

16. Recognition of the privilege in intra-law firm communications with in-house counsel concerning a current client of the firm.

Since the 1980's, a law firms' ability to invoke the attorney-client privilege to protect the results of their internal investigations has been a highly debatable issue of litigation.<sup>1</sup> Courts have been charged with the weighing a law firm's professional and ethical duties to its client against the law firm's ability to protect confidential information in order to defend itself from pending law suits.<sup>2</sup> District Courts have long recognized that the attorney-client privilege applies to confidential intra-firm communications in instances where law firms are sued for legal malpractice by their former clients. However, this privilege has been limited by a "fiduciary exception" when the communication between attorneys of the same firm implicate or create a conflict, in violation of Rule 1.7, between the law firm's fiduciary duties to itself and its duties to the client seeking to discover the communication.<sup>3</sup> Despite acknowledging the existence of such

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<sup>1</sup> *In re Sunrise Secs. Litig.*, 130 F.R.D. 560, 597 (E.D. Pa. 1989)(holding that a law firm's communication with in-house counsel is not protected by the attorney client privilege if the communication implicates or creates a conflict, in violation of Rule 1.7, between the law firm's fiduciary duties to itself and its duties to the client seeking to discover the communication).

<sup>2</sup> MODEL RULES OF PROF'L COND., R. 1.7(b)("a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client)(2015).

<sup>3</sup> *Id.*; *See, e.g., E-Pass Techs., Inc. v. Moses & Singer, LLP*, 2011 U.S. Dist. LEXIS 96231, \*10, 2011 WL 3794889 (N.D. Cal. Aug. 26, 2011)(stating that if a law firm intends to separately—and confidentiality—represent itself on a fees motion against a client, then it has a duty to disclose this conflict and obtain the client's consent to continued representation); *Hope for Families & Cmty. Serv. v. Warren*, No. 06-1113, 2009 U.S. Dist. LEXIS 5253, \*111 (M.D. Ala. Jan. 26, 2009)(stating that that the attorney-client privilege ought not be permitted when an attorney at a law seeks internal firm advice about a matter involving another attorney at the law firm's client, in which the attorney has a financial interest in); *SonicBlue Claims LLC v. Portside Growth and Opportunity Fund (In re SonicBlue Inc.)*, No. 07-5082, 2008 Bankr. LEXIS 181, \*29 (Bankr. N.D. Cal. Jan. 18, 2008)(holding that in addition a law firm's ethical duties of loyalty, in the Bankruptcy setting, a law firm has a duty to remain disinterested and not to represent any adverse interests); *Thelen Reid & Priest LLP v. Marland*, No. 06-2071, 2007 U.S. Dist. LEXIS 17482, \*20-21 (N.D. Cal. Feb. 21, 2007)(declaring that while consultation with an in-house ethics adviser is confidential, once a law firm learns that a client may have a claim against the firm or that the firm needs client consent in order to commence or continue another client representation, then the firm should disclose to the client the firm's conclusions with respect to those ethical issues); *Asset Funding Group, L.C.C. v. Adams & Reese, L.L.P.*, No. 07-2965, 2009 U.S. Dist. LEXIS 48420, \*9 (E.D. La. June 4, 2009)(holding that a firm may assert the in-house privilege against its client with respect to communications regarding intra-firm ethical consultations unless and until the firm learns that its representation of the client conflicts with another client's interests, requiring an express waiver by the clients or the firm's cessation of representation of the clients); *Burns v. Hale & Dorr LLP*, 242 F.R.D. 170, 174 (D. Mass. 2007)(holding that the law firm could not assert the attorney/client privilege against the plaintiff with respect to any evidence relevant to their management or investment of the Trust Funds on

conflicts, some courts have shown a reluctance to compel law firm's to disclose confidential communications regarding their liability and defenses to their client's lawsuit against them.<sup>4</sup>

A growing number of state courts have also recognized that the attorney-client privilege applies to confidential communications between a law firm's in-house counsel and the law firm's attorneys, even where the communications concern a current client of the firm.<sup>5</sup> Thus, in instances where a client later brings a malpractice suit and seeks discovery of those

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plaintiff's behalf); *Koen Book Distribs. v. Powell, Trachman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, 286 (E.D. Pa. 2002)(stating that the fact that the plaintiffs may have retained other counsel when deciding to file legal malpractice suit against the law firm did not remove the conflict so long as the law firm also continued to represent plaintiffs); *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 220 F. Supp. 2d 283, 283 (S.D.N.Y. 2002)(holding that a law firm could not invoke the attorney-client privilege against a current client when performing a conflict check in furtherance of representing that client).

