BUSINESS LITIGATION

When a Lawyer Needs a Lawyer

By Brooke D. Anthony

An attorney walks into his partner's office with a concerned look on his face. He closes the door and begins to discuss an active case. "Here is what happened. What would you do? What if this happens? What if it does not?" If these questions mature into a claim of legal malpractice adverse to a current or former client, who can a lawyer turn to for legal advice? Can he speak with his partners? And if he does, will those communications be protected from disclosure in the subsequent malpractice claim? It depends.

A communication for the purposes of giving or receiving legal advice between a client and his attorney is privileged from disclosure. Minn. Stat. §595.02. There is no question that communications with outside counsel retained for the purposes of assessing a potential malpractice claim or defending against an actual malpractice claim are protected as privileged. But, in today's world of frequent malpractice claims and significant retentions, it is natural for a law firm to want to keep things in house. If an attorney is the client and he is communicating with other attorneys in his own office, the definition of what is privileged is less clear.

The Supreme Court long ago recognized that "in-house" counsel for corporations can conduct investigations with the protection of the attorney-client privilege. See *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981). The same reasoning should apply to law firms, but courts have been reluctant to reach that conclusion. The first court to reject the idea that a law firm may be both lawyer and client found that the resulting internal consultation created a conflict of interest and thus, no privilege could apply. In *re Sunrise Securities Litigation,* 130 F.R.D. 560 (E.D. Pa. 1989). Other courts agreed. See e.g., *Koen Book Distributors, v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.,* 212 F.R.D. 283 (E.D. Pa. 2002); *Asset Funding Group LLC v. Adams & Reese, LLP,* 2008 WL 4948835 (E.D. La. 2008); *E-Pass Technologies, Inc. v. Moses & Singer, LLP,* 2011 WL 3794889 (N.D. Cal. 2011).

Nonetheless, the tide appears to be turning in favor of protecting internal law firm in house communications. The commentary to Rule 1.6 of the ABA Model Rules of Professional Conduct notes that a lawyer's obligation to keep client confidences does not preclude that lawyer from securing confidential legal advice about his personal responsibility to comply with the rules. In 2012, the Illinois Appellate Court used this ABA commentary to support its finding that a law firm could withhold communications related to a malpractice claim, even as it continued to represent the client. *MDA City Apartments LLC v. DLA Piper LLP,* 967 N.E.2d 424 (Ill. App. Ct. 2012). That same year, the Massachusetts Supreme Court held that internal law firm communications are privileged so long as: (1) the law firm has designated an attorney as in-house counsel; (2) the in-house counsel has not worked on the client matter at issue or a substantially related matter; (3) the time spent talking with in-house counsel is not billed to the client; and (4) the communications are made in confidence and kept confidential. See *RFF Family P'ship, LP v. Burns & Levinson, LLP,* 465 Mass. 702 (2013). In 2013, the Georgia Supreme Court adopted the same rationale. See *St. Simons Waterfront LLC v. Maclean,* 293 Ga. 419 (2013). Then, most recently, in November 2014, the California Court of Appeals did so as well. See *Palmer v. Superior Court of Los Angeles Cty., 231 Cal.* App. 4th 1214 (Cal. Ct. App. 2014).

Minnesota courts have not weighed in on this issue. The national trend, however, appears to be toward protecting in house law firm communications. Thus, law firms of all sizes are wise to consider a designated in house counsel for internal communications related to legal matters facing the law firm or its attorneys. If such designation is not feasible or practical for a particular law firm, a lawyer should consider whether internal law firm communications are the best course. While one court has found that general loss mitigation communications among colleagues should be protected, that approach is not well-supported or widespread. See *Tattletale Alarm Sys. Inc. v. Calfee, Halter & Griswold, LLP*, 2011 WL 382627 (S.D. Ohio 2011). Even those courts that have protected internal in house communications have stopped short of protecting communications made to an undesignated colleague. And, absent an express protection, it is probably better to be safe than sorry.

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