



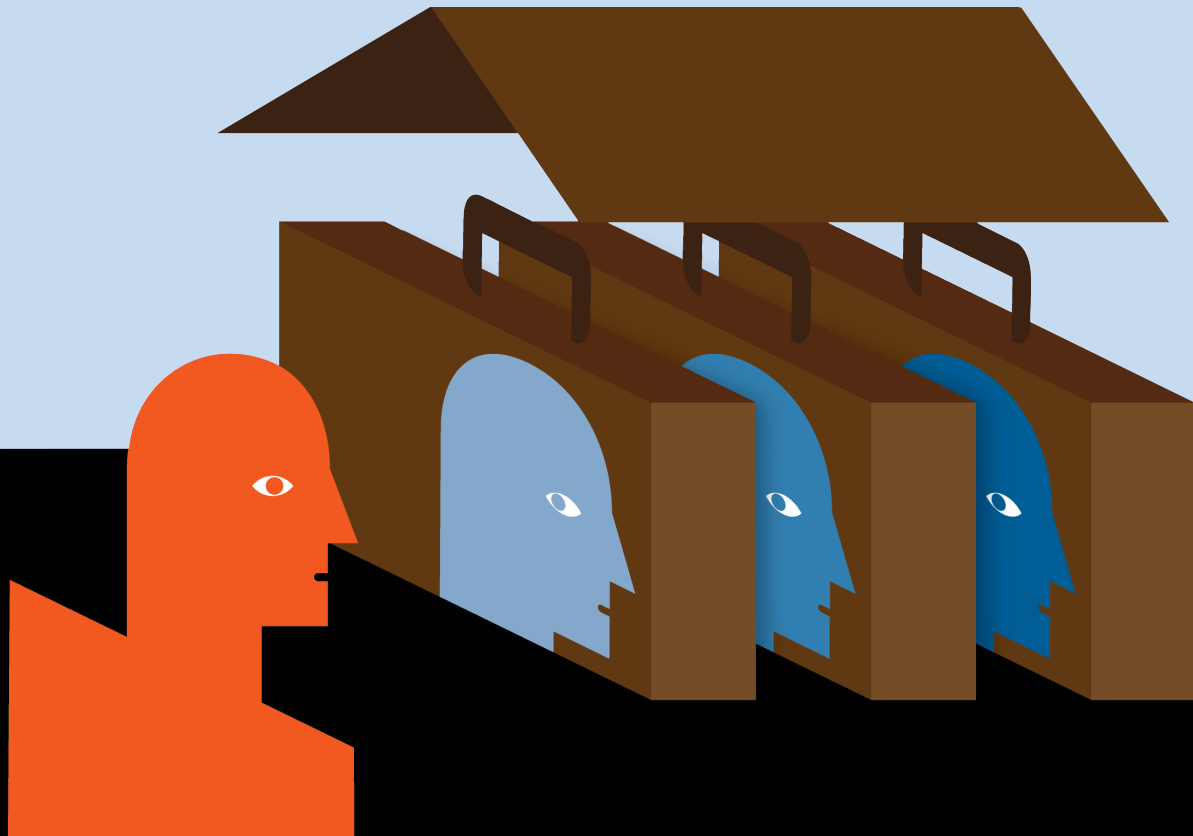
ETHICALLY SPEAKING

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Protecting In-House Consultation: Attorney-Client Privilege and Intrafirm Communications

A client whom you currently represent in litigation takes on an aggressive tone, accusing you of mishandling his or her legal matter, failure to advise the client properly, breaching the engagement agreement, and charging excessive fees. While the relationship with your client still exists, you speak with another of your firm's partners about how the firm should respond. Is the communication going to be privileged if the client seeks evidence of it in a later malpractice action? A recent court of appeal decision from the second district, *Palmer et al., v. Superior Court*,¹ resolves the issue in favor of law firms' having the right to privileged in-house consultations while still representing the client, provided some important caveats are followed.

The real party in interest, Shakrokh Mireskandari, retained Edwards Wildman Palmer LLP (the Firm) to represent him in an invasion of privacy lawsuit against the Daily Mail, to be prosecuted in the Central District of California. The relationship soured within months after the Daily Mail lawsuit was filed. Mireskandari sent emails to one of the Firm's partners, Dominique Shelton, expressing dissatisfaction with the Firm's billings and representation, asserting a breach of the retainer agreement, and providing notice that he would hold the Firm liable for damages. Other communications from Mireskandari claimed that Shelton's estimate of the cost of the litigation had been vastly understated, that she had failed to discern that the Daily Mail was likely to file an anti-SLAPP motion, and failed to timely advise him. The client demanded that all communications between him and Shelton be in writing to avoid any misunderstandings.



While still representing Mireskandari, Shelton consulted with several partners of her Firm, including partners designated as the Firm's General Counsel and Claims Counsel, regarding his claims.

