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ARE COMMUNICATIONS WITH A LAW FIRM'S IN-HOUSE COUNSEL PRIVILEGED?

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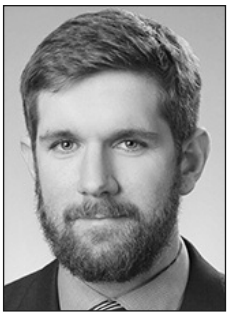

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Can you have privileged communications about an ongoing matter with your law firm's General Counsel? Good question. The answer is evolving and not entirely clear. Although historically courts held there was no privilege, more recently courts—including one California court—have concluded that communications between attorneys and their firm's in-house counsel are privileged.

In re Sunrise: The "Fiduciary" Exception to the Attorney-Client Privilege

Until roughly five years ago, most courts held that communications between an attorney and her in-house counsel about a potential claim by a client were not privileged. These earlier opinions generally reasoned that extending the privilege to these communications would raise a conflict of interest between the firm's representation of its clients and its representation of its own attorneys.

In re Sunrise Securities Litigation, 130 F.R.D. 560 (E.D. Pa. 1989), is representative of this line of cases. There, the law firm Blank Rome, which acted as general counsel to Sunrise Savings & Loan Association, was named as a defendant in multidistrict proceedings after Sunrise became insolvent. Blank Rome attempted to withhold several documents sought by Sunrise's outside directors on the basis that they constituted privileged communications between Blank Rome attorneys and the firm's in-house counsel concerning a potential claim against the firm. The court rejected Blank Rome's position and held that "a law firm's communication with in house counsel is not protected by the attorney client privilege if the communication implicates or creates a conflict between the law firm's fiduciary duties to itself and its duties to the client seeking to discover the communication." Id. at 597.

Numerous courts extended *Sunrise* to communications with in-house counsel concerning the possibility of a malpractice claim. In *Bank Brussells Lambert v. Credit Lyonnais (Suisse)*, the Southern District of New York held that a law firm could not assert the privilege over emails between firm attorneys and in-house counsel concerning a potential claim by a current client because doing so would "create an inherent conflict against that client." 220 F. Supp. 2d 283, 207 (S.D.N.Y. 2002). The District of Massachusetts similarly concluded that because a law firm owed a fiduciary duty to a plaintiff trust beneficiary who was its former client, the firm could not withhold communications concerning an internal investigation of the beneficiary's claim against the firm. *Burns ex rel. Office of Public Guardian v. Hale and Dorr LLP*, 242 F.R.D. 170 (D. Mass. 2007).

Although no California state court directly addressed the issue during the 1990s and 2000s, federal courts in California predicted that California courts would follow Sunrise. In *Thelen Reid & Priest LLP v. Marland*, No. C 06-2071 VRW, 2007 WL 578989, at *1 (N.D. Cal. Feb. 21, 2007), for instance, the Northern District of California cited *Sunrise* in holding that a law firm's "fiduciary relationship" with a former client "lift[ed] the lid" on communications between the firm's attorneys and its in-house counsel concerning a potential claim against the firm. *Id*. at *7. The following year, 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." *SonicBlue Claims, LLC v. Portside Growth & Opportunity Fund* (In re SonicBlue Inc.), Ch.11 Case No. 03-51775-MM, Adv. No. 07-5082, 2008 WL 170562, at *9 (Bankr. N.D. Cal. Jan. 18, 2008).

Edwards Wildman: California Rejects the "Fiduciary" and "Current Client" Exceptions

Over the last five years, several courts have refused to follow *Sunrise*; instead, they have held that the attorney-client privilege applies to communications between firm attorneys and their in-house counsel. In 2013, for instance, the Massachusetts Supreme Judicial Court declined to recognize a "fiduciary" or "current client" exception to the attorney-client privilege. It held that "the attorney-client privilege applies to confidential communications between a law firm's in-house counsel and the law firm's attorneys, even where the communications are intended to defend the law firm from allegations of malpractice made by a current outside client." *RFF Family P'Ship, LP v. Burns & Levinson, LLP*, 991 N.E.2d 1066, 1080 (Mass. 2013). The next day, the Georgia Supreme Court reached the same conclusion, holding that "the attorney-client privilege applies to communications between a law firm's attorneys and its in-house counsel regarding a client's potential claims against the firm . . . ." *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 746 S.E.2d 98, 108 (Ga. 2013).

California courts soon followed suit. In *Edwards Wildman Palmer LLP v. Superior Court*, 231 Cal. App. 4th 1214 (Ct. App. 2014), the California Court of Appeal broke with Sunrise—and more specifically, the California federal courts' interpretation of California law—by holding that such communications were privileged. In *Edwards Wildman*, a client fired his law firm, sued for malpractice, and sought to obtain communications between his former attorneys and the firm's in-house counsel concerning his allegations of malpractice. *Id*. at 1221-22. Although the firm asserted that those documents were privileged, the trial court ordered the firm to produce them. Relying primarily on *Thelen Reid* and *SonicBlue*, the trial court held that "the client's right to be informed took precedence over any claim of privilege." *Id*. at 1223.

The Court of Appeal reversed, holding that the "plain language" of the California Evidence Code rendered the communications privileged. *Id*. at 1227-28. Because the scope of the attorney-client privilege is defined by statute in California, the court explained, it was not at liberty to recognize a "fiduciary" or "current client" exception to the privilege, even if it were inclined to do so. *Id*. at 1231. Moreover, the court explained, an attorney's consultation with in-house counsel will not necessarily be adverse to the client's interests; to the contrary, it emphasized that their interests "are likely to dovetail insofar as the attorney seeks to resolve the dispute to the client's satisfaction, or determine through consultation with counsel what his or her ethical and professional responsibilities are in order to comply with them." *Id*. at 1233-34.

While the issue remains unsettled in many jurisdictions, several courts have followed *Edwards Wildman* in treating communications between firm attorneys and their in-house counsel as privileged. *See, e.g., Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 326 P.2d 1181 (Or. 2014); *Garvy v. Seyfarth Shaw, LLP*, 966 N.E.2d 523 (Ill. App. Ct. 2012); *Stock v. Schnader Harrison Segal & Lewis LLP*, 35 N.Y.S.3d 31 (N.Y. App. Div. 2016).

Conclusion

The trend towards treating these communications as privileged is a welcome development. Lawyers are frequently faced with complex legal issues and risk sanctions, disqualification, or even personal liability. Instead of encouraging a lawyer to obtain legal guidance about how to navigate these risks, the fiduciary exception penalizes her for seeking advice from her firm's in-house counsel. That penalty is not only unfair to the lawyer, but may be adverse to the client's interests insofar as it discourages lawyers from obtaining valuable guidance that may resolve difficult ethical issues.

Hopefully, the tide has turned for good on the fiduciary exception.

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