

Case Study: Fireman's Fund Insurance V. Front Gate Plaza

Law360, New York (September 19, 2011, 12:35 PM ET) -- Law firms assemble teams of lawyers, paralegals and legal assistants to represent their clients. Effective representation requires that communications among the team members about their client's confidences as well as the team's legal opinions be kept confidential. Most lawyers assume that the attorney-client and work-product privileges protect from disclosure such communications and opinions, even if they are unwritten and never communicated to the client.

However, until recently, no California court had explicitly ruled on the matter. That changed with *Fireman's Fund Insurance Company v. Sup. Ct.* (2011) 196 Cal. App. 4th 1263, in which a California court of appeal put to rest any doubt that both the attorney-client and work-product privileges absolutely protect from disclosure communications among legal team members as well as an attorney's unwritten, uncommunicated legal opinions.

The case reached the court of appeal as a result of a decision by the trial court that surprised California's legal profession. The court of appeal considered whether an attorney may be forced to reveal her confidential communications about client matters with other legal team members, including two other attorneys at her law firm and an investigator whom the law firm hired to represent the client. It also considered whether the work-product privilege absolutely protected her unwritten legal opinions. The trial court had found that the communications were not privileged because they did not involve a communication with the client, and her legal opinions were not privileged because they had not been reduced to writing.

The trial court's decision threatened to have a substantial impact on the practice of law in law firms throughout California and would have potentially led to considerable changes in the way firms manage and document communications regarding a client or a client's case. For example, the decision — if allowed to stand — would have required attorneys to document every thought to avoid discovery and would have exposed attorneys to malpractice suits if the failure to communicate to clients or document an opinion resulted in its discovery. This would have had a profound impact on the very practice of law.

The court of appeal, however, unanimously reversed the trial court, rejecting the trial court's narrow and restricted view of the attorney-client and work-product privileges.

First, the court of appeal held that California's attorney-client privilege extends to not only confidential communications between a client and an attorney, but also to the attorneys in a law firm, whether or not the attorney communicates that information to the client. It recognized the everyday reality that attorneys working together at a law firm must share confidential information, and that such sharing cannot abrogate the privilege.

Similarly, an attorney may disclose confidential information to an agent hired by the law firm in the course of its representation of the client because such transmission is reasonably necessary to effectively represent the client. Accordingly, the attorney-client privilege bars discovery of confidential communications among legal team members about client matters, even if they are not transmitted to the client.

Second, the court of appeal found that California's codified work-product privilege expressly provides absolute protection to an attorney's written legal opinions and qualified protection to an attorney's unwritten non-opinion work product. It rejected the argument that an attorney's unwritten legal opinions are not also entitled to absolute protection.

Applying these principles, the court of appeal held that the attorney could not be compelled to disclose her confidential communications with legal team members or her unwritten legal opinions. And in doing so, the court finally put to rest the question of whether the attorney-client and work product privileges protect all forms of intrafirm communications. The answer, to the relief of many, is a resounding "yes."

--By Rex Heinke and Maria Ellinikos, Akin Gump Strauss Hauer & Feld LLP

Rex Heinke is a partner in Akin Gump's commercial litigation practice and co-head of the firm's Supreme Court and appellate practice, in the firm's Los Angeles office. Maria Ellinikos is counsel in the firm's commercial litigation practice in San Francisco.

Akin Gump Strauss Hauer & Feld LLP served as counsel to Fireman's Fund Insurance Company in the case referenced above, Front Gate Plaza LLC v. Fireman's Fund Insurance Company.

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