Within months, Mireskandari hired another firm to represent him in the Daily Mail litigation. He also sued the Firm and Shelton for legal malpractice. Mireskandari sought in the malpractice case to discover internal Firm communications and documents prepared in anticipation of litigation with the plaintiff. The Firm refused to produce as many as 387 documents claiming they were protected by attorney-client privilege. Asserting privilege, Shelton declined to answer questions at her deposition regarding her internal communications. Mireskandari brought a motion to compel answers to questions at the deposition and to compel production of the intrafirm communications.

Opposing the motions to compel, the Firm claimed attorney-client privilege, and filed declarations stating that Shelton had sought legal advice from two partners who were general counsel, and claims counsel, who were tasked with "claims handling and loss prevention issues" on behalf of the Firm. It was asserted by the Firm that Shelton sought the advice of the general counsel regarding her responses to the client's complaints, thereby establishing an attorney-client relationship with advisors from within the Firm. The Firm's opposition also asserted that a third partner, Mark Durbin, was "deputized" by the Firm to advise Ms. Shelton regarding her responses to Mireskandari's complaints, the management of the client relationship, and to supervise the preparation of briefs which Mireskandari had asked the firm to prepare on his behalf.²

The trial court granted the motion to compel, finding that the Firm's fiduciary and ethical duties trumped the claim of attorney-client privilege. Shelton and the Firm brought a petition for writ of mandate, seeking to set aside the discovery order. The *Palmer* decision arises out of the writ petition, which was granted in part, and denied in part. In opposing the writ, Mireskandari's attorneys advanced arguments that the communications among Shelton and her partners are not protected by attorney-client privilege. These included: (1) that the Firm had failed to establish an attorney-client relationship existed between Shelton and the partners with

whom she consulted; (2) that the firm and each of its partners owe a fiduciary duty to the client of full and complete disclosure; (3) that the law firm's representation of its own interests while still representing the client creates an impermissible conflict of interest; (4) the intrafirm claim of privilege must be subordinated when a conflict of interest exists between the attorney and the client, who is the actual party to the attorney-client privilege; and (5) that communications were not privileged, per Evidence Code section 958,³ and the joint client exception to attorney-client privilege under Evidence Code section 962.⁴

The national debate over intrafirm privilege for discussion among partners about how to deal with a problem client has produced mixed results in judicial decisions in a number of jurisdictions. A

The lawyer's duty of confidentiality to the client survives the termination of the lawyer-client relationship and, thus, the lawyer may not reveal client secrets.

number of courts have concluded that law firms do not have the right to claim attorney-client privilege for internal consultations regarding a *current* client, because of the firm's fiduciary duty to the client, and the conflict of interest that arises from the firm's essentially representing itself, adverse to the client.⁵ Other courts including those in Oregon,⁶ Massachusetts,⁷ and Georgia⁸ have found in favor of law firms' having a right to protect internal communications as privileged, declining to apply what has come to be known as the "current client" or "fiduciary duty" exceptions to attorney-client privilege.

Federal decisions purporting to apply California law have previously found such in-house communications to be discoverable by the former client in a later malpractice action. One such district court decision, *Thelen Reid & Priest LLP v. Marland* ("*Thelen*"),⁹ recognized that law firms should and do seek advice about

their legal and ethical obligations to clients, and normally do so from their own lawyers within the firm. However, because of the firm's ethical and fiduciary duties to the current client, once the law firm learns that the client may have a claim against the firm, it needs client consent in order to commence or continue internal representation of the firm, and should disclose to the client the firm's conclusions with respect to those ethical issues.¹⁰

In a bankruptcy decision, *In re SonicBlue, Inc.* ("*SonicBlue*"),¹¹ the court recognized that public policy encourages lawyers to consult with ethics counsel in order to "understand and comply with their professional responsibilities and ethical restraints."¹² This policy favors allowing the privilege to be asserted, but only until such time as the firm has, or should have, determined that dual representation of itself and an outside client should not continue without the outside client's informed consent.¹³ In other words, once the in-house consultation results in an impermissible conflict with the outside client, privilege may not be asserted.¹⁴

Under *Thelen* and *SonicBlue*, ethical responsibilities to avoid conflicts of interest between the firm and its client took priority, precluding the firm from representing itself, adverse to its own client, and making those communications discoverable. The *Palmer* court declined to follow *Thelen* or *SonicBlue*, and established for the first time in California, that law firms may, in appropriate circumstances, have the right to internal consultation in a privileged attorney-client context while still representing the outside client.

Despite recognizing that the Firm's representation of itself vis-à-vis a current client "may raise thorny ethical issues," the *Palmer* court concluded that "it does not follow that the looming specter of ethical issues mandates the extinguishment of the attorney-client privilege."¹⁵ While expressing no opinion on whether there was an ethical breach, and stating that it did not intend to condone or minimize the significance of an attorney's violation of the Rules of Professional Conduct, the court concluded that nothing in the Evidence Code suggests that an actual conflict of interest arising under the circumstances presented in the case abrogates the attorney-client privilege. In the unpublished portion of the decision, the court found that Evidence Code sections 958 and 962

were not applicable to the Firm's internal consultations.

