THE RECORDER
ESSENTIAL CALIFORNIA LEGAL CONTENT

Viewpoint: Law Firms Gain Secrecy at the Expense of Client Loyalty

By Richard Zitrin Contact All Articles

The Recorder

July 19, 2013

On consecutive days earlier this month both the Massachusetts and Georgia Supreme Courts issued opinions that were great news for law firms that want to consult internally in secret about possible screw-ups they've made in their clients' cases. "This is as good an opinion for law firms as they could possibly expect. It's a total win," opined New York University ethics professor Stephen Gillers on the blog LegalEthicsForum.com about the Massachusetts high court opinion this month in *RFF Family Partnership v. Burns & Levinson*, SJC-11371.

Unfortunately, Gillers was right on the money. But as good a day as it was for law firms, it was an equally bad day for clients who expect loyalty from the firms they employ.

The Massachusetts court, repeatedly citing to and closely following a poorly reasoned law firm apologia from a 2005 law review article, perpetuated the idea that a law firm may do almost whatever it wants within its own four walls, even if it is contrary to the needs or wishes of its own current client. The next day, in the Georgia Supreme Court followed suit.

Here's the situation: Baskin and Robins, two lawyers at BigFirm, are concerned that they have made significant errors on client Farmer Brown's case. Rather than going to an outside ethics expert — Gillers would be a good choice — they consult within their own firm, with their own ethics counsel, or their professional responsibility committee, or perhaps their loss prevention

team. Perhaps the BigFirm lawyers tell them: "Look, if you screwed up, fall on your sword, tell the client everything, then work with the client to fix it as best as possible."

Or perhaps the BigFirm honchos closet themselves with Basko and Robbie and try to figure out how to minimize the damage to the firm — whatever the consequences to poor old Farmer Brown.

In either event, whatever discussions take place between B&R and internal ethics counsel or a PR or loss prevention committee, the actions of B&R, their knowledge of their mistakes, and the consequences of those mistakes, and how best to deal with those mistakes — whether correcting or hiding them — are certainly going to be discussed.

It's the after-the-fact results of such situations that come to the attention of the courts, usually when the client — ultimately unhappy with the law firm's services — sues the firm, and seeks information in discovery about the substance of the internal conversations. After all, Farmer Brown reasons, "I was the law firm's client; how can the firm hire itself as a client? Isn't that an automatic conflict of interest between the law firm and me if they're discussing how they messed up my case? After all, if BigFirm had gone out and represented Farmer Smith against my interests, that would be a conflict on a concurrent matter, right? How is this different? And how can they keep those discussions secret from me?" (Farmer Brown, it turns out, is a recovering lawyer now doing organic, non-GMO farming in Sonoma County.)

That seems to make a great deal of sense. In such situations, the correct approach would go something like this:

"The firm must produce any communications discussing claims that the client might have against the firm or discussing known errors in its representation of the client. The firm must produce any communications discussing known conflicts in its representation of the client or other circumstances that triggered the firm's duty to advise the client and obtain the client's consent. Conflicts include any representation — whether of the firm itself, [a third party] or another — adversely implicating or affecting the interests of the client, when the firm was receiving information from and/or providing legal advice to its own lawyers while at the same time continuing to represent the client."

So stated U.S. District Judge Vaughn Walker in *Thelen, Reid & Priest v. Marland*, 2007 WL 578989 (N.D. CA 2007). I've simply replaced the word "Thelen" with "firm," and the word "Marland" with "client." (Disclosure: Both my firm, Carlson, Calladine & Peterson, and I were involved in the representation of Marland in that case.) Other California cases, especially federal ones, have followed suit with opinions consistent with Walker's ruling, cases I wrote about in an earlier Moral Compass column. ("When a Lawyer Needs a Lawyer," *The Recorder*, May 14, 2012.)

If only the Massachusetts and Georgia courts had similarly followed Walker's lead.

Here are just three examples of the Massachusetts court's wrongheaded thinking:

First, without this opinion, said the court, "a law firm, without benefit of expert advice, may unnecessarily withdraw from the representation where the conflict was illusory."

Nonsense. The firm can — and often does — get *outside* expert advice, and if the conflict is indeed illusory, it will never result in withdrawal, much less litigation or the resultant discovery. Even if a complaint were filed, the client would learn only the truth: that the firm felt that there was only an "illusory" problem.

Second, the court says that ABA Model Rule 1.10 — a rule we don't have in California — imputes conflicts to a firm representing two "outside" clients, but not one "outside" client and itself. It is obviously counterintuitive that a law firm has more protection in representing itself adversely to its own client than it would representing a third party, and in fact Rule 1.10 says nothing of the sort. The 2005 law review article by professor Elizabeth Chambliss says it, but that doesn't make it so. Representing two concurrent clients with conflicting interests is a no-no. Period.

Third, somehow the court thought that "applying the privilege in such contexts will often benefit the client and will likely result in increased law firm compliance with ethical obligations."

Again, it's hard to know what the court was thinking. Could Massachusetts' highest court be so naive as to think this conversation taking place will likely result in benefit to the client? If there's a real malpractice, the firm and its inside counsel are more likely than not having meetings to figure out how they can deflect responsibility, get out of liability, and cover its tracks. If there is no malpractice, then the issue will never arise.

I know and have worked with many excellent in-house counsel. But it is rare that the only conversation among law firm partners will include: "What should we do that's best for us and the client?" The discussion is more likely to at least include something like: "Joe really screwed up out in San Fran. What the heck can we do to get out of it?" Even if ethics counsel says the right thing — as she often will — that view may be overruled. Either way, the client is entitled to the conversation and any admission.

I have to conclude that courts ruling this way are simply protecting the interests of lawyers over those of clients, and that is inexcusable. To illustrate, let me quote from the second opinion, that of the Georgia Supreme Court, which reversed both the trial court and the appellate court's "carefully considered opinion":

"We hold further that the Georgia Rules of Professional Conduct do not govern the applicability of the attorney-client privilege or work product doctrine, and therefore the conflict of interest that may arise between the firm and the client when the firm begins acting in its own defense does not affect the protections afforded to privileged communications and attorney work product."

What was that again? What about the lawyers' fiduciary duties to the client?

No, say the Georgia Supremes — those duties simply don't count:

"The court of appeals' framework assessed the nature of the communications at issue; the structure of the in-house counsel position; and the extent to which the client gave informed consent, in conformity with the rules of professional conduct, to the firm's undertaking defensive measures in anticipation of litigation during its ongoing representation of the client. *We now restructure this framework* to fit within the parameters of Georgia's general law on privilege and work product and *to remove the rules of professional conduct from the analysis*." The emphasis is mine, albeit incredulously.

So in Georgia, it's at least freely admitted that law firm self-defense trumps a firm's fiduciary duties to its client under the ethics rules, even while the client is still being represented. (In Massachusetts the court was much more oblique.) The conclusion? All bets are off in Georgia on a lawyer's duties to the client, as the ethics rules simply may not be considered.

Wow! Every ethics opinion or court opinion I'm aware of requires a malpracticing lawyer or law firm to fully brief the client on the malpractice they've committed. The ethics rules themselves require this. But in Georgia, if the ethics rules no longer apply to lawyers defending themselves, perhaps this, too, is no longer required.

Every law student is taught that a lawyer's fiduciary duties are of the highest character, and they mean putting the client's interests ahead of the lawyer's. But there's been a dangerous trend in some states in recent years to severely diminish or even do away with the duties lawyers owe to clients. The Georgia court's writing the ethics rules out of the equation is just another example, merely more blunt than most.

This is an unfortunate trend. If it continues, and if it infects us on the relatively enlightened Pacific Coast, it will be a sad day indeed.

Richard Zitrin is a professor at UC-Hastings and of counsel to San Francisco's Carlson, Calladine & Peterson. He is the lead author of three books on legal ethics, including The Moral Compass of the American Lawyer.