Legal Times
WEEK OF NOVEMBER 13, 2006 • VOL. XXIX, NO. 45
ALM

When Law Firms Need Legal Advice

Is your client breaking the law? Not paying bills? Maybe you need some outside counsel this time.

BY ARTHUR D. BURGER

Ethics

Law firms, just like all other entities, sometimes need legal advice. It's like a doctor going to a doctor. Law firms, which are engaged in assisting others in complex and high-stakes matters, regularly encounter issues warranting analysis of their professional obligations. These can include, for example, situations in which a client fails to pay its bills while a trial date is looming; a conflict of interest unexpectedly arising during a representation; a client engaging in conduct that may be illegal, fraudulent, or otherwise harmful to third parties; or a law firm otherwise encountering strains in its relations with a client.

It's a healthy thing for a law firm to get advice in these circumstances. Seeking advice helps firms meet their ethical and legal obligations. The value of this kind of advice was recognized in a recent amendment to ABA Model Rule 1.6(b)(4), permitting an exception to a lawyer's obligation of client confidentiality when a lawyer seeks outside legal advice about his ethical obligations.

There are two basic ways that law firms can obtain advice: They can seek advice from lawyers within their firm, or they can retain outside counsel. In-house advice is fine for routine issues, but for more sensitive matters, the use of outside counsel carries the added benefit of the attorney-client privilege.

Over the past decade it has become increasingly common for law firms to use one or more of their lawyers as in-house counsel, providing the firms with legal advice to ensure compliance with their ethical obligations and to reduce the likelihood of malpractice suits or ethics complaints.

These internal arrangements vary widely. A lawyer assigned this responsibility may be called an ethics partner, loss-prevention counsel, conflicts counsel, firm counsel, or in-house counsel. Some firms use a group of firm lawyers to serve as an ethics committee. It's a wise investment for a firm to reward firm lawyers who serve this need by compensating them, as if they were doing billable work, to ensure the vitality and regularity of this sort of system. One benefit of this internal approach is that lawyers within a firm can consult with a colleague they trust on an informal and relaxed basis.

Time to Go Outside

But some courts have held that because of the fiduciary obligations of all lawyers in a firm to firm clients, consultations with in-house counsel may not qualify for the protections of attorney-client privilege. So if a malpractice suit is filed or other litigation with a client ensues, the firm may be required to disclose the content of its internal consultations. When law firms face issues of particular sensitivity and anticipate the possibility of future litigation, they should therefore consider using outside counsel.

The seminal case on the obstacles to privilege for in-house counsel in a law firm is *In re Sunrise Securities Litigation*, 130 F.R.D. 560 (E.D. Pa. 1989). In that case, law firm Blank Rome Comisky & McCauley (now known as Blank Rome) had represented Sunrise, a failed savings and loan association. Both Sunrise and Blank Rome were sued by the Federal Savings and Loan Association, former shareholders of Sunrise, and members of Sunrise's board of directors, for wrongful conduct leading to the financial failure. The plaintiffs sought to obtain a series of documents from Blank Rome, and Blank Rome asserted the attorney-client privilege. Blank Rome argued that the documents consisted of consultations among Blank Rome lawyers, some of whom were seeking legal advice.

The court identified the central problem to be that every lawyer in a law firm has a fiduciary duty both to the firm and to the firm's clients. Where the interests of a law firm and the interests of the law firm's current client are potentially adverse, all members of the law firm would have a conflict of interest in serving as counsel for their own firm.

© 2006 ALM Properties Inc. All rights reserved. This article is reprinted with permission from Legal Times
(1-800-933-4317 • LTsubscribe@alm.com • www.legaltimes.com).

The conflict arises because the in-house lawyer cannot shed his fiduciary obligation to the firm's client. The court wrote that "a firm's communication with in-house counsel is not protected by the attorney-client privilege if the communication implicates or creates a conflict between the law firm's fiduciary duties to itself and its duties to the client seeking to discover the communication."

The U.S. District Court for the District of Columbia recognized this principle in *Neese v. Pittman*, 206 F.R.D. 325 (D.D.C. 2002). In *Neese,* law firm Shaw Pittman represented Blair Temporaries and Staffing Inc. in a loan transaction with another party. The law firm became concerned that as a hearing date approached, Blair had not paid its legal bills. The firm also claimed to be frustrated about conduct by the client that ran counter to its advice. The firm had some internal conversations about how to handle the matter. At the hearing, an attorney with Shaw Pittman told the court that the firm was withdrawing as counsel and presented no argument on Blair's behalf. Instead, the firm requested a continuance until Blair could retain new counsel. The court declined the continuance and entered an order unfavorable to Blair.

Following the hearing, a Blair official called a Shaw Pittman partner expressing anger at the developments in court. He demanded that the problem be "fixed." Shaw Pittman then held internal discussions about how to address the matter. Later, Blair sued Shaw Pittman for malpractice and for "abandoning" them during the course of the representation.

In the lawsuit, the company sought various documents connected to the firm's internal discussions. The court found that because the firm did not retain outside counsel, some of the material was not privileged. The court stated: "A law firm's interest in protecting its otherwise privileged communications must yield to the societal interest in assuring that before a lawyer takes action which may jeopardize a former client's interests he seeks *truly independent advice* as to his ethical obligations." (Emphasis added.) The court recommended that lawyers seek independent outside advice for these kinds of ethical issues.

Outside counsel, having no professional obligation to the law firm's client, can form a conventional attorney-client relationship with the firm, with an unquestioned right for the firm to claim privilege for these communications. But the uncertainty of the application of attorney-client privilege should not lead to overall abandonment of a firm's internal protective measures. Rather, law firms should consider outside counsel as an option when they might anticipate future litigation with a client.

Although no one has a crystal ball that can predict when future litigation will arise, unhappy clients will usually let their unhappiness be known, and if they believe they have suffered from the handling of a case, the firm can expect to hear from them. Also, when a client is investigated or sued regarding a matter for which a law firm was involved, the firm can anticipate that the client will try to share the blame.

Finally, there is another hazard in relying on in-house advice. The coziness of consulting with close colleagues carries the danger that necessary but tough advice will either not be given or not be taken seriously. The formality of retaining outside counsel, who is focused on providing competent and independent advice, can be just what the doctor ordered when the stakes are high.

Arthur D. Burger is a director at Washington, D.C.'s Jackson & Campbell and is chair of the firm's professional responsibility practice group. He represents law firms and lawyers in matters related to professional ethics.

© 2006 ALM Properties Inc. All rights reserved. This article is reprinted with permission from Legal Times
(1-800-933-4317 • LTsubscribe@alm.com • www.legaltimes.com).