

Source: ABA/BNA Lawyers' Manual on Professional Conduct: All Issues > 2013 > 08/28/2013 > Conference Report: ABA Annual Meeting > Confidentiality: ABA Formally Backs Attorney-Client Privilege For Consults With Law Firms' Inside Counsel

29 Law. Man. Prof. Conduct 553

Confidentiality

ABA Formally Backs Attorney-Client Privilege For Consults With Law Firms' Inside Counsel



By Joan C. Rogers

The ABA Aug. 12 adopted a resolution urging courts and legislatures to recognize that lawyers' consultations with their firm's in-house counsel are privileged even if they concern potential liability to a client in an ongoing representation.

The measure garnered easy approval from the ABA's policy-making House of Delegates at the bar group's Annual Meeting in San Francisco. In other actions

Aug. 12-13, the delegates:

- urged courts and lawyer regulatory authorities to coordinate with their foreign regulatory counterparts to facilitate the exchange of relevant disciplinary and admissions information in light of the increasing global mobility of lawyers (Resolution 104);
- replaced the ABA Criminal Justice Standards on Fair Trial and Free Press with the ABA Criminal Justice Standards on Fair Trial and Public Discourse as a guide for lawyers involved in, or providing public comment on, criminal cases (Resolution 113F);
- opposed plea or sentencing agreements in which a criminal defendant waives post-conviction ineffective assistance of counsel, prosecutorial misconduct, or destruction of evidence claims, except in certain circumstances (Resolution 113E);
- adopted revisions to the ABA's 1996 civil pro bono standards to address advances in technology and developments in the practice of law (Resolution 109); and
- condemned unauthorized organizational and individual intrusions into lawyers' computer systems and networks, to address the dangers of cyber threats to the legal profession (Resolution 118).

BNA Snapshot

Key Development: The ABA officially endorses recognition of the attorney-client privilege for lawyers' discussions with their firm's in-house counsel about problems with a current client's representation.

Also of Note: The Association of Corporate Counsel opposes the in-firm privilege and is fighting it in a case pending before the Oregon Supreme Court.

Courts' Recognition

Resolution 103, as revised, declares that the attorney-client privilege shields lawyers' consultations with a law firm's inside counsel even if the discussions create a conflict of interest between the firm and the client whose representation is at issue. It also asserts that the fiduciary exception to the privilege does not apply when lawyers seek legal advice, from in-house or outside counsel, about their own responsibilities to a client. (*See box.*)

The accompanying report asserts that court decisions that have reached the opposite conclusion are poorly reasoned and at odds with broader lines of authority.

The new ABA policy comes on the heels of two recent state supreme court decisions—issued after the resolution sponsors submitted their report—that back the attorney-client privilege for lawyers' talks with their firm's in-house counsel about potential problems in a current client's representation: *RFF Family P'ship, LP v. Burns & Levinson, LLP*, 2013 BL 184885, 29 Law. Man. Prof. Conduct 422 (Mass. July 10, 2013), and *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 2013 BL 185295, 29 Law. Man. Prof. Conduct 424 (Ga. July 11, 2013).

According to William T. Barker of Dentons U.S. LLP, Chicago—who authored the resolution—the new policy will provide a strong footing for ABA advocacy on the issue.

Barker said in an e-mail to BNA that the ABA already contributed importantly to the development of the law on this issue by submitting successful amicus briefs in *St. Simons Waterfront* and *RFF Family Partnership*. But the bar group's ability to advocate in those cases was limited by the lack of sufficiently precise policy on the issue, he added.

"Resolution 103 now provides the policy necessary to fully advocate in support of the privilege in future cases, which can build on the precedents just established," he said.

Meanwhile, another ruling on the in-firm privilege issue from a state's top court is on the horizon. The Oregon Supreme Court has scheduled oral argument Nov. 4 in a mandamus proceeding that presents the issue, *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, Or., No. S061086, writ granted 3/28/13.

Plenty of Support

Barker worked on the resolution for the ABA Tort Trial and Insurance Practice Section (TIPS), which sponsored the measure along with the Section of Business Law. He is the author of *Law Firm In-House Attorney-Client Privilege vis-a-vis Current Clients*, 70 Def. Couns. J. 467 (2003).

The resolution was co-sponsored by the Section of Real Property, Trust and Estate Law, the Section of Taxation, and the Law Practice Management Section, along with the Illinois State Bar Association, the New York State Bar Association and the Beverly Hills Bar Association.

Business Law Section delegate Maury L. Poscover of Husch Blackwell LLP, St. Louis, was instrumental in lining up support for the

measure. In an interview with BNA, Poscover said the Litigation Section initially opposed the proposal but decided to embrace it once some changes were worked out, although Poscover noted that the Litigation Section did not sign on as a co-sponsor.

