Communications with Law Firm In-House Counsel: Does the Privilege Apply?

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Ethics Watch

One of your worst nightmares occurs—you've missed the statute in one of your cases. Or one of your clients is complaining about how you are handling his case. Or you want to withdraw from a case because it has become much more expensive and the prospects of recovery much less favorable than you anticipated when the case began. How should you handle such situations? You need advice from your firm's in-house counsel. (An increasing number of firms employ in-house counsel under a variety of titles, including ethics counsel, general counsel, or risk management attorney.) But a concern crosses your mind: Will your discussions with in-house counsel be privileged or can they be used against you and the firm by the client should litigation or some other adversarial proceeding develop?

While it is clear that communications between lawyers in a firm ("consulting lawyers") and in-house counsel would in general enjoy the privilege toward third parties, it is unclear whether the privilege applies when it is the client that is asserting a right to the communications, typically when the client has brought or is threatening a malpractice claim. Some courts have denied the privilege based on either "fiduciary" or "current client" exceptions to the attorney-client privilege.

However, two recent state supreme court decisions held that communications between consulting lawyers and the firm's in-house counsel were subject to the attorney-client privilege towards the client provided certain conditions were met. See *RFF Family Partnership, LP v. Burns & Levinson, LLP* (Mass. SJC #11371, July 10, 2013) and *St. Simons Waterfront, LLC v. Hunter, MacLean, Exley & Dunn, P.C.* (Ga. S12G1924 July 11, 2013). Nonetheless, both decisions imposed a number of requirements and left open a number of questions that firms should consider in structuring and operating their in-house counsel system.

In both cases the lawyers who were representing the clients learned of potential malpractice claims against them by their clients. They discussed the potential claims with the in-house counsel of their firms. When the clients subsequently brought malpractice claims, they sought to discover communications between the consulting lawyers and in-house counsel. Both courts held that the communications between the consulting lawyers and in-house counsel could be subject to the attorney-client privilege. The cases are significant in a number of respects:

1. Acceptance of policy justifications for recognition of the privilege. Both courts recognized that policy considerations supported recognition of the attorney-client privilege as to communications between consulting lawyers and a law firm's in-house counsel. Law firms, like business entities in general, often need the advice of counsel. Of course, law firms, unlike general business entities, have professional and fiduciary obligations to their clients. However, as the *RFF* court indicated, recognition of the privilege as to communications between consulting lawyers and in-house counsel benefits clients because it encourages communication with in-house counsel, who can improve the quality of self-regulation by encouraging questions, providing resources, and monitoring firm policies and procedures.

2. Rejection of decisions that applied "fiduciary" and "current client" exceptions. Both courts discussed and rejected decisions in other jurisdictions that had refused to recognize the attorney-client privilege in communications between consulting lawyers and in-house counsel on the basis of either the "fiduciary" or "current client" exceptions to the privilege. The fiduciary exception, which developed from trust law, provides that when a trustee hires counsel who is paid from trust funds, any communications between the trustee and counsel are not privileged with regard to claims brought by beneficiaries. The *RFF* court found that the fiduciary exception did not apply because the firm in that case did not bill the client for the time of in-house counsel or consulting attorneys. Somewhat similarly, the *St. Simons Waterfront* court found that the fiduciary exception applies when the trustee and beneficiary have a "mutuality of interest"; according to the Georgia court, when consulting attorneys seek the advice of in-house counsel about a potential malpractice claim, there is no mutuality of interest. As the Massachusetts court pointed out, rejection of the fiduciary exception does not undermine a firm's fiduciary obligations to its clients. The firm must still provide full disclosure of material facts to the client; only communications between consulting lawyers and in-house counsel are privileged: "The client still has access to every communication between the client and the firm and to every communication made by the lawyer, whether within the firm or outside of it, that reflects how the lawyer was carrying out the client's legal business."

Both the Georgia and Massachusetts courts rejected the current client exception, but they used different rationales. Under the current client exception recognized by some courts, the attorney-client privilege does not apply to commu-

nications between firm lawyers and in-house counsel when a current client is seeking such communications. Courts applying the current client exception may allow the firm to preserve the privilege either by withdrawing from the representation or by obtaining the client's informed consent to the firm's continued representation and the consulting lawyers' communication with in-house counsel before communications with in-house counsel occur. The Georgia court rejected the exception because it decided that the ethical conflict rules had no bearing on the legal issue of whether the attorney-client privilege applied. The court cited language from the Preamble of the Georgia Rules stating that the rules did not govern application of the attorney-client or work product privileges. The Georgia rules also state that they did not augment or create substantive legal duties. In somewhat troubling language, however, the court stated it was not expressing an opinion on the ethical propriety of a firm undertaking defensive action against a current client, and that such situations presented "thorny ethical issues."

By contrast, the Massachusetts court attempted to reconcile the conflicts rules with the recognition of the attorney-client privilege for communication between consulting lawyers and in-house counsel. The court reasoned that the conflict of interest rules serve two purposes: loyalty and confidentiality. The court decided that a firm was not being disloyal to a client when the consulting lawyers seek advice about how to handle the situation involving the client's claim. In fact, a rule that required either firm withdrawal or informed consent before the consulting lawyers could seek the advice of in-house counsel would be "dysfunctional, both to the client and the law firm." For example, without expert advice the consulting lawyers might withdraw unnecessarily or without adequately protecting the client's interests. As to confidentiality, the court concluded that consulting lawyers were ethically permitted to reveal confidential information to the extent reasonably necessary to defend against charges of misconduct. See SCRPC 1.6(b)(6).

3. Establishment of standards for recognition of the privilege. Both courts announced requirements for recognition of the attorney-client privilege for communications between consulting lawyers and in-house counsel. The Georgia court concluded that the same principles that apply to recognition of the attorney-client privilege in other circumstances should also apply to this situation. Accordingly, the court held that the privilege would apply if the firm establishes: (a) the existence of an attorney-client relationship between in-house counsel and the firm; (b) communications related to the purpose for which advice was sought; (c) communications maintained in confidence, and (d) absence of an exception to the privilege. The Massachusetts court also announced requirements for the privilege to apply, but these were specific to the in-house counsel setting: (a) the law firm has designated an attorney or attorneys within the firm to represent the firm as in-house counsel; (b) the in-house counsel has not performed any work on the client matter at issue or a substantially related matter; (c) the time spent by the attorneys in these communications with in-house counsel is not billed to a client; and (d) the communications are made in confidence and kept confidential.

It should be noted that the issue of attorney-client privilege is separate from the issue of a lawyer's ethical obligation to disclose information to the client. An issue of privilege arises in cases like *RFF* and *St. Simons* when the client has asserted a right to communications between consulting lawyers and in-house counsel in a proceeding before a tribunal. What is the status of communications between in-house counsel and a consulting lawyer if the client has *not* made a claim for such communications? For example, suppose a lawyer asks in-house counsel whether the firm has a conflict of interest in representing the client. In-house counsel advises the lawyer that no conflict exists. This situation does not present an issue of attorney-client privilege because the client is not trying to compel the production of such information. Instead the situation raises an issue of the ethical duty to communicate information, which implicates both Rule 1.4 and 1.7. See the discussion below on ethical obligations of in-house counsel.

What steps should a firm take to protect the privilege?

1. Designate a lawyer or lawyers in the firm who serves in the capacity of in-house counsel. For small firms the responsibilities of in-house counsel can be included among the duties of the managing partner. If a firm has not designated in-house counsel before a client problem arises, it could do so at that time.

2. Adopt a written firm policy that is publicized in the firm defining the role of such counsel. One tricky issue is how to structure the relationship between in-house counsel, the firm, and consulting lawyers. It is possible for the in-house counsel to represent only the firm, see SCRPC 1.13(a), or both the firm and the consulting lawyers so long as no conflict exists, 1.13(g). In deciding how to structure the relationship, the firm should consider the possibility of conflicts of interest between the firm and consulting lawyers, the effect of the relationship on the willingness of firm lawyers to consult with in-house counsel, and the impact of the relationship on the duty to report under Rule 8.3. Full analysis of these considerations is too complex for this column. However, my tentative opinion is that in-house counsel should represent both the firm and the consulting lawyers but with a limitation of the scope of representation of the consulting lawyers, see SCRPC 1.2(a), as follows:

(a) In-house counsel will withdraw from representation of the consulting lawyer but may continue to represent the firm if a conflict of interest develops between the firm and the consulting lawyer;

(b) A consulting lawyer consents to communication by in-house counsel of any information about the matter to appropriate firm management for the purpose of advising the firm about its obligations in the matter.

The written policy should state that in-house counsel represents the firm and the consulting lawyers with regard to ethical and legal matters that affect the firm, including issues related to the representation of current clients. The role of in-house includes giving advice to members of the firm about the firm's obligations both with regard to specific matters and in general ("compliance advice").

3. Create an attorney-client relationship with regard to a specific client matter. When consulting lawyers seek the advice of in-house counsel about a client matter, in-house counsel should open a file in the name of the firm and the consulting lawyers for the specific client matter. The file should be separate from the client matter file. In-house counsel and the consulting lawyers should record their time for advice to the firm file, not to the client matter file, and the client should not be billed for such advice. If the advice is routine, the time of in-house counsel could be billed to a general firm file. The first e-mail or other written communication between in-house counsel and consulting lawyers should state that in-house counsel has been retained to provide advice to the firm and the consulting lawyers about a designated client matter. All communications from in-house counsel should contain an appropriate confidentiality notice and should reference the firm policy on engagement of in-house counsel, including the scope of representation of in-house counsel.

4. Limit disclosure of communications between in-house counsel and consulting lawyers to members of the firm with a need to know about the matter. Where necessary, communications can be shared with the managing partner or members of a management committee. To protect against disclosure of such communications, firms could decide that in-house counsel will provide in-person rather than e-mail or other written briefings to management. In addition, when management meetings are held with regard to such matters, they can be closed to other members of the firm.

5. Include appropriate policies in the firm's operating agreement or other governing documents. To support the confidentiality of communications with and the authority of in-house counsel, the firm's operating agreement could include provisions like the following:

(a) "It is expected and anticipated that In-House Counsel [or other designation appropriate to the firm] or his or her designee will have confidential communications with the attorneys and staff of the Firm on matters related to clients or the Firm and those communications are and will remain confidential within the Firm."

(b) "In-House Counsel or his or her designee is authorized to appear

as an attorney of record on behalf of the Firm or its lawyers and, if necessary and in consultation with the Managing Attorney, to hire attorneys and experts to represent, advise, or assist the Firm or its lawyers."

(c) "In-House Counsel shall provide an in-depth in-person briefing to the Management Committee, regarding the matters for which In-House Counsel has responsibility, at least two times per year and in less comprehensive updates as needed throughout the year. The Management Committee has discretion to close portions of meetings in which In-House Counsel is providing legal advice to the Firm to members of the Committee."

What ethical obligations should in-house counsel and consulting lawyers consider?

As the Georgia court pointed out, troubling ethical issues arise if in-house counsel begins providing advice to consulting lawyers when a conflict has arisen between the client and the firm. In ABA Formal Opinion #08-453, the ABA Committee provided useful advice to lawyers facing such a situation.

First, a question that will often arise when a client is threatening a lawyer with a malpractice action is whether it is ethically permissible for the firm to continue representation of the client? The natural reaction of most lawyers without ethics advice is that they must withdraw in this situation. However, it is ethically possible for the firm to continue representation at least on matters not directly related to the malpractice claim with the informed consent of the client confirmed in writing. See SCRPC 1.7(b)(4). In fact, in both the Massachusetts and Georgia cases the firm continued to represent the clients in certain matters. Moreover, it may be possible for the firm to continue to represent the client even in the matter in which the client claims malpractice. For example, if the consulting lawyers have missed the statute of limitations, it may nonetheless be in the client's interest for the firm to continue the representation with the informed consent of the client confirmed in writing in the hope of obtaining some recovery for the client. Such a situation could arise if the firm has a particular expertise or if there may be other theories of recovery for which a longer statute applies. See ABA Formal Op. #08-453 (¶On "Ethics Consultation Not a Per Se Conflict with Firm Client").

Second, the firm must comply with its duty to communicate under Rule 1.4. The firm must inform the client of decisions it has made about the representation. For example, if the client is asking the firm to engage in conduct that would violate the rules of professional conduct, the firm has an obligation to inform the client why it cannot engage in such conduct. See SCRPC 1.4(a)(5). Similarly, if the in-house communication involves a potential conflict with a current or former client, it may be necessary to obtain the client's informed consent confirmed in writing under Rule 1.7(a)(2) and (b)(4). However, the duty to communicate generally does not require consulting lawyers or the firm to inform the client that the consulting lawyers have sought the advice of in-house counsel or the substance of the advice given; disclosure of such information is discretionary with the firm. See ABA Formal Op. #08-453 (¶"On Duty to Inform the Client of Ethics Consultation"). The client, of course, has the right to any information and communications related to the representation that do not involve privileged communications between in-house counsel and the consulting lawyers.

Third, in-house counsel may have to deal with conflicts of interest between the consulting lawyer and the firm, for example if the consulting lawyer engaged in serious ethical misconduct that could lead to his discharge from the firm. If in-house counsel represents only the firm and a conflict arises, in-house counsel should advise the consulting lawyer of the desirability of obtaining independent counsel for advice about his personal interests and obligations as distinguished from those of the firm. See ABA Formal Op. #08-453 (¶"Identifying Ethics Counsel's Client"). See also SCRPC 1.13(g). If in-house represents both the firm and the consulting lawyer, the lawyer should withdraw from representation of the consulting lawyer but may continue the representation of the firm with consent of the consulting lawyer given either at the commencement of the matter as part of the scope of representation or at the time the conflict arises.

Fourth, if the consulting lawyer has engaged in serious misconduct, in-house counsel may have an obligation to report the matter to higher authority in the firm, for example to the managing partner or the management committee. See SCRPC 1.13(b). See ABA Formal Op. #08-453 (¶"Disclosing Information Under Model Rule 1.13").

Fifth, Rule 8.3 determines whether in-house counsel or the management of the firm have an obligation to report misconduct by a consulting lawyer to the disciplinary authorities. Normally, reporting will not be ethically required. To be reportable the misconduct must raise a "substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." In addition, reporting is not required when it would involve disclosure of information otherwise protected under Rule 1.6. See SCRPC 8.3(d). Whether in-house counsel represents the firm or both the firm and the consulting lawyer, in most instances the information of lawyer misconduct will relate to the representation of a client and be protected by Rule 1.6(a). Thus, unless one of the exceptions to Rule 1.6 applies, there is no duty to report under Rule 8.3. In addition, to the extent that the information is confidential information of the firm's client, the consent of that client may also be necessary. See ABA Formal Op. #08-453 (¶ "Reporting the Consulting Lawyer's Misconduct to Disciplinary Authorities").

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