

Are Law Firm Loss Prevention Communications Discoverable?

Conflict Bars Privilege

Some years ago, courts in New York and elsewhere wrestled with the question whether the attorney-client privilege may be applied to in-house communications within a law firm. Now, it appears fairly settled that courts do not generally recognize internal firm communications to be privileged. The guiding principle was first enunciated in a Pennsylvania case¹ which stated, "when a law firm seeks legal advice from its in house counsel, the law firm's representation of itself (through in house counsel) might be directly adverse to, or materially limit, the law firm's representation of another client, thus creating a prohibited conflict of interest." The court held, 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 between the law firm's fiduciary duties to itself and its duties to the client seeking to discover the communication."

1. Law in New York

Under New York law, the attorney-client privilege does not attach to intra-firm consultations by law firms. A case from the Southern District of New York² held that a law firm's "internal review of representation" with its own lawyers regarding conflicts checks were not privileged in a client's action against the firm where it was representing the client at the time it performed the conflicts checks in furtherance of the representation. The court observed, "asserting the privilege against a current client seems to create an inherent conflict against that client." The firm had an ethical duty, the court added, to avoid the conflict by seeking the client's informed consent with full disclosure of the benefits and risks associated with the simultaneous representation of its own interests and the client's interests.

2. Law in Other States

Case law in some other states³ has reached similar conclusions. In a Pennsylvania case,⁴ during the attorney-client relationship, the client became dissatisfied with the representation and the lawyers performing the work consulted with other firm attorneys regarding a potential malpractice case by the client. The court stated, "the law firm was in a conflict of interest relationship with its client" when lawyers within the firm consulted with each other about loss prevention issues, and concluded that the privilege could not be asserted to shield documents from discovery. The court added that if the firm wished to communicate about the potential malpractice case in a privileged fashion, it could have withdrawn from its representation of the client before engaging in any loss prevention communications, or it could have solicited the client's consent to the conflicting representation. Having done neither, the court refused to allow the firm to withhold the documents on privilege grounds.

New Trend or Aberration?

A recent Ohio case⁵ is one of the first to break away from this line of opinions. The client is appealing the decision. In that case, attorneys in a law firm sought legal advice from their colleagues regarding loss prevention strategies for a potential malpractice action involving alleged non-payment of patent maintenance fees. After the client sued the firm, a discovery dispute erupted over the firm's internal communications. The court upheld the firm's privilege, rejecting the client's argument that the privilege was lost because of a conflict created by the firm's simultaneous representation of its own interests and the client's interests. The court observed, "there are societal values to be served by allowing members of a law firm to converse openly and freely about potential mis-steps in their representation of a client without worrying about whether the client will eventually be able to use those communications to the lawyer's disadvantage." The court concluded that intra-firm loss prevention communications during a client's representation *are* privileged unless the client can establish good cause for discovery.⁶

Things to Consider...

It is unclear whether the Ohio decision signifies a shift in the application of the privilege or if it is anomalous. In the meantime, law firms would be well advised to consult on internal risk management and loss prevention issues with outside counsel, who typically are independent and uninvolved in the underlying client representations. Doing so might minimize the risk of creating a potential conflict of interest with a current client that might require withdrawal from continued representation. Keep in mind an ethics opinion issued by the American Bar Association,⁷ advising that a lawyer's consultation with his law firm's in-house ethics counsel regarding the lawyer's conduct in representing a client does not create a conflict of interest between the firm and the client unless the primary objective of the consultation is to protect the lawyer or firm from the consequences of the lawyer's misconduct.

1. *In re Sunrise Securities Litigation*, 130 F.R.D. 560 (E.D. Pa. 1989).
2. *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*, 220 F. Supp.2d 283 (S.D.N.Y. 2002).
3. Some courts in California and Massachusetts have ruled that in-house consultations are not protected because they create a conflict with a current client. *In re SonicBlue, Inc.*, 2008WL 170562 (N.D. Cal. 2008); *Burns ex rel. Office of Public Guardian v. Hale and Dorr LLP*, 242 F.R.D. 170 (D. Mass. 2007).
4. *Koen Book Distributors v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283 (E.D. Pa. 2002).
5. *Tattletale Alarm Systems, Inc. v. Calfee, Halter & Griswold, LLP*, 2011 WL 382627 (S.D. Ohio 2011).
6. The court glossed a test requiring good cause from *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970).
7. American Bar Association Formal Ethics Opinion 08-453 (2008).

If you have questions regarding this Alert, please contact the co-chair of Moses & Singer's **Legal Ethics & Law Firm Practice**, **Devika Kewalramani** at 212.554.7832 or dkewalramani@mosessinger.com.

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