Uncharted Jurisprudential Waters

Attorney-Client Privilege and In-House Communications

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Many law firms today create in-house general counsel positions to advise the firm on various ethical, regulatory and risk-management issues, including malpractice claims. These individuals do not actively represent the firm's clients. Instead, they advise the firm (and its lawyers) on firm-wide issues, specific conflicts and other individual-lawyer(s) issues covered by the applicable rules of professional conduct; usually this covers compliance with the rules of professional conduct, increasingly complex regulations, and disclosure obligations under major pieces of legislation (e.g., Sarbanes-Oxley). Often, in-house counsel will also serve as sole or additional counsel in a malpractice action against the firm.

Within reason, the confidentiality requirement may need to be expanded within a narrowly prescribed group—i.e., the ethics partner(s), the firm's managing partner and/or executive committee if necessary, and the firm's malpractice carrier.

These positions, while essential, carry a degree of risk in the context of discoverable information. Consider a simple hypothetical wherein a firm lawyer has bungled a matter and consults with her firm's in-house counsel about appropriate next steps. Are these discussions privileged and therefore not discoverable by the client in the ensuing malpractice claim? Are these lawyers duty-bound to approach the client prior to communicating? Who is the client: the firm, the client or both?

Courts around the country are considering these questions within the relatively "new" context of in-house communications, and have concluded differently. Some have held the privilege does not apply—others that it does; still, others have narrowed its application or approved a balancing test—while noting jurisdictional differences. This uncertainty of result led the Supreme Court of Georgia in *Hunter, Maclean, Exley & Dunn v. St. Simons Waterfront* to note "plainly, we are in uncharted jurisprudential waters."

In the landmark 1981 United States Supreme Court case, *Upjohn v. United States,* the Court noted that "the attorney-client privilege is the oldest of the privileges for confidential communications known to the common law," and added that the privilege encourages "full and frank communication" between an attorney and his or her client, promotes "broader public interests in the observance of law and administration of justice," and recognizes that "sound legal advice… serves public ends" through "fully informed" lawyers.

But does it apply within the context of in-house communications? Proponents argue there is "nothing exceptional" about lawyers consulting in-house counsel standing (along with the firm) in a "client relationship to the attorney whose advice has been sought" such that the privilege should apply just as it applies to communications with in-house counsel in other organizations. The "firm client" benefits when lawyers freely consult in-house ethics counsel in a "privileged communication." The freedom to discuss potential problems in the representation of a current client benefits both the lawyer and the client insofar as prompt attention to any mistake may ultimately save the client (and the firm) from irreparable harm.

Opponents contend applying the privilege contradicts established rules and cite American Bar Association Model Rules of Professional Conduct (and/or their respective state versions)—particularly, Rule 1.7 (a), which states: "[a] lawyer shall not represent a client if… there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client…" Additionally, Rule 1.10, adds that "While lawyers are associated in a firm, none of them shall knowingly represent a client when anyone of them practicing alone would be prohibited from doing so…"

Others argue that lawyers exist to advise clients "as advocates, not fight them as adversaries," adding that the privilege serves the "broader relationship" between firms and their clients, and that the application of the privilege would lead clients to stop trusting firms and lawyers, which would be in contradiction to the privilege's objective.

This August, the American Bar Association endorsed the application of the privilege, urging "all… judicial…bodies" to acknowledge that, among other provisions:

> (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 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; and
>
> (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.

The ABA's pronouncement follows two state Supreme Court opinions decided in July 2013. In *RFF Family Partnership v. Burns & Levinson,* decided by the Supreme Judicial Court of Massachusetts, RFF Family Partnership retained Burns & Levinson (B&L) to close a commercial loan. Once closed, the borrower defaulted and a foreclosure suit ensued leading to a lien dispute. The partnership filed a claim against B&L and argued it was entitled to communications between B&L's in-house counsel and the B&L attorneys performing the legal work.

The Supreme Judicial Court of Massachusetts concluded the privilege could apply if:

> (a) B&L had designated an attorney within the firm to represent the firm as in-house counsel;

(b) in-house counsel had not performed any work on the client matter at issue or a substantially related matter;

(c) time spent by the attorneys communicating with in-house counsel was not billed to a client; and

(d) communications were made confidentiality and kept confidential.

In *St. Simons Waterfront v. Hunter, Maclean, Exley & Dunn,* St. Simons Waterfront (SSW) hired Hunter Maclean, Exley & Dunn (HM) to help it develop and sell condominiums, including drafting purchase contracts to be used for pre-selling. Several buyers rescinded their "pre-sale" purchase commitments, alleging, in part, defective purchase contracts. SSW obtained new counsel and sued HM alleging several claims, including malpractice. SSW argued it was entitled to discover the communications with in-house and outside counsel.

The Supreme Court of Georgia held the privilege could apply if:

(a) there was an attorney-client relationship between the firm's lawyers and the in-house counsel;

(b) the communications related to the purpose for which legal advice was sought;

(c) the communications were conducted and maintained in confidence; and

(d) no exceptions to the attorney-client privilege applied.

Analysis in this area begins in part with the characterization of lawyers (and firms) seeking advice from in-house counsel. Proponents and opponents alike seem to agree such lawyers are properly characterized as "clients." As such, proponents analogize them to corporate employees seeking counsel from corporate in-house counsel; opponents argue the characterization prohibits their "representation" by in-house counsel (under the Model Rules) and application of the privilege. The Supreme Judicial Court of Massachusetts noted:

"… 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 the withdrawal to the client, such as where a law firm's withdrawal may imperil a business deal that is near a closing… The 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 Rule 1.7, especially where time is of the essence."

It also noted that doing so is not "in and of itself adverse to the client, and… may ultimately benefit the client."

The Supreme Court of Georgia acknowledged its analysis assumes a lawyer "from within a law firm" may represent the firm against a current firm client and that this appears 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." It also noted that "While we acknowledge that the principle of imputed conflicts may present ethical problems for firms employing in-house counsel, we do not believe that potential ethics violations are relevant to the attorney-client privilege determination"—adding that the Georgia State Bar has taken the position that the rules "are not intended to govern or affect judicial application" of the attorney-client privilege.

Regardless, these issues will not be finally resolved any time soon and firms might truly find themselves in uncharted jurisprudential waters. Thus far, neither the Kentucky Supreme Court nor the Kentucky Bar Association Board of Governors has addressed the issue. At a minimum, a law firm is well-advised to:

(a) have a clearly designated ethics partner(s);

(b) make certain that the ethics partner not have participated substantively on the client matter in issue prior to the consultation;

(c) make sure that no time be billed by the consulting attorney or by the ethics partner concerning the ethics request; and

(d) ensure that the consultation is made confidentially and kept confidential.

Within reason, the confidentiality requirement may need to be expanded within a narrowly prescribed group—i.e., the ethics partner(s), the firm's managing partner and/or executive committee if necessary, and the firm's malpractice carrier.

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LAW POEM

LEGAL HEAVEN

Douglas Haynes

I died and went to heaven.

Exhausted by the transition,

I muttered "law" when asked

where I wanted to visit.

I was ushered to a room

of shouting people.

I found myself with Mrs. Palsgraf

and Mr. Miranda.

She was nearly in tears from laughter

when she cried out:

"Actually, I got hurt by falling

on the stairs to the train platform!

The scales had nothing to do with it!"

Mr. Miranda waved her off and declared:

"I would have talked no matter

what was told to me!"

They both turned to me, waiting.

"I have tried to achieve justice

in all that I did," I mumbled.

Their faces were quite the pose.

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