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Privilege when firms advise themselves

By Gay Crosthwait Grunfeld and Sarah Poppy Alexander

The decision in *Edwards Wildman Palmer LLP v. Superior Court*, 231 Cal. App. 4th 1214 (2014), shields intra-firm conversations about a current client's potential malpractice claims from future discovery if that client files a subsequent lawsuit against its attorneys. In reaching this result, the 2nd District Court of Appeal rejected the teaching of three federal district courts, all of which had refused to recognize law firm general counsel communications about a dissatisfied client as privileged under California law.

The general rule in malpractice cases is that communications between the former client and its former law firm are no longer subject to the attorney-client privilege for the purposes of the malpractice suit. However, the *Edwards Wildman* court held that, so long as a "genuine attorney-client relationship exists" between a law firm's "in-house counsel" and the law firm, the firm may shield all communications concerning a client's potential claim, once the firm learns the client may bring a malpractice suit.

To obtain this protection, a firm must show that (1) an attorney has been designated — formally or informally — as in-house counsel; (2) this attorney has not performed work for the outside client on "substantially related matter[s]"; (3) the outside client was not billed for the consultation time between the in-house counsel and the firm's other attorneys; and (4) the communications were "made in confidence and kept confidential."

In so holding, the *Edwards Wildman* court carves out a special privilege for law firms with designated in-house counsels: Only those firms can shield communications from discovery. After *Edwards Wildman*, wronged clients seeking malpractice damages must not only overcome the barriers posed by a one-year statute of limitations and a but-for causation standard, they must also face a judicially created barrier to highly relevant discovery.

The *Edwards Wildman* court based its holding on a narrow reading of the California Evidence Code. Because the code includes no enumerated exception to attorneyclient privilege that explicitly allows an attorney's "fiduciary duty" or duty to a "current client" to trump attorney-client privilege, the court found that an alleged violation of the law firm's duties to its clients cannot overcome the attorney-client relationship that exists between a firm's in-house counsel and itself.

To reach this conclusion, *Edwards Wildman* relies on *Wells Fargo Bank v. Superior Court*, 22 Cal. 4th 201 (2000), where the state Supreme Court shielded communications between a trustee bank and its in-house counsel from discovery by the trust's beneficiaries who alleged trustee misconduct. The *Edwards Wildman* court reads *Wells Fargo* to "foreclose [the plaintiff's] argument that a fiduciary or current client exception to the attorney-client privilege exists." But by treating *Wells Fargo* as controlling authority, the *Edwards Wildman* court ignores the fundamental difference between attorneys and other fiduciaries.

For a law firm seeking to shield communications, a second attorney-client relationship is at play — that of the firm to its allegedly wronged client. This second and more important attorney-client relationship is not an issue for any other fiduciary. In fact, a key component the *Wells Fargo* decision was that under California law, "the attorney for the trustee of a trust is not, by virtue of this relationship, also the attorney for the beneficiaries of the trust."

The opposite is true in the in-house counsel context. The outside client remains the client of the entire law firm, including the designated in-house counsel, and the entire law firm retains its attorney-client obligations to the outside client. *Edwards Wildman* dismisses this as a "thorny ethical issue[]"with no legal analysis.

Edwards Wildman's simplistic holding ignores the dual representation problem created when a firm consults in-house counsel about claims that may be brought by the law firm's outside clients: The law firm comes to represent both itself and the outside client in violation of Rule of Conduct 3-300. By designating a general counsel who can provide secret advice to the firm's attorneys, the law firm assumes an adverse relationship to its own client — without informed consent and waiver from that same client.

These ethical issues have been glossed over by other articles, which have viewed *Edwards Wildman*'s general counsel shield as a positive development.

By quickly dismissing the dual representation issue, *Edwards Wildman* and previous commentators overlook exactly how "thorny" this issue really is. For example, the problem of attorney-client confidentiality for the outside client is not adequately addressed. Effectively, *Edwards Wildman* allows the firm to breach the confidentiality of one client (the outside client) by discussing its case with another client (the law firm itself). The outside client receives no notice of this breach of confidentiality. Law firms get to have it both ways: They can share confidential information about their outside clients with their in-house counsel, because all the firm lawyers are within the privilege. But they get to use the in-house counsel to create a new attorney-client relationship to shield those in-house communications from future discovery.

The *Edwards Wildman* court values the attorney-client privilege of one set of communications (lawyer to lawyer) above another (lawyer to client). Despite *Edwards Wildman*'s lip service to judicial restraint, there is no statutory or precedential justification for this choice. *Edwards Wildman* may chill attorney-outside client speech as clients may avoid alerting attorneys to their dissatisfaction with the attorneys' services, knowing this expression will allow attorneys to shield communications. Simple attorney-client disagreements or misunderstandings that could be resolved through open and honest communication may instead end up in litigation.

The dual representation problem does not bother the *Edwards Wildman* court because apparently the court trusts that attorneys will keep the outside clients' best interests in mind: Outside clients should simply trust that the shielded conversations are in the outside client's interests. Many clients will find this position naïve. Why should an already dissatisfied client trust a firm to value its outside client's interest above its own?

The *Edwards Wildman* ruling not only hurts clients, it also sets up a two-caste system for legal practitioners. Larger firms with the resources to designate in-house counsel receive added protection against discovery in their defense against malpractice suits. Smaller firms and solo practitioners without these resources will not gain the same protections. Large firms can proactively fight future discovery requests by "deputizing" scores of lawyers as "in-house counