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PERSPECTIVE

Privileges when law firms seek advice

By Stephen L. Raucher

Do a law firm's fiduciary and ethical duties to its current clients trump the attorney-client privilege? On Nov. 25, a California Court of Appeal answered this question in the negative, notwithstanding two prior federal decisions in California which had reached the opposite result. The case, *Edwards Wildman Palmer v. Superior Court*, 2014 DJDAR 15783, provides important guidance for law firms who look to their in-house colleagues for advice on how to deal with potential or actual disputes with current clients. Law firms can now rest easier knowing that communications with designated in-house counsel, at least, will be protected by the privilege in California.

The facts of *Edwards Wildman* will sound familiar to any litigator who has dealt with a demanding or difficult client. Edwards Wildman, an international law firm with 16 offices and over 600 attorneys, was retained by plaintiff Sharokh Mireskandari in March 2012 to represent him in an invasion of privacy lawsuit against the Daily Mail, a newspaper based in the United Kingdom. The firm accordingly filed a complaint against the Daily Mail in federal court.

By June 2012, Mireskandari was sending emails to the firm complaining about both the firm's bills and the quality of its representation. In addition to asserting that the firm had understated the cost of the litigation, Mireskandari criticized the firm for failing to advise him that the Daily Mail would likely file an anti-SLAPP motion in response to the complaint (which the Daily Mail did do). Even before the firm had been substituted out of the case on Aug. 16, 2012, Mireskandari had sued for legal malpractice.

Between the time that Mireskandari started sending his critical emails and the substitution of the firm out of the underlying case, the partner handling the matter consulted with two other attorneys from the firm — one, the firm's "general counsel," the other, the firm's "claims counsel." Those attorneys shared responsibility for advising "on claims handling and loss prevention issues." In addition, they "deputized" another partner to supervise "the preparation of pleadings that Mr. Mireskandari wanted the firm to file on his behalf, notwithstanding his existing disputes and assertions against the firm." The firm did not bill Mireskandari for any of the consulting attorneys' time.

In the malpractice action, Mireskandari demanded that the firm produce its internal law firm communications, including those with in-house lawyers acting in their capacity as counsel for the firm. When the firm invoked the attorney-client privilege, Mireskandari moved to compel. Observing that the issue was novel, the trial court granted the motion, relying primarily on the unpublished but influential case *Thelen Reid & Priest LLP v. Marland*, 2007 U.S. Dist. Lexis 17482 (N.D. Cal. 2007). The trial court reasoned that "if there were ... discussions among members of the firm regarding the client, the client's case, the client's claims, what was going on, that belongs to the client. The client is the holder of the privilege." The firm petitioned for a writ of mandate which the Court of Appeal, after staying the trial court's decision, granted in part, disagreeing with the logic of the trial court and *Thelen Reid*.

The *Edwards Wildman* decision begins with a discussion of the historical importance of the attorney-client privilege, noting that even though the privilege sometimes leads to the suppression of relevant evidence, the public policy behind the privilege outweighs that concern. The Court of Appeal found that under the Evidence Code, "an attorney who consults another attorney in the same firm for the purpose of securing confidential legal advice may establish an attorney-client relationship."

Sections 956 through 962 of the California Evidence Code enumerate eight exceptions to the attorney-client privilege. However, citing the California Supreme Court's decision in *Costco Wholesale Corp. v. Superior Court*, 47 Cal. 4th 725 (2009), the Court of Appeal emphasized that "Where none of these exceptions apply, 'the privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case.'" This strict limitation on exceptions to the privilege under California law is what led the *Edwards Wildman* court to reject the reasoning of the *Thelen Martin* case.

Citing *Thelen Martin* and another unpublished federal decision, *In re SonicBlue Inc.*, 2008 Bankr. Lexis 181 (Bankr. N.D. Cal. 2008), Mireskandari argued that the firm had a conflict of interest at the time of the privileged intrafirm communications due to the dual representation of Mireskandari and itself, and that because of this conflict, disclosure of the intrafirm communications was required.

In *Thelen Martin*, the firm simultaneously represented Marland and the California Department of Insurance regarding the same claims. During that representation, the firm's general counsel advised the handling attorneys regarding conflicts between the two clients and other issues. When Thelen sued Marland for fees, the client moved to compel the intrafirm communications. Applying California law in the diversity case, the district court found that "Thelen's fiduciary relationship with Marland as a client lifts the lid on these communications." The *SonicBlue* court reached the same conclusion, finding that "a law firm cannot assert the attorney-client privilege against a current outside client when the communications that it seeks to protect arise out of self-representation that creates an impermissible conflicting relationship with that outside client." This concept has been denominated the "fiduciary" or "current client" exception by various other courts. However, as noted in the *Edwards Wildman* decision, the supreme courts of Massachusetts, Georgia and Oregon have rejected this exception.

The *Edwards Wildman* court also rejected the "fiduciary" or "current client" exception, though not based on any particular public policy concerns. Rather, the Court of Appeal reasoned that it was "not at liberty to adopt the fiduciary or current client exceptions to the attorney-client privilege" given that the privilege and its exceptions are creatures of California statute. To support this position, *Edwards Wildman* cited to the California Supreme Court's decision in *Wells Fargo Bank v. Superior Court*, 22 Cal. 4th 201 (2000), which rejected the notion of a fiduciary exception in a different context. There, Wells Fargo, a co-trustee of a trust, sought to protect communications with its in-house counsel from discovery in a dispute with the trust beneficiaries. Acknowledging that courts in other jurisdictions had given a trustee's reporting duties precedence over the attorney-client privilege, the Supreme Court nonetheless found it had no power to create common law exceptions to the privilege in light of its statutory basis.

Mireskandari's argument that a fiduciary exception was inherent in other statutes and rules, such as Rule of Professional Conduct 3-310, which prohibits the representation of adverse interests without informed written consent, did not alter the analysis. While the *Edwards Wildman* court acknowledged that a law firm's self-representation could raise "thorny ethical issues," that did not justify abrogating the attorney-client privilege. The court reasoned that a law firm would not necessarily be disloyal to a client by seeking internal advice on how to address a potential conflict; such consultation might ultimately benefit the client by allowing the firm to determine the most ethical way to proceed. Finally, while the intrafirm communications would remain privileged, the firm would remain obligated to keeps its client apprised of developments, including the duty to report malpractice.

In response to Mireskandari's concern that extending the privilege to intrafirm communications would encourage firms to create artificial attorney-client relationships to hide malpractice, the *Edwards Wildman* court set out four factors to be considered when analyzing the validity of an attorney-client privilege claim: (1) whether the law firm has designated, formally or informally, an in-house or ethics counsel; (2) whether that in-house counsel worked on the client's matter; (3) whether the in-house counsel's time was billed to the client; and (4) whether the communications were made in confidence and kept confidential.

Applying these concepts, the court upheld the privilege as to communications with the general counsel and claims counsel. However, the Court of Appeal found that the firm had not established an attorney-client relationship as to the communications with the "deputized" attorney. In addition to the fact that the deputized attorney's normal role was not general or ethics counsel, the court was influenced by the fact that he worked on the underlying matter, even though his time was not billed.

Given the reasoning of its decision in *Wells Fargo*, it seems unlikely that the Supreme Court will disturb the *Edwards Wildman* decision. It would thus fall to the Legislature to create a fiduciary exception to the privilege. Hopefully, no such exception will be enacted. While law firms must tread carefully when their own interests may diverge from a current client's interests, well-reasoned decisions and better outcomes are more likely if lawyers can express their concerns to their in-house counsel without fear those communications may later have to be produced in discovery.

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