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Who can you talk to confidentially about a client dispute?

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A dispute has arisen between you and a client. You are not exactly sure how to handle the situation, so you walk down the hallway to your law partner, or the firm's general counsel, or another attorney in your office to get some advice.

You describe what happened, revealing the good and the not-so-good, and your colleague advises you on how to deal with the client, and what to do differently in the future with your other clients to avoid the situation from arising again.

Things go from bad to worse. The client, now a former client and an adversary, sues you and your firm for malpractice and attempts to discover your firm's relevant internal communications, including those conversations or emails you had with your colleague about what to do to handle the situation, both for this client and potentially others.

Are the communications you had with the law firm attorney protected from disclosure by the attorney-client privilege?

While Rhode Island courts have not yet decided this issue, state Supreme Court precedent — including a recent 2017 decision on the attorney-client privilege in the legal malpractice context — invites serious caution.

Landscape for internal firm privilege

Courts addressing the issue of internal law firm privilege around the country have had to balance competing policy considerations: first, the attorney's duty of loyalty to his client under the rules of ethics, and second, the attorney's right to obtain privileged and confidential legal advice concerning the attorney's (or the firm's) rights and responsibilities.

Rule 1.7 of the Rhode Island Rules of Professional Conduct governs the attorney's duty of loyalty to current clients, stating that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.

A concurrent conflict exists if, among other things, there is a significant risk that the representation of the client will be materially limited by the personal interest of the lawyer.

If such a conflict arises, the lawyer may not represent the client unless the lawyer reasonably believes that he will be able to provide competent and diligent representation of each affected client, and each affected client gives informed consent in writing. Rule 1.10 generally imputes the duty of loyalty to a firm client under Rule 1.7 to other firm attorneys.

Some courts have relied on similar rules of ethics codifying the duty of loyalty in denying that attorney-client privilege covers communications about a current client between attorneys in the same firm.

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

The representation of the firm or firm lawyer by the in-house attorney creates a conflict of interest with respect to the client, and any attorney-client privilege with the in-house attorney is vitiated.

More recently, certain state courts have upheld the attorney-client privilege between a firm attorney and a firm general counsel if certain conditions are met.

In 2013, the Massachusetts Supreme Judicial Court held that communications between firm attorneys and a law firm's general counsel concerning a malpractice claim asserted by a current client of the firm are protected from disclosure to the client by the attorney-client privilege if:

(1) the law firm has designated an attorney or attorneys within the firm to represent the firm as in-house counsel;

(2) the in-house counsel has not performed any work on the client matter at issue or a substantially related matter;

(3) the time spent by the attorneys in these communications with in-house counsel is not billed to a client; and

(4) the communications are made in confidence and kept confidential.

Almost simultaneously with the Massachusetts decision, the Supreme Court of Georgia came down with a ruling protecting the attorney-client privilege under similar circumstances, and the Oregon Supreme Court subsequently issued a similar ruling with slightly different reasoning. Furthermore, in 2016, a New York state appeals court also upheld the attorney-client privilege for in-house law firm communications.

Even these rulings, however, may provide little comfort to small and mid-size law firms and sole practitioners.

In a smaller firm where attorneys frequently talk about and work on each other's matters, the designation of a firm general counsel may be virtually impossible. Additionally, smaller firms may not have the administrative structure to ensure that the requirements articulated by these courts in creating and preserving the integrity and isolation of a law firm in-house counsel position can be met.

While the option of designating an attorney to serve as general counsel may be useful for large law firms, it likely offers little solace to small and mid-size firms and sole practitioners who wish to seek privileged legal advice on how to handle a client dispute.

Until the Supreme Court decides the issue of in-house law firm privilege, Rhode Island case law concerning privilege suggests that law firms and lawyers should proceed with caution.

Rhode Island case law

Rhode Island courts have not decided the issue of whether communications between an attorney and in-house law firm counsel concerning a dispute or potential dispute with a current client of the firm may be protected from disclosure by the attorney-client privilege.

The Rhode Island Supreme Court has stated that the attorney-client privilege "must be narrowly construed because it limits the full disclosure of the truth," *Callahan v. Nystedt*, 641 A.2d 58, 61 (R.I. 1994) (citing *State v. von Bulow*, 475 A.2d 995, 1006 (R.I. 1984)), and the burden of establishing the existence of the attorney-client privilege rests on the party seeking to prevent disclosure of protected information. *von Bulow*, 475 A.2d at 1005.

Furthermore, the recent decision in *DeCurtis v. Visconti, Boren & Campbell, Ltd.*, 152 A.3d 413 (R.I. 2017), suggests that the Rhode Island Supreme Court, even if it were to recognize the in-house law firm privilege, may construe it narrowly in the legal malpractice context.

In *DeCurtis*, a former client brought a legal malpractice action against a law firm and its attorney, claiming that they were negligent in drafting the client's prenuptial and postnuptial agreements. During discovery, the plaintiff client requested copies of prenuptial and postnuptial agreements drafted by the attorney for other clients in the time period after the attorney drafted the documents for the plaintiff client.

The plaintiff client sought the documents under the theory that they may reveal subsequent remedial measures taken by the law firm to correct the prior error in the plaintiff client's documents by altering the language in similar agreements for other clients.

Unlike many other jurisdictions, Rhode Island law permits the trial court to admit evidence of subsequent remedial measures to prove negligence. R.I. Rules of Evidence 407.

Affirming the trial court, the Rhode Island Supreme Court held that the plaintiff client was entitled to discover redacted prenuptial and postnuptial agreements prepared for other clients because they were relevant and reasonably calculated to lead to the discovery of admissible evidence concerning subsequent remedial measures taken by the law firm and its attorney, and were not protected from disclosure by the attorney-client privilege, marital privilege or attorney work product rule.

Law firms and lawyers should pay particular attention to two parts of the DeCurtisruling.

First, as a matter of first impression in the legal malpractice context, the court held that the triggering event giving rise to discovery of subsequent remedial measures is the date of the allegedly negligent act, or "liability-causing conduct," itself — not the initiation of legal proceedings, as the defendant law firm had argued.

Second, the court gives short shrift to the assertion by the law firm and lawyer of the attorney-client privilege on behalf of other clients where, according to the court, "the only interests at stake are those of the attorney" and "defendants essentially are asserting the privilege in defense of their own alleged negligence."

Until the Rhode Island Supreme Court decides the issue of in-house law firm privilege, Rhode Island case law concerning privilege — including the *DeCurtis* decision — suggests that law firms and lawyers should proceed with caution.

What can attorneys do?

In light of the still-developing case law and legal uncertainty, the most prudent course of action for an attorney facing a potential dispute with a current client is to retain outside counsel.

While it may seem easier simply to ask the attorney down the hall or in the next office how to handle a client dispute, this approach runs the risk of opening up communications seeking legal advice to discovery by the client in legal malpractice proceedings.

Even if your firm relies on designated in-house law firm general counsel, having them hire outside counsel offers greater assurance that communications between management, in-house counsel and outside counsel would be privileged and confidential, allowing the attorney and law firm to obtain the best advice for legal and ethical issues.

Hiring outside counsel also allows the attorney and firm to seek legal and ethical advice efficiently, avoiding the time and risk associated with failing to get such advice. It helps the lawyer and law firm decrease potential costs and risks arising from disputes with current and former clients.

Avoiding trouble with clients, and better serving their legal needs, can only help in expanding the success for your practice.

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