



Protecting Communications with a Law Firm's Own In-House Counsel

Daniel W. Hager

In *Palmer v. Superior Court* (2014) 231 Cal. App.4th 1214, the court held that the attorney-client privilege may apply to intrafirm communications with a law firm's in-house counsel concerning a present client threatening a malpractice claim. *Palmer* provides guidance on establishing a genuine attorney-client relationship with in-house counsel that enjoys the protection of the privilege should a claim later materialize.

FACTS OF PALMER

In the underlying matter, the client, Shahrokh Mireskandari, retained the law firm Edwards Wildman Palmer to prosecute a lawsuit, and attorney Dominique R. Shelton was the partner in charge. Within three months the client threatened malpractice and other claims against the firm, but insisted the firm continue representing him until he retained substitute counsel three months later. During that period Shelton consulted with two attorneys within the firm, Jeffrey Swope and James A. Christman, concerning the client's complaints.

The client later sued the firm and Shelton for malpractice. In discovery, the firm asserted the attorney-client privilege protected communications between Shelton and the in-house lawyers acting as counsel for the firm. The client moved to compel, arguing the privilege was inapplicable when a firm is counsel to both an outside client and to itself.

Opposing the motion, the firm submitted evidence that Swope was the firm's general counsel and Christman was its claims counsel and that they shared responsibility on claims-handling and loss-prevention issues. As in-house counsel, Swope and Christman had numerous communications advising Shelton regarding responses to the client's complaints and the handling of the client relationship. Swope and Christman assigned partner Mark Durbin to supervise preparation of pleadings for the client. Durbin communicated with Shelton as Swope and Christman's deputy. The firm did not bill the client for time incurred by Swope, Christman, or Durbin.

The trial court compelled disclosure of the communications, finding the firm's fiduciary and ethical duties to its outside client trumped application of the attorney-client privilege with in-house counsel.

THE PRIVILEGED NATURE OF COMMUNICATIONS WITH IN-HOUSE COUNSEL

Recognizing that "[l]arge law firms increasingly are hiring their own in-house counsel to provide day-to-day ethics advice, monitor internal policies and procedures, and respond to potential and actual malpractice claims against the firm," the court of appeal held that "an attorney who consults another attorney in the same firm for the purpose of securing confidential legal advice may establish an

attorney-client relationship.” Affirming the long-standing importance of the attorney-client privilege, the court noted that where none of the eight exceptions set forth in Evidence Code sections 956–962 apply, the privilege is absolute and disclosure cannot be ordered.

The court was unpersuaded by two federal decisions holding that any privilege between firm attorneys and in-house counsel is superseded by conflicting fiduciary duties of candor and communication owed to the firm’s client—so-called fiduciary and current client exceptions to the privilege. The court concluded a firm’s duties to its client do not trump assertion of its own attorney-client privilege.

The court acknowledged “that a law firm’s representation of itself, or one of its partners, in regard to a dispute or a threatened claim by a current client may raise thorny ethical issues.” The court recognized that while an attorney who violates the Rules of Professional Conduct may be subject to discipline, a potential or actual conflict of interest with a client threatening a malpractice claim does not abrogate the firm’s attorney-client privilege.

The surest way to ensure confidentiality of legal advice on threatened malpractice claims remains to use outside counsel. However, *Palmer* confirms that internal consultations with in-house counsel can also be protected from disclosure.

Similarly, recognizing an attorney-client privilege with in-house counsel does not undercut a lawyer’s duty to keep clients apprised of significant developments. While the privilege may protect communications with in-house counsel, it does not, for example, excuse lawyers from disclosing facts to clients that may constitute malpractice.

Applying factors discussed below, the court found the firm had not established an attorney-client relationship between Shelton and “deputized” attorney Durbin, since Durbin had not submitted a declaration and had worked on the client’s case. It found sufficient evidence supporting an attorney-client relationship—and, thus, application of the privilege—between Shelton and in-house general counsel and claims counsel.

LESSONS LEARNED FROM PALMER

The surest way to ensure confidentiality of legal advice on threatened malpractice claims remains to use outside counsel. However, *Palmer* confirms that internal consultations with in-house counsel can also be protected from disclosure. The court provided the following factors indicating a genuine attorney-client relationship with in-house counsel:



The firm must have designated, formally or informally, an attorney or attorneys within the firm to represent it as in-house or ethics counsel, so that an attorney-client relationship exists between in-house counsel and the firm *prior to the time the consultation occurs*. Thus, regardless of firm size, officially designate a qualified attorney in the firm to serve as general counsel, claims counsel, risk management counsel, and so on, with the express responsibility for advising the firm and its lawyers on avoiding and responding to potential claims and ethical issues. This designated counsel can serve as liaison to the firm’s errors and omissions carrier, for procuring and maintaining coverage, and managing claims. This function should be confirmed in a written policy.



Where a current client threatens litigation, in-house

counsel must not have performed any work on that client matter or a substantially related matter.



Time spent communicating with in-house counsel may not be billed to the client.



Communications must have been made in confidence and kept confidential. Label all written communications as “Privileged & Confidential Attorney-Client Communications.” Written records of such communication should not be maintained in the underlying matter file, but in a separate file for the potential claim that is protected from access by those not a party to the consultations with in-house counsel.

Designating an in-house general or claims counsel is a sound risk management tool for firms of all sizes. Carefully following the procedures outlined in *Palmer* will protect the confidentiality of their advice.

Daniel W. Hager is corporate counsel to Abern Insurance Brokerage and has spent his career practicing in the fields of lawyers’ professional liability, risk management, and legal ethics. Abern Insurance Brokerage is a member benefit partner of The Bar Association of San Francisco.

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