Confidentiality of Communications Between Lawyers in the Same Firm

Most of us use lawyers during our lifetimes, from planning our estates, to helping with a divorce, to assisting in probating a deceased family member's will. Some of us may occasionally consult a lawyer concerning whether our representation of a client meets ethical standards, which could include whether the representation might involve a conflict of interest with another current or former client, or even whether we might have committed an act of malpractice that could subject us and our firms to liability. When outside counsel is hired for this purpose, the communications between the lawyers will be confidential and privileged.[1]

But what of the situation where a lawyer seeks advice from the firm's "loss prevention" partner, or its in-house ethics expert, or just another member of the firm whose judgment and advice the lawyer respects? In a subsequent malpractice suit brought by the client, will those communications among the firm's lawyers be discoverable?

Are intrafirm communications with "inside" ethics counsel discoverable?

First, it seems to be fairly well settled that a non-client third party will not be entitled to subpoena or discover intrafirm communications concerning whether there was a potential conflict of interest[2] or malpractice claim concerning a client.[3]

Ethics Opinions and the Rules of Professional Conduct are available at www.azbar.org/Ethics

Second, when it is the client (or former client, as the case may be) that wants to get copies of intrafirm communications on whatever the problem was initially perceived to be, we have to examine whether the firm was still representing the client when the intrafirm communications occurred. Thus, although initial consultations with in-house ethics counsel will usually be held to be confidential and subject to the attorney–client privilege,[4] after the firm learns of a conflict, including a potential malpractice claim, and as long as the firm thereafter continues to represent the client, intrafirm communications will not be protected by the attorney–client privilege and will be discoverable by the client in subsequent litigation.[5] This is known in some jurisdictions as the "fiduciary–duty exception" to the attorney–client privilege, based on the continuing duties owed the client until the relationship is terminated. After termination of the attorney–client relationship, however, further intraoffice communications will be protected by the privilege.[6]

But what about that No Man's Land in the lawyer–client relationship when it is clear that a potential claim may be filed by the client and the client has been advised of the firm's resulting conflict of interest, but the firm has not yet terminated the relationship because of lingering responsibilities it must honor[7]? Will the intrafirm communications with "inside" ethics counsel be discoverable as a result?

A recent case from Georgia said "No," as long as the firm's internal counsel had no part in the client's representation.[8] The court held that the firm could claim the privilege against a yet-to-be-terminated client if there was no conflict of interest between the firm counsel's duty to the law firm and the firm counsel's duty to the client. This would most easily be shown if the firm counsel serves in that position full time and does not represent firm clients. Otherwise, the court said that the firm should be required to show that the internal attorney–client relationship had been established before the intrafirm communication occurred.

What this all boils down to is this: If a lawyer determines that a client has a potential claim against him and continues to consult with his firm's in-house ethics counsel, the firm in effect has two clients (one of them being itself) that have potentially divergent interests. At that point, ER 1.7(a) provides that the lawyer cannot continue to represent the client if the "representation" of itself as a client will be directly adverse to its "real" client and that client's potential claim. At that point, the Georgia court suggests that the law firm explain in writing the firm's perception of the problem and (1) seek the client's informed consent for an immediate withdrawal, disclosing to the client the potential harm that could result, and/or (2) seek the client's informed consent to continued representation until such time as the firm can ethically withdraw, with disclosure that the firm will simultaneously take steps to protect its own interests, including having

—continued on p. 90

David D. Dodge provides consultation to lawyers on legal ethics, professional responsibility and standard of care issues. He is a former Chair of the Disciplinary Commission of the Arizona Supreme Court and is Of Counsel to the firm of Lorona Steiner Ducar, Ltd. in Phoenix.

intrafirm communications with ethics counsel for which it will assert the attorney–client privilege.[9]

The cases recognize that it is beneficial to everybody in the long run to encourage lawyers to seek ethics advice from others in their firms and to have the initial communications concerning that advice protected by the appropriate privilege. But once it is determined that there is or might be a problem, the privilege gives way to the duties of a lawyer to consult with the client about any limitations that might impair the lawyer's obligations of undivided loyalty to the client,[10] and to advise the client of the potential conflict of interest that may result.[11]

endnotes

1. *See* A.R.S. §12-2234 (Attorney and client); *Garvy v. Seyfarth Shaw LLP*, 2012 Ill. App. (1st) 110115 (Mar. 1, 2012).
2. ER 1.7(a), Rule 42, ARIZ.R.S.CT.
3. *U.S. v. Rowe*, 96 F.3d 1294 (9th Cir. 1996).
4. *Thelen Reid & Priest LLP v. Marland*, 2007 WL 578989 (N.D. Cal., Feb. 21, 2007), 23 LAW. MAN. PROF. CONDUCT 184.
5. *E-Pass Technologies Inc. v. Moses & Singer LLP* (N.D. Cal., Aug. 26, 2011), 27 LAW. MAN. PROF. CONDUCT 561. In *E-Pass*, the lawyers billed the client for the time spent by them in consulting with "loss prevention" counsel about the mistakes that led to the client's malpractice suit. For a case that holds to the contrary, *see Tattletale Alarm Systems Inc v. Calfee, Halter & Griswold LLP*, 2011 WL 382627 (S.D. Ohio, Feb. 3, 2011), 27 LAW. MAN. PROF. CONDUCT 106.
6. *Id*.
7. Remember that ER 1.16(b)(1) requires that termination of the representation be accomplished without material adverse effect on the interests of the client.
8. *Hunter, Maclean, Exley & Dunn v. St. Simons Waterfront LLC*, (Ga. Ct. App., July 13, 2012), 28 LAW. MAN. PROF. CONDUCT 433.
9. *Id*. at p.40 of the slip opinion.
10. ER 1.4(a)(5).
11. *See generally*, Colo. Ethics Op. 113, *Ethical Duty of Attorney to Disclose Errors to Clients* (Nov. 19, 2005).