

# Where can you (safely) turn for advice about a client?

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As more and more law firms employ in-house general counsel to advise them, their lawyers and employees, courts increasingly are asked to consider the scope of the attorney-client privilege.

The issue arises usually when a former client and the firm become embroiled in a dispute and the former client seeks to compel the production of communications that the client's individual lawyers may have had with the firm's general counsel.

As the following discussion of some of the key decisions makes clear, courts must consider weighty and competing policy interests.

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On the one hand, law firms owe a duty of loyalty to their clients, which is codified in the Rules of Professional Ethics as a prohibition against a firm simultaneously representing clients with competing interests.

When a firm gets legal advice from its general counsel about its rights and responsibilities in a dispute with a current client, the firm arguably violates those conflict rules. General counsel represents both the current client (because the firm's duties are imputed to all counsel) and the firm, and their interests conflict.

On the other hand, lawyers are entitled, and should be encouraged, to obtain legal advice about how best to fulfill their professional obligations or how to protect the firm's interests in the event of a dispute with a client.

That right is best protected by applying the attorney-client privilege to private communications seeking legal advice.

Some courts have relied on the Rules of Professional Conduct, in particular the conflict rules governing current clients, or the law firm's general fiduciary duty to its clients to produce communications with general counsel to the former client, now its adversary.

Other courts have found communications between the lawyer and the firm's general counsel about how best to respond to a potential dispute with the client to be privileged and refused to compel production to the client. Those cases have discussed the ethical rules and

the firm's fiduciary duties, but have come down strongly in favor of protecting the principles that underlie the attorney-client privilege.

Until there is further clarity, law firms and law firm general counsel would be well advised to understand the reasoning these courts have applied.

The question courts must answer is whether communications about a dispute with a current client are privileged and can be withheld from production to the client.

Some courts have answered that question "no" in reliance on Rule 1.7 of the Rules of Professional Conduct. That rule prohibits a lawyer from representing a client if "the representation of that client will be directly adverse to another client."

Thus, two federal courts in the eastern districts of Louisiana and Pennsylvania have reasoned that, when lawyers consult with the firm's general counsel about a potential dispute with a current client of the firm, general counsel represents both the firm and, because of the imputation rules, the client.

The representation of the firm by general counsel therefore creates a conflict of interest vis-a-vis the client, and any attorney-client privilege between the firm and general counsel is vitiated.

Understandably, law firms have argued that when a current client alleges wrongful conduct by the firm, the lawyer and the firm are entitled to obtain legal advice from general counsel.

The alternative puts the lawyer in the untenable position of being unable to seek privileged legal advice or being forced to hire outside counsel to do so, thus abrogating the role of general counsel.

Courts that have applied Rule 1.7 to the question have little sympathy for that quandary because, they say, Rule 1.7 itself provides the solution to the firm's predicament: The firm should either (i) seek to withdraw from representing the client immediately upon the development of a dispute, or (ii) if the firm reasonably believes that representation of the client would not be adversely affected by also representing itself, solicit the client's consent to continue the representation after full disclosure and consultation.

An additional anti-privilege theory employed by some courts focuses on the broad fiduciary duties the firm owes to its clients.

For example, a Massachusetts federal court required the production of documents and testimony related to an internal investigation by a law firm concerning the management of a trust. The court ordered production over the firm's attorney-client privilege objection relying on the firm's fiduciary relationship with the trust beneficiary.

The court held that, because the firm owed the beneficiary a fiduciary duty, there was no policy reason to permit the firm to withhold from disclosure information relevant to her claim.

A Bankruptcy Court in the Northern District of California required disclosure of claimed privileged material between a

lawyer and general counsel to the client, finding that the nature of the attorney-client relationship created duties that exceeded other fiduciary relationships and that applying the privilege would interfere with the lawyer's faithful fulfillment of its duties to its client.

Other courts have disagreed and, in evaluating the competing policy concerns, have come down on the side of protecting the attorney-client privilege.

For example, an Ohio federal court upheld a law firm's in-house privilege claim in which attorneys at the firm sought legal advice from their colleagues regarding a potential malpractice action. The court found that the societal value of permitting lawyers at a firm to discuss possible mistakes freely and without worrying about disclosure and whether a client could use those communications to its later advantage outweighed the other policy considerations.

That court addressed the ethical rules and the arguable conflict with current clients, but distinguished the need for protection of internal communications from a lawyer's duty to disclose the conflict and obtain the client's consent.

The court found that the existence of a conflict of interest was the starting point in a privilege analysis and not the ending point.

An Illinois state appellate court recently upheld the privilege with in-house general counsel and rejected arguments premised on the ethical rules and the firm's fiduciary duties.

The court first held that even if a jurisdiction had adopted the fiduciary duty exception to the attorney-client privilege,

the exception would not apply where the advice being sought from in-house counsel concerned an actual or potential dispute between the fiduciary (the firm) and the beneficiary (the client).

Responding to the argument that the firm violated the conflicts rules, the court drew a distinct line between an ethical violation and the attorney-client privilege, stating that while a violation of the ethical rules may be relevant to the underlying dispute, it was not relevant to the issue of whether the communications were protected by the attorney-client privilege.

The attorney-client privilege enables clients to make full disclosure to their lawyer of all relevant facts so that the lawyer may offer informed legal advice. Thus, clients are entitled to have full and frank discussions with their attorneys.

The rules of ethics, on the other hand, "are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself." Mass. R. Prof. C. [Scope] 1.

Those courts that have refused to invade the attorney-client privilege based on the ethical rules, therefore, arguably got it right. Once a conflict between a law firm and a client arises, the law firm should be able to obtain legal advice about its rights and obligations without running the risk that those communications are later discoverable by the client.

The rules of ethics should not be read to limit a lawyer or firm's ability to solicit confidential legal advice about compliance with the ethical rules, even in relation to a current client of the firm.

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