APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT PROTECTION TO INTERNAL LAW FIRM INVESTIGATIONS

Like other business organizations, law firms have increasingly relied upon in-house committees or designated lawyers to promote and enforce compliance with legal and ethical obligations arising out of their various representations. While the creation of these in-house compliance structures has been applauded and encouraged by courts,[i] ethics commissions,[ii] and commentators,[iii] the law is not so clear as to the application of the attorney-client privilege or work-product protection to communications between a lawyer and an in-house adviser should the firm become a party to litigation. In *Upjohn Co. v. United States,*[iv] the Supreme Court sagely observed that "[a]n uncertain privilege . . . is little better than no privilege at all."[v] Keeping this principle in mind, law firms should refrain from embarking on their own internal investigations into a particular representation, unless the law leaves no doubt that the results of such an investigation will remain in-house, protected by the attorney-client privilege and work-product protection. To get a better appreciation for this cautionary advice, let's take a look at the case law.

In the corporate context it has become a well-established rule that the attorney-client privilege applies to communications between an employee and in-house counsel where the purpose of the communication is the securing of legal advice on behalf of the corporation.[vi] By analogy, some courts have recognized that the privilege may apply in the law firm setting where one lawyer seeks legal advice from another lawyer within the firm.[vii] In one case, for example, a federal district court applied the privilege to preclude

discovery from the plaintiff law firm, where the information sought involved communications between the firm and one of its lawyers who was counsel of record in the action.[viii] In another case, a federal appellate court similarly applied the privilege to preclude a law firm's associates from testifying before a grand jury concerning their conservations with a partner as to their investigation into a colleague's conduct, where the associates had been enlisted by the partner to perform the investigation on behalf of the firm.[ix]

As these cases illustrate, intra-firm communications may be protected from compelled disclosure by the attorney-client privilege – at least where disclosure is sought by a non-client. But where a law firm seeks to assert the privilege against a client, most courts that have addressed the issue have categorically held that the privilege is inapplicable because of an inherent conflict of interest.[x] For the same reason, at least two courts have rejected a law firm's claim of work-product protection.[xi]

In *In re Sunrise Securities Litigation*,[xii] for example, one of the defendants, a law firm that had served as Sunrise's general counsel, sought to withhold from discovery documents reflecting consultations between lawyers within the firm both during the course of the firm's representation of Sunrise and after the institution of litigation against the firm. Relying on pertinent ethical rules prohibiting the simultaneous representation of clients having adverse interests[xiii] and on decisions precluding the assertion of the privilege by a person owing conflicting fiduciary duties to the parties in the litigation,[xiv] the court set forth the following rule:

> Applied to the situation presented here, the reasoning of *Valente* would dictate that a law firm's communications 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. . . .The attorney client privilege therefore will protect only those otherwise privileged documents withheld by Blank Rome which do not contain communications or legal advice in which Blank Rome's representation of itself violated Rule 1.7 with respect to a Blank Rome client seeking the document.[xv]

Whether application of this rule precludes assertion of the privilege based on an impermissible conflict requires an *in camera* examination of the documents.[xvi]

While most courts concur with the *Sunrise* decision,[xvii] at least one court has recognized a narrow exception to strict application of its holding. According to the federal court in the Northern District of California, a lawyer's consultation with in-house advisers regarding her ethical and legal obligations to a client are confidential – at least until the firm learns of the possibility of a potential claim by the client against the firm or of the need to obtain the client's consent with respect to another representation, at which point the firm must disclose only its *conclusions* regarding these consultations.[xviii] As explained by the court:

> The court recognizes that law firms should and do seek advice about [ ] their legal and ethical obligations in connection with representing a client and that firms normally seek this advice from their own lawyers. Indeed, many firms have in-house ethics advisers for this purpose. A rule requiring disclosure of all communications relating to a client would dissuade attorneys from referring ethical problems to other lawyers, thereby undermining conformity with ethical obligations. Such a rule would also make conformity costly by forcing the firm either to retain outside counsel or terminate an existing attorney-client relationship to ensure confidentiality of all communications relating to that client. This court declines to follow such a strict rule, preferring one that is consistent with a law firm in-house ethical infrastructure.[xix]