Several significant factors persuasive to the court in the *Palmer* decision were that an attorney-client relationship was established between Shelton and two of the three partners involved in the internal consultations because they provided legal advice, were designated as "claims counsel" and General Counsel, had not performed any legal services for Mireskandari, and the law firm did not bill Mireskandari for their time. The *Palmer* court declined to apply the current client or fiduciary duty exceptions recognized in prior decisions, because it concluded that California courts have no power to create non-statutory exceptions to attorney-client privilege.¹⁶ The basis for the court's decision was that the exceptions to attorney-client privilege in California are governed by statute, and the fiduciary and current client exceptions articulated in other decisions are not recognized under California law. Thus, the court would not recognize implied exceptions to attorney-client privilege.¹⁷ Accordingly, the writ petition was granted directing the trial court to vacate its ruling to the extent it required disclosure of the communications with the general counsel and claims counsel partners.

In contrast, the court found that no attorney-client relationship existed between Shelton and partner Durbin, whose role was not that of general or ethics counsel. The court did not accept the assertion that Durbin was deputized to act as claims counsel with responsibility for loss prevention. Instead, Durbin had actually worked on the case, being tasked with assisting Shelton with pleadings prepared on behalf of Mireskandari. Thus, the writ was denied as to the trial court's decision that communications with Durbin would have to be produced. This indicates that the determination whether in-house privilege may be invoked is going to depend significantly on what role is occupied by the attorneys providing the internal advice, how they are characterized as ethics or legal advisors, and the requirement that they perform no work on the case and don't bill their time to the client. It remains to be seen how these limitations will be developed in future cases.

The *Palmer* court chose to express no opinion regarding violation of conflict of interest rules. While noting it is not a foregone conclusion that an attorney's consul-

tation with in-house counsel regarding a client dispute will always be adverse to the client, the court gave virtually no consideration of the consequences of a violation of RPC Rule 3-310(C), which prohibits an attorney, without the informed written consent of the client, from accepting or continuing representation of more than one client where conflicts of interest exist. The opinion does not explain how, when conflicts of interest are imputed to all members of the firm, one partner's advising another partner at least potentially adverse to an existing client could be ethically permitted without disclosure and informed consent.

Although the court determined that some of the internal communications were privileged, the court expressly stated that this did not excuse the firm from disclosing that it had committed legal malpractice. The court held that should the consultation reveal the attorney or firm had committed malpractice, fiduciary duty would obligate the attorney or firm to report the malpractice to the client despite the privileged nature of the communication.¹⁸

Any lawyer or law firm faced with the situation of a contentious, accusatory attorney-client relationship would be prudent to consider its own conflicts of interest, appropriate disclosures, and proper documentation before engaging in internal consultations.

ENDNOTES

- (1) *Edwards Wildman Palmer LLP v. Superior Court*, 231 Cal. App. 4th 1214 (2014).
- (2) *Edwards Wildman Palmer's Petition for Writ of Mandate* at 4, para.6.
- (3) Evidence Code section 958 provides: "There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship."
- (4) Evidence Code section 962, commonly known as the "Joint Client Exception to Attorney-Client Privilege," provides: "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)."

- (5) *See, e.g., In re Sunrise Sec. Litig.*, 130 F.R.D. 560, 597 (E.D. Pa. 1989); *VersusLaw, Inc. v. Stoel Rives, LLP*, 126 Wash. App. 1047 (Ct. App. 2005); and *Koen Book Distribs. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, 285-86 (E.D. Pa. 2002).
- (6) *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 326 P.3d 1181, 1183 (Ore. 2014).
- (7) *RFF Family Partnership, LP v. Burns & Levinson, LLP*, 465 Mass. 702 (2013).
- (8) *St. Simons Waterfront, LLC v. Hunter, Maclean Exley & Dunn, P.C.*, 293 Ga. 419 (2013).
- (9) *Thelen Reid & Priest LLP v. Marland*, No. C-06-2071-VRW, 2007 WL 578989 (N.D. Cal. Feb. 21, 2007).
- (10) *Id.* at *8
- (11) *SonicBlue Claims LLC v. Portside Growth & Opportunity Fund (In re SonicBlue, Inc.)*, No. 03-51775-MM, 2008 WL 170562 (Bankr. N.D. Cal. Jan. 18, 2008).
- (12) *Id.* at *9.
- (13) *Id.*
- (14) *Id.*
- (15) *Palmer*, 2014 WL 6662053 at *10.
- (16) *Id.* at *8.
- (17) *Id.* at *8-9.
- (18) *Id.* at *9, *11.



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