairs of the fiduciary office), if recognized by the jurisdiction, does not apply to confidential communications between law firm personnel, acting on behalf of the law firm in its individual capacity, and the firm's in-house or outside counsel, even if those communications regard the law firm's own duties, obligations, and potential liabilities to a current client; and
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> (d) as a reaffirmation of existing Association policy, confidential communications between personnel of a corporation or other entity and that entity's in-house counsel should be protected by the attorney-client privilege to the same extent as confidential communications with outside counsel would be protected."

Conclusion--Risk Management Lessons

These cases extend protections in the jurisdictions in question for communications between law firm attorneys and in-house counsel as long as certain elements are met to establish the applicability of the attorney-client privilege. The ABA Resolution proposes a similar national approach. The described elements for protection of such communications should instruct firms regarding the best methods to attempt to protect their intra-firm risk management and/or ethical communications. The elements are:

1. The establishment of a formal position of "in-house" counsel (general counsel, ethics counsel, etc.) for a lawyer/lawyers within the firm;

2. For such lawyers' position as "in-house" counsel to be realized in connection with the application of the privilege in any given case, the lawyers cannot have worked on the underlying matter (or related matter) for which risk management advice is sought;

3. Work on the matter should not be billed to any client or external source. This will commonly be accomplished by the use of "risk management" or equivalent "firm matter" billing codes for matters addressed by in-house counsel; and

4. The use of segregated filing for "in-house" communications that are kept apart from the underlying matter from which the risk management issue has arisen. These files should, of course, be kept confidential, especially from the client, so as to avoid a waiver.

Hopefully, by structuring the work of law firm in-house counsel in conformity with these principles, more and more courts will recognize that law firms should have the full benefits of having access to in-house counsel on a confidential and privileged basis, whenever professional responsibility questions or issues arise that require guidance, even in connection with potential adversity to current clients.

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