The exception recognized by the federal court comports with the position of the New York State Bar's Committee on Professional Ethics. Stressing the necessity for the

existence of ethical infrastructures within law firms, the Committee has opined that a lawyer may consult with one or more lawyers within the firm with respect to her duties to a client, without violating ethical prohibitions on the unauthorized representation of conflicting interests, and may be required to disclose conclusions about the firm's ethical or legal obligations but not necessarily matters pertaining to the underlying consultations.[xx]

As the foregoing suggest, consultations among lawyers within a firm or investigations regarding a lawyer's compliance with ethical and legal obligations owed to a client may constitute ethically permissible conduct – but not necessarily protected conduct when the client subsequently engages the firm in litigation.

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[i] *See Thelen Reid & Priest LLP v. Marland*,, No. C 06-2071 VRW, 2007 WL 578989 at *7 (N.D. Cal. Feb. 21, 2007).

[ii] *See* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 789, 2005 WL 3046319 at *2 (2005) (stating that because the professional conduct rules explicitly impose obligations on law firms, "[we are persuaded] that the Code endorses and in some cases requires mechanisms within a law firm to promote obedience to a firm's obligations.").

[iii] *See id.* at *3.

[iv] *Upjohn Co. v. U.S.*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981).

[v] *Id.,* 449 U.S. at 393.

[vi] *See id.* at 389-390; *see generally* John Villa, *Corporate Counsel Guidelines*, § 1:3 (Thomson/West 2007).

[vii] *See Hertzog, Calamari & Gleason v. Prudential Ins. Co.*, 850 F. Supp. 255 (S.D.N.Y. 1994) ("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. That partner or associate is the functional equivalent of a corporate staff attorney representing a corporate employer."); *In re Sunrise Securities Litigation*, 130 F.R.D. 560, 595 (E.D. Pa. 1989) ("[I]t is possible in some instances for a law firm, like other business or professional associations, to receive the benefit of the attorney client privilege when seeking legal advice from house counsel."); *see also Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wash. App. 309, 111 P.3d 866, 878 (2005).

[viii] *Hertzog, Calamari & Gleason*, 850 F. Supp. at 255-256.

[ix] *U.S. v. Rowe*, 96 F.3d 1294, 1296-1297 (9th Cir. 1996).

[x] *See Bank Brussels Lambert v. Credit Lyonnais (Suisse)*, 220 F. Supp. 2d 283, 285-287 (S.D.N.Y. 2002); *Koen Book Distrib. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombard,* 212 F.R.D. 283, 286-287 (E.D. Pa. 2002); *In re Sunrise Securities Litigation*, 130 F.R.D. at 596-597; *Versuslaw, Inc. v. Stoel Rives, LLP*, 111 P.3d at 878.

[xi] *Koen Book Distrib.*, 212 F.R.D. at 286 ("]W]here a client, as opposed to some other party, seeks discovery of the lawyer's mental impressions. . . .[the work-product doctrine] cannot shield a lawyer's papers from discovery in a conflict of interest context anymore than can the attorney-client privilege."); *accord. Thelen Reid & Priest LLP v. Marland*, 2007 WL 578989 at *8-*9.
[xii] 130 F.R.D. 560 (E.D. Pa. 1989).
[xiii] *Id.* at 596, n.8 (citing Rule 1.7 of the Pennsylvania Rules of Professional Conduct).
[xiv] *Id.* at 596-597 (citing *Valente v. PepsiCo.*, 68 F.R.D. 361 (D. Del. 1975) and *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970).
[xv] *Id.* at 597.
[xvi] *Id.*. In making such a determination, the court must focus on the relationship between the law firm and the client and determine whether the documents were created after termination of the attorney-client relationship. S*ee Versuslaw, Inc. v. Stoel Rives, LLP*, 111 P.3d at 879; *see also Thelen Reid & Priest LLP v. Marland*, 2007 WL 578989 at *7-*8 (ordering production where documents were created during the firm's representation of the client).
[xvii] *See* n. 10, *supra.*
[xviii] *Thelen Reid & Priest LLP v. Marland*, 2007 WL 578989 at *7-*8.
[xix] .*Id.* at *7.
[xx] N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 789, 2005 WL 3046319 (2005).