Accidents happen. Bad things happen to good lawyers. Sometimes lawyers commit malpractice. During the course of the representation of any client, a lawyer will come to question whether something that lawyer did constitutes malpractice. Sometimes the answer is obvious, other times not. Perhaps the client has already threatened or hinted at a malpractice claim. In nearly all instances, however, the lawyer is likely to begin her analysis in the office of the firm’s designated general counsel or go to an ethics and risk management guru. What the lawyer seeks is legal advice. What can or must I do to inform the client of this potential problem? Is the client or opposing counsel or the court that says I erred correct? What about this or that fact and what about my analysis on that issue? Can I stay in the case? What about unpaid fees? Do I need a waiver and what should it look like? Can I mitigate the client and the firm’s damages by pursuing x or y course of action? What do we tell the carrier? Will they sue us? What should we do to prepare our file? Do I need a litigation hold?

These are all questions that the lawyer should be asking and questions that a competent and effective Firm counsel will answer. The question presented here is whether those conversations should enjoy the attorney client privilege as between the lawyer/law firm and its in-house lawyer the same way it would be enjoyed with any other corporation and its in-house lawyer, or does the law firm’s fiduciary duty to the client trump that assumption?

Some basic principles are at play. First, there is the notion that the law firm represents the client and the firm has a duty under RPC 1.4 to provide all or most information relevant to the client’s matter. Perhaps that should include the benefit of in-house counsel’s analysis of the lawyer’s error? Certainly that analysis may benefit the client at the likely expense of the law firm. Second is the related notion that the entire firm owes the client the duties of loyalty, and when in-house counsel is advising a lawyer on the potential malpractice claim, that advice is being provided by a member of the firm and it is inherently adverse to the firm’s current client. Finally, there are policy considerations. Why should a law firm enjoy a B list relationship with its in-house lawyers and be forced to bear the expense of outside counsel for even the most basic consult? These questions have been confronted in a series of recent cases, many leaving open the practical challenges of real world in firm communication and the extent to which those communications slide along the scale between bright line rules.

The US District Court for the District of Massachusetts and the US District Court for the Northern District of California have held that the attorney-client privilege is unavailable when a lawyer discusses a current client’s potential legal malpractice claim with in-house counsel.¹

both of those cases, a client was permitted to discover communications between their former lawyer and the law firm’s in-house counsel about the client’s legal malpractice claim. Other courts, however, have held that the attorney-client privilege does apply because the lawyer and the in-house counsel have an attorney-client relationship. Although courts differ on whether the attorney-client privilege applies when a lawyer confers with in-house counsel about a current client’s potential legal malpractice claim, there are several key factors that courts look at when reaching their decision. This article will focus upon important factors that courts are likely to consider when determining if the attorney-client privilege is available to a lawyer who confers with in-house counsel about a current client’s potential legal malpractice claim.

The attorney-client privilege applies when a client seeks legal advice from a lawyer and there is a reasonable and continuing expectation that the communications will be confidential. The purpose of the attorney-client privilege is to encourage full and truthful disclosures between an attorney and a client. Consequently, a client’s communications with their lawyer, including in-house counsel, is generally protected from disclosure. Some cases hold that in light of its important purpose, the attorney-client privilege must be broadly construed. Nevertheless, most recent cases hold that because the privilege is an obstacle to the truth, it should be narrowly construed.

The main struggle for courts deciding if the attorney-client privilege is available to a lawyer who confers with in-house counsel about a current client’s potential legal malpractice claim is whether a lawyer’s fiduciary duty to a client should override the lawyer’s attorney-client privilege with in-house counsel.

The fiduciary question only arises in the context of the current attorney-client relationship. When the attorney-client relationship terminates, the communications between a lawyer and in-house counsel about a former client’s legal malpractice claim are protected by the attorney-client privilege. It is logical that the former client is not be entitled to a lawyer’s communications with in-house counsel about the former client’s current legal malpractice claim because the duty of loyalty has changed and is drastically limited. However, the communications between a lawyer and in-house counsel about a client’s potential legal malpractice claim will not be protected by the attorney-client privilege if the lawyer does not unequivocally terminate the attorney-client relationship. In Cold Spring Harbor Laboratory v. Ropes & Gray LLP, the court held that a fiduciary must perform “an affirmative act” that informs the client that the fiduciary’s representation has unequivocally ended. Until the fiduciary unequivocally informs the client that representation has ended, the fiduciary owes a fiduciary duty to the client. The court in the Cold Springs matter was not only unconvinced that

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4 See, e.g., United States v. Collis, 128 F.3d 313, 320 (6th Cir. 1997); United States v. Gray, 876 F.2d 1411, 1415 (9th Cir. 1989).
6 See, e.g., In re Keeper of Records, 348 F.3d 16, 22 (1st Cir. 2003) (“the attorney-client privilege must be narrowly construed because it comes with substantial costs and stands as an obstacle of sorts to the search for truth”).
the attorney client relationship was terminated, but it also held that the on-going fiduciary duty trumped the privilege.\textsuperscript{8} 