During back-and-forth with other interested groups, Poscover said, the original proposal was reworked in several ways. For example, a key change was made in the second paragraph of the resolution, which states that the privilege is not lost through any conflict of interest arising out of a consultation about a current client's potential claim against the firm.

As originally drafted, that paragraph ended with the clause "at least so long as the client is appropriately and timely informed of the potentially viable claim." That language was stripped out as a result of concerns that it would create an ambiguity, Poscover said.

In addition, a fourth paragraph was added to the measure, reaffirming existing ABA policy that supports the attorney-client privilege for communications between employees of a corporation and its in-house counsel.

Poscover said that before the resolution, the ABA did not have a specific policy on the application of the attorney-client privilege to consultations with a law firm's in-house counsel. The resolution concerns the privilege, not ethics or breach of fiduciary duty, and "it doesn't negatively impact clients," he said.

The ABA's ethics committee issued an opinion in 2008 on "In-House Consulting on Ethical Issues," but it deals with application of professional conduct rules rather than the evidentiary privilege. See ABA Formal Ethics Op. 08-453. In addition, ABA ethics opinions do not represent official ABA policy, which is set by the House of Delegates.

Benefit of In-Firm Counsel

The resolution was presented at the delegates' meeting by TIPS delegate Robert Peck, who is president of the Center for Constitutional Litigation, P.C., in Washington, D.C. No one at the delegates' meeting spoke in opposition to the measure.

In an e-mail to BNA about the new policy, Peck emphasized the value of fostering lawyers' consultation with their firm's in-house counsel. With the complexity of many representations, he said, it is essential to enable lawyers to consult with those who can independently evaluate concerns that may arise. But if the only way to obtain guidance is by consulting outside counsel, cost considerations and even finding counsel in the first place may discourage the effort, he pointed out.

"By affording the same type of attorney-client privilege to in-house counsel that would exist if outside counsel were consulted, we will have eased the process and encouraged more widespread consultation. The result benefits clients and lawyers alike," Peck said.

ACC Criticism

However, the Association of Corporate Counsel has gone on record as opposing the attorney-client privilege for lawyers' consultations with a law firm's in-house counsel about problems in an ongoing representation.

In an amicus brief it filed in the *Crimson Trace Corp.* case, the ACC argues that attorney-client privilege must serve the broader relationship of loyalty and trust between clients and law firms. This obligation prevents law firms from accepting clients with direct conflicts, and it should apply with equal force to prevent law firms from representing themselves as clients when a conflict exists, the ACC contends.

"Clients pay law firms to serve them as advocates, not fight them as adversaries," the brief declares.

"Law firms owe their clients a profound duty of loyalty under the ethics rules," ACC president Veta T. Richardson said in a news statement announcing the amicus brief. "It is this duty of loyalty that prohibits law firms from claiming a privilege to let them hide information from existing clients," she said.

For More Information

Full text of Resolution 103 and the accompanying report at <http://www.abanow.org/2013/06/2013am103/>.

The ACC's amicus brief in the *Crimson Trace* case can be accessed at <http://www.acc.com/advocacy/upload/ACCamicusCrimsonTrace080813.pdf>.

The docket in the *Crimson Trace* case is available at http://www.bloomberglaw.com/public/document/Crimson_Trace_Corporation_v_Davis_Wright_Tremaine_LLP_Docket_No_S.

ABA to Courts: Privilege Shields Lawyers' Talks With Firm's Inside Counsel About Current Client

ABA Resolution 103, as revised, states:

"RESOLVED, That the American Bar Association urges all federal, state, tribal, territorial, and local legislative, judicial and other governmental bodies to support the following principles that:

"(a) the attorney-client privilege applies to protect from disclosure confidential communications between law firm personnel and their firms' designated in-house counsel made for the purpose of facilitating the rendition of professional legal services to the law firm (including any legal advice provided by such counsel) to the same extent as such confidential communications between personnel of a corporation or other entity and that entity's in-house counsel would be protected;

"(b) any conflict of interest arising out of a law firm's consultation with its in-house counsel regarding the firm's representation of a then-current client and a potentially viable claim the client may have against the firm does not create an exception to the attorney-client privilege;

"(c) the 'fiduciary exception' to the attorney-client privilege (for a fiduciary's communications seeking legal advice regarding ordinary affairs of the fiduciary office), if recognized by the jurisdiction, does not apply to confidential communications between law firm personnel, acting on behalf of the law firm in its individual capacity, and the firm's in-house or outside counsel, even if those communications regard the law firm's own duties, obligations, and potential

liabilities to a current client; and

“(d) as a reaffirmation of existing Association policy, confidential communications between personnel of a corporation or other entity and that entity's in-house counsel should be protected by the attorney-client privilege to the same extent as confidential communications with outside counsel would be protected.”

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ISSN 1521-5083

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