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Viewpoint: Privilege Can't Be Used Against Client

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In answer to my recent Moral Compass column about protecting clients from their own law firm's internal secrecy, San Francisco attorney Justin Fields wrote an op-ed that began:

"The attorney-client privilege is one of the oldest, most sacrosanct privileges in our legal system. Attorneys are entitled to the privilege when they consult with their in-house law firm counsel, just like anyone else who consults with his lawyer."

Of course they are. So if one of my lawyer-clients consults me, her confidential information is sacrosanct, just as it would be for a non-lawyer client.

But if two clients consult me on a matter on which their interests diverge, there can be no privilege between them. The fact that one of those two clients happens to be the firm where I work should not and does not protect that firm from having to reveal internal communications about the mistakes I may have made in my current client's case.

California's Evidence Code says exactly that. Here's §962 in its entirety:

Where two or more clients have retained or consulted a lawyer upon a matter of common interest, none of them, nor the successor in interest of any of them, may claim a privilege under this article as to a communication made in the course of that relationship when such

communication is offered in a civil proceeding between one of such clients (or his successor in interest) and another of such clients (or his successor in interest).

In other words, if the client sues the law firm for malpractice over the law firm's mistakes — obviously a "matter of common interest" to both firm and client — the law firm has no privilege. In perhaps the most succinct holding on this issue, the court in *In re SonicBlue Inc.*, 2008 WL 170562 (N.D. Cal. January 18, 2008) wrote 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."

But, complains Fields, this means that "attorneys cannot seek advice from their own in-house counsel without running the risk that their communications will be disclosed and potentially misconstrued in a malpractice lawsuit." Yes indeed, and what's wrong with that? As for "potentially misconstrued," that's what finders of fact are for. And such misconstruction is exactly what Fields, who by his own description "has worked extensively in defense of lawyers accused of malpractice," is there to prevent.

Is this unfair to law firms? Of course not. Any other law-firm client (other than the firm itself) that has a conflict of interest with another of the firm's clients would be in the exact same boat. Except that on top of being its own client, the law firm also owes fiduciary duties to its clients. This includes the duty of candor, which in California — by both statute (Bus. & Profs. Code §6068(m)) and rule (Calif. R. of Prof'l Conduct 3-500) says that lawyers must keep clients reasonably informed about "significant developments" in their cases.

It should go without saying that a lawyer's need for assistance from his firm on "loss prevention" issues is a significant development that the client should be made aware of. Fields writes that "Attorneys communicating with in-house counsel on such sensitive issues [including "loss prevention"] expect to do so in confidence...." But how can firms have that expectation if they are obligated to tell their clients about this "significant development"?

While using that recent article as a reference point, I should emphasize that this issue is more than just a spitting contest between two lawyers with different viewpoints. It's far broader and more important: What is a law firm's duty of loyalty to its clients? Or put another way, are law firms allowed to protect themselves at the expense of their duties to their clients? After all, the most fundamental definition of "fiduciary duty" in this and many other states is "the duty to put the client's interests ahead of one's own." Fields and others have quoted Judge Vaughn Walker in *Thelen, Reid & Priest v. Marland*, 2007 WL 578989 (N.D. CA 2007). But that quote ignored Judge Walker's actual holding, which reads:

"Thelen must produce any communications discussing claims that Marland [its former client] might have against the firm or discussing known errors in its representation of Marland. Thelen must produce any communications discussing known conflicts in its representation of Marland or other circumstances that triggered Thelen's duty to advise Marland and obtain Marland's consent. Conflicts include any representation — whether of Thelen itself … or another — adversely implicating or affecting the interests of Marland, when Thelen was receiving information from

and/or providing legal advice to its own lawyers while at the same time continuing to represent Marland."

That seems unambiguous. Judge Walker said, quite clearly, that clients are entitled to be protected by their law firms, even against their firms' own malpractice, and are entitled to learn of such matters both when they occur during the representation, and after-the-fact in a malpractice case. To do otherwise would be to allow a law firm to put its own interests ahead of its clients' — standing on its head the very concept of fiduciary duty.

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