The current attorney-client relationship, on the other hand, is dependent upon a lawyer’s undivided loyalty to his client. A lawyer’s fiduciary duty to a client consists of a lawyer’s responsibility to act in the best interest of his client, even if that means subordinating the lawyer’s personal interest to that of the client’s. Consequently, as occurred in the \textit{Cold Springs} case, the court found that a lawyer’s fiduciary duty to his client trumped the lawyer’s attorney-client privilege with in-house counsel.\textsuperscript{9} Although it varies by jurisdiction, two important factors that courts are likely to look at are: (1) the structure of the in-house counsel position; and (2) whether the law firm has disclosed the potential conflict of interest between the lawyer and the client.

An important factor in determining whether the firm will enjoy a privilege turns on whether the in-house counsel is solely dedicated to in-house counsel duties. In \textit{Hunter, Maclean, Exley & Denn v. St. Simons Waterfront, LLC}, the court found that when the lawyer in that case sought advice from in-house counsel about a client’s potential legal malpractice claim, the lawyer was the sole beneficiary of the advice, and therefore, the communications were protected by the attorney-client privilege.\textsuperscript{10} Importantly, the court emphasized that the attorney-client privilege will apply if the role of in-house counsel is clearly defined prior to the communications between a lawyer and in-house counsel about a current client’s potential legal malpractice. The in-house counsel may not represent clients of the firm and must not have worked on the client’s case. Firm lawyers who serve as in-house counsel on an ad hoc basis may have the burden of proof to show that their role as in-house counsel was defined prior to communications between a firm lawyer and themselves about a client’s potential legal malpractice claim.

Even where the requirements for the in-house counsel role are not satisfied, a court may still recognize the attorney-client privilege between a lawyer who confers with in-house counsel about a current client’s potential legal malpractice claim if the lawyer discloses to the client the potential conflicts of interest and the client waives the conflicts. This in an important step in any continuing relationship between law firm and client in the fact of allegations of malpractice, but is less easily satisfied in the early stages when the extent or gravity of a potential error is under consideration. It is clear, however, that a client’s and a lawyer’s interests conflict when a lawyer begins to prepare his defense to a current client’s potential legal malpractice claim. Under Rule 1.7 of the Model Rules of Professional Conduct, the lawyer may not continue to represent the client unless, among other things, the lawyer receives the client’s written informed consent. Because there is a potential conflict between a lawyer’s personal interest and a lawyer’s fiduciary duty to the client, the lawyer must fully disclose the potential conflicts to the client. The lawyer’s representation of the client may not continue unless the client makes a fully informed decision to

\textsuperscript{8} However, see \textit{RFF Family Partnership, LP v. Burns & Levinson, LLP}, 2012 WL 6062740 (Mass. Super. 2012) where the Superior Court of Massachusetts strayed from the District Court of Massachusetts’s opinion in \textit{Cold Spring}, and determined that the attorney-client privilege trumps a lawyer’s fiduciary duty to her client.


waive the potential conflicts. An appropriately drafted waiver may be sufficient to preserve the post waiver privileged communications.

In *Garvey v. Seyfarth Shaw LLP*, the court held that the attorney-client privilege did apply between a lawyer who conferred with in-house counsel about a current client’s potential legal malpractice claim. The court relied heavily on the fact that the client was advised of the potential conflicts of interest between the client and the lawyer, the client retained independent counsel, and the client waived the potential conflicts. Because the client was fully informed of the potential conflicts of interest, and waived the potential conflicts, the client could not then use the lawyer’s continued representation of the client as a means to demand production of communications between the lawyer and in-house counsel. As the *Garvey* court stated, the client cannot “have it both ways.” The client cannot insist that the lawyer continue representation of the client but then, after the fact, demand that the lawyer’s fiduciary duty to the client trumps the lawyer’s attorney-client privilege with in-house counsel. The attorney-client privilege between a lawyer who confers with in-house counsel about a current client’s potential legal malpractice claim will likely be recognized if the client has been fully informed of the potential conflicts of interest and the client waives the potential conflicts.

In light of recent court decisions, lawyers need to be aware that communications with in-house counsel about a potential legal malpractice claim may not be protected by the attorney-client privilege. Great debate rages about the policy considerations on both sides. For now, lawyers may want to get a signed agreement from the client which acknowledges and accepts that lawyers working on their case may need to seek internal advice about their ethical obligations and that such internal advice does not waive the attorney-client privilege. In-house lawyers must be cautious defining their duties and ideally dedicate their practice to representing the firm. Law firms should also be sensitive to the fact that the law of in-house privilege is a moving target. Documenting internal consultation is important, but it should be done in a manner and with a mind to the possibility that it may be produced some day. Finally, conflict waiver letters with clients sooner rather than later are clearly in order.

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