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Viewpoint: When a Lawyer Needs a Lawyer

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What happens when a lawyer may have committed malpractice? May the offending lawyer confidentially consult internally within in his or her firm with— the "loss prevention" partner, the ethics committee, or the managing partner — and may those others then consult confidentially about the situation among themselves?

This is an issue that has flown under the radar for many years, but has begun to get considerable attention from courts and commentators in the past five years, most frequently, as it happens, in federal courts in Northern California. Here, the ethics rules on confidentiality are not much help. These issues generally arise in the context of privilege: when a law firm claims during discovery in the client's later malpractice suit that its internal conversations were privileged as internal attorney-client communications.

But where a law firm's representation of a client is ongoing when the firm's possible malpractice of that client arises, most courts have held that internal consultations on this topic are not privileged. They reason that even if the firm is a client of itself, so, too, is the existing client, and the conflicting interests between the firm and the existing client vitiate any internal privilege. Some have gone so far as to say that these discussions are not even confidential — that is, the duty of candid communication includes revealing the malpractice to the client.

For some reason, most court opinions on this issue — only about a dozen in all — have come from federal courts, arising most often in an after-the-fact motion to compel discovery of those internal communications. Only in California, Pennsylvania and Massachusetts does the issue seem well settled. In four cases in the past five years, courts in the Northern District of California

have unanimously held that internal law firm communications are discoverable if they relate to internal law firm discussions about the mistakes their lawyers may have made in its ongoing client's case.

First, Chief Judge Vaughn Walker, writing in *Thelen Reid & Priest v. Marland*, (N.D.Cal. 2007), ordered production of internal documents of the Thelen law firm in its dispute with its client Marland: "The court grants Marland's request to order Thelen to produce the documents listed in its privilege log. The logged documents relate to the Marland representation and were created during the Marland representation. ... As a result, all of these documents implicate or affect Marland's interests, and Thelen's fiduciary relationship with Marland as a client lifts the lid on these communications." Walker did create what he characterized as a "narrow exception" for some preliminary intrafirm discussions whose privilege ends "once the law firm learns that a client may have a claim against the firm."

Next, in the bankruptcy matter *In re SonicBlue,* (Bankr.N.D.Cal. 2008), Judge Marilyn Morgan wrote that "when a law firm chooses to represent itself, it runs the risk that the representation may create an impermissible conflict of interest with one or more of its current clients. In light of these ethical concerns, the courts that have considered the issue have resoundingly found that, where conflicting duties exist, the law firm's right to claim privilege must give way to the interest in protecting current clients who may be harmed by the conflict." Morgan sensibly denied the client's efforts at discovery of the law firm's communications with outside lawyers, since these lawyers owed their loyalty only to the law firm, not its client.

In the third case, *Landmark Screens v. Morgan, Lewis & Bockius* (N.D.Cal. Jan. 15, 2010), U.S. Magistrate Judge Howard Lloyd cited both *Marland* and *Sonic Blue* and reiterated the in-firm/outside counsel distinction:

"Although a law firm may assert privilege over communications with outside counsel, its fiduciary duty to avoid conflicts of interest prevents it from withholding internal communications relating to the client's representation 'once the law firm learns that [the] client may have a claim against the firm.' [quoting *Marland*]. 'As a result, 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.' [Quoting *In re SonicBlue*.]. This rule also applies to documents withheld on work-product doctrine grounds."

Most recently, in *E-Pass Technologies v. Moses & Singer* (N.D. Cal. Aug. 26, 2011), U.S. Magistrate Judge Jacqueline Scott Corley focused on the period during which the law firm represented the client while also consulting itself. Then she succinctly summarized the state of the law in applying it to the facts of the case — a motion against both the law firm and the client for attorneys fees:

"Moses & Singer cannot credibly dispute that it owed a fiduciary duty to E-Pass during the time it represented E-Pass. ... Rather, it is making the unprecedented argument that notwithstanding its fiduciary duty, at the same time it was representing E-Pass on the motion it could engage in intrafirm communications relating to how to protect itself ... and then withhold those

communications from E-Pass. Moses & Singer's interests were in conflict with those of E-Pass. ... If it intended to separately — and confidentiality — represent itself on the fees motion it had a duty to disclose this conflict and obtain E-Pass's consent to continued representation. Because it failed to do so, it cannot claim that internal communications discussing or implicating such a conflict are privileged."

The judge distinguished between internal firm communications during and after the law firm terminated its representation, and held that after termination, the firm could maintain the privilege. However, if the representation is still in litigation, the law firm could not terminate its relationship without either client consent or court approval.

This California rule makes simple common sense. After all, if a law firm starts giving advice to client No. 1 that is adverse to ongoing client No. 2, the conflict of interest is self-evident. When the advice relates to the exact same facts for both clients, the problem is even more obvious. Viewed in this context, the argument that somehow if the law firm itself is client No. 1 those consultations magically remain confidential and privileged strains credulity, especially considering that these consultations are designed to protect the firm against its existing client's claim. Not surprisingly, the majority of the existing decisional law strongly supports this view, including two recent federal cases in Massachusetts, two more in Pennsylvania, and elsewhere, including Louisiana and Washington State.

But this common-sense view is not unanimous. Recent cases in Ohio and Illinois both hold that on the specific facts presented, a law firm is not required to disclose its internal communications about loss prevention even if it was still representing the client asserting the claim. The Illinois case, while acknowledging that the law firm violated its fiduciary duty to its client, noted somewhat counterintuitively that the fiduciary violation does not create an exception to the privilege under current Illinois law. Notably, however, neither case analyzed the law firm's ongoing duty during the "dual representation" to candidly communicate with its third-party client, including about its own malpractice, an issue the California courts wisely recognize.

Time will tell how this issue develops, but three things seem likely. First, it will become more hotly litigated across the country. Second, the more logical and fair-minded California view is highly likely to prevail, especially because both the duties of loyalty and candid communication are involved. And third, if a California law firm wants to consult other lawyers about a potential ethics or malpractice violation, it sure as heck had better do it through outside counsel, because anything internal will be discoverable.

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