<sup>4</sup> *See, e.g., TattleTale Alarm Sys. v. Calfee, Halter & Griswold, LLP*, No. 10-226, 2011 U.S. Dist. LEXIS 10412, \*29 (S.D. Ohio Feb. 3, 2011)(holding, in a legal malpractice suit, that the extension of the attorney-client privilege to intra-firm "loss prevention" communication promoted the affected attorneys' ability promptly to seek advice and to obtain it based on a complete disclosure of the circumstances which led them to believe that some loss prevention communication was warranted); *Nesse v. Pittman*, 206 F.R.D. 325, 331 (D.D.C. 2002)(where the lawyer tells one member of the law firm what she (the lawyer) has learned from another member of the firm, compelled disclosure violates the Upjohn proscription irrespective of the reason why the member of the firm sought the information or what use the latter will make of it); *Hertzog, Calamari & Gleason v. Prudential Ins. Co. of Am.*, 850 F. Supp. 255, 255 (S.D.N.Y. 1994)(stating that no principled reason appears for denying a comparable attorney-client privilege to a law partnership which elects to use a partner or associate as counsel of record in a litigated matter, thus not requiring disclosure of intra-firm communications); *Lama Holding Co. v. Shearman & Sterling*, No. 89-3639, 1991 U.S. Dist. LEXIS 7987, \*3 (S.D.N.Y. June 14, 1991)(holding that it is undisputed that an attorney-client relationship can exist within a law firm, thus not requiring disclosure of intra-firm communications).

<sup>5</sup> *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 355 Ore. 476, 502, 326 P.3d 1181, 1195 (2014)(rejecting application of any "fiduciary" exception to the privilege because Oregon did not provide for such exception, thus protecting intra-firm communications); *RFF Family P'ship, LP v. Burns & Levinson, LLP*, 465 Mass. 702, 715, 991 N.E.2d 1066, 1076 (2013)(while a client a client is entitled to full and fair disclosure of facts that are relevant to the representation, a client is not entitled to revelation of the law firm's privileged communications with in-house or outside counsel where those facts were presented and the sound legal advice was formulated if those communications were conducted for the law firm's own defense against the client's adverse claims.); *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 293 Ga. 419, 425-426, 746 S.E.2d 98, 106 (2013)(concluding that the potential existence of an imputed conflict of interest between in-house counsel and the firm client is not a persuasive basis for abrogating the attorney-client privilege between in-house counsel of a law firm and the firm's attorneys); *Edwards Wildman Palmer LLP v. Superior Court*, 231 Cal. App. 4th 1214, 1232, 180 Cal. Rptr. 3d 620, 634 (2014)(affirming that California does not recognize a fiduciary exception to privilege that would compel intra-firm communications); *Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523, 537 (Ill. App. Ct. 2012)(declining to apply the fiduciary-duty exception to the attorney-client privilege when it is not currently the law in Illinois, thus protecting intra-law firm communications from disclosure); *VersusLaw, Inc. v. Stoel Rives, L.L.P.*, 127 Wn. App. 309, 334-335, 111 P.3d 866, 879 (Wash. Ct. App. 2005)(holding that when determining whether there is a conflict between the law firm's own interests and its fiduciary duty to plaintiff(client), it will be important for the court to focus on the timing and relationship between the parties); *Coloplast A/S & Coloplast Corp. v. Spell Pless Sauro, PC*, No. 27-CV-12-12601, 2013 Minn. Dist. LEXIS 45, \*17 (Minn. Dist. Ct. 2013)(citing *RFF Family P'ship, LP v. Burns & Levinson, LLP*, 465 Mass. 702, 715, 991 N.E.2d 1066, 1076 (2013)).

communications with in-house counsel, state courts have applied the attorney client privilege to deny discovery of these protected communications.<sup>6</sup>

As aforementioned, out of the concern that this application of the privilege would undermine and violate a law firm's duties to its client under Rule 1.7, a number of federal courts have refused to recognize that the attorney-client privilege applies in such situations.<sup>7</sup> However, the ABA's recent adoption of Resolution 103 should eliminate this concern.<sup>8</sup> Recognizing that "the attorney-client privilege for consultations with in-house counsel is critical to ensuring that attorneys and other law firm personnel receive the best possible advice on complicated legal and ethical issues," the ABA House of Delegates reaffirmed that "any conflict of interest arising out of a law firm's consultation with its in-house counsel regarding the firm's representation of a then-current client and a potentially viable claim the client may have against the firm does not create an exception to the attorney-client privilege. . . ." <sup>9</sup> The ABA went even further by rejecting "the fiduciary exception" and reaffirmed the applicability of privilege to communications with law firm in-house counsel. <sup>10</sup> According to the ABA, it is in the public interest for the law to encourage and facilitate the use of law firm in-house counsel.<sup>11</sup>

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<sup>6</sup> Id.

<sup>7</sup> See, *supra*, n.3.

<sup>8</sup> ABA, Resolution 103 (Policy adopted Aug., 2013), available at [http://www.americanbar.org/content/dam/aba/directories/policy/2013\\_hod\\_annual\\_meeting\\_103.docx.authcheckdam](http://www.americanbar.org/content/dam/aba/directories/policy/2013_hod_annual_meeting_103.docx.authcheckdam)

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Id.