

PROFESSIONAL LIABILITY UPDATE

ATTORNEY-CLIENT PRIVILEGE

By Jennifer A. Becker

***Edwards Wildman Palmer v. Superior Court (Mireskandari)* (2014) 231 Cal.App.4th 1214**

The Second District holds communications between a law firm's in house counsel and one of its attorneys about a current client are protected by the attorney-client privilege.

Shahrokh Mireskandari retained Edwards Wildman Palmer LLP attorney Dominique Shelton to represent him in an invasion of privacy lawsuit. Soon after the firm filed a complaint, Mireskandari expressed dissatisfaction with the cost and quality of representation. Shelton consulted with the firm's general counsel, and an attorney designated by the firm to handle claims "claims counsel," about Mireskandari's criticisms. They "deputized" another partner to assist Shelton, and that partner performed services on Mireskandari's behalf.

After Mireskandari discharged Shelton he sued her firm for legal malpractice, breach of fiduciary duty, and breach of contract. The firm asserted her intra-firm communications about Mireskandari's criticisms were protected by the attorney-client privilege. The Firm argued it was common practice within the legal community to seek advice within the firm when a client becomes hostile and accusatory. Mireskandari asserted a lawyer who counsels another lawyer in the same firm, regarding a current client of the firm, has an impermissible conflict of interest. The firm's attorney-client privilege must be subordinated to the firm's ethical duties, and the firm cannot claim

attorney-client privilege.

The trial court granted Mireskandari's motion to compel production, relying on federal cases applying California law. These cases held a "fiduciary exception" or "current client exception" applied to abrogate the attorney-client privilege for intra-firm communications about a current client. The trial court reasoned the client's right to information, and to his file, overcame the firm's claim of privilege. Discussions within the firm regarding the client, the client's case, the client's claims, and the case status belong to the client, who holds the privilege.

The *Edwards* court reflected the attorney-client privilege is to safeguard the confidential relationship between clients and their attorneys, and to promote full and frank discussion of the facts and tactics surrounding individual legal matters. This preserves the client's right to confide in a lawyer and receive adequate advice or a proper defense. The privilege, codified at Evidence Code § 954 reflects the legislative judgment that the concern over suppression of relevant evidence is outweighed by the importance of preserving confidentiality in the attorney-client relationship. Courts have

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consistently recognized the benefits justify the risk of unfair decisions resulting from the suppression of relevant evidence.

The privilege cannot shield facts, only communications, from discovery. Relevant facts cannot be withheld by incorporating them into an attorney-client communication.

An attorney who consults another attorney in the same firm to secure confidential legal advice may establish an attorney-client relationship between the firm and the general counsel. This creates a conflict of interest because general counsel, by imputation, also represents the client.

However, the *Edwards* court relied on statutory interpretation, and declined to adopt a “fiduciary” or “current client” exception to the attorney-client privilege. In precedent, the California Supreme Court specifically declined to do so. The Supreme Court held courts have no power to expand or to recognize implied exceptions to the attorney-client privilege in the Evidence Code.

The *Edwards* court followed the lead of other state’s Supreme Courts. Other states have reasoned there are benefits to the attorney and the client when attorneys can speak confidentiality with firm counsel about an ongoing matter. As a highly regulated profession, compliance with rules and duties is not always instinctive. In-house counsel is the logical counsel for many lawyers to turn to for advice about how they may best comply with ethical rules, especially where time is of the essence. Recognizing a privilege encourages attorneys to seek advice about how to correct errors. Soliciting advice, whether from an in-house counsel or from an outside attorney, is not necessarily adverse to the client, and doing so may ultimately benefit the client.

Not recognizing a law firm privilege might cause an attorney to withdraw to protect the

attorney-client privilege, which may be unnecessary or hurt the client’s interests. An attorney might have to advise a client of a conflict, just to seek permission to consult with in-house counsel to understand the conflict. Without protecting confidentiality, either the disclosures to general counsel, or the advice from general counsel, may be “sugar coated.” An attorney forced to retain outside counsel to protect communications would involve additional cost to the law firm, which would inevitably delay receipt of advice.

The *Edwards* court was not concerned intra-firm attorney-client privilege would diminish a client’s rights, because certain ethical duties continue to apply. Business and Professions Code § 6068(m) imposes a duty to respond promptly to reasonable status inquiries and to keep clients reasonably informed of significant developments. Rules of Professional Conduct, rule 3–500 requires a lawyer keep the client reasonably informed about significant developments relating to the employment or representation. Attorneys have a common law fiduciary obligation to disclose material facts to their clients, including acts of malpractice.

The *Edwards* court noted certain factors help establish a genuine attorney-client relationship exists between in-house counsel and the law firm. The law firm must formally or informally designate a firm attorney or attorneys as in-house or ethics counsel so an attorney-client relationship between in-house counsel and the firm exists when the consultation occurs. The in-house counsel must not have performed work on the client matter, or a substantially related matter. No time spent on communications with firm counsel may be billed to the client. The communications must be made in confidence and kept confidential.

Applying the law to the facts, the court found Shelton’s consultation with the firm’s general counsel and claims counsel were protected attorney-client communications. Both attorneys

were pre-designated; neither performed work on the client's matter; the client was not billed for Shelton's consultations; and her communications with those attorneys were kept confidential.

Shelton's communications with the partner who was "deputized" to assist her were not confidential. He was not designated until after the dispute arose, and, most significantly, he performed services on the case. The court concluded the law firm did not establish Shelton had an attorney-client relationship with this partner, and her communications with him were not protected by attorney-client privilege.

Comment: Edwards is the only California decision on intra-firm attorney-client privilege. It follows the lead of three other states recognizing the privilege. It remains to be seen if other Districts will agree. For now, law firms who wish to test the waters should carefully follow the protocol in the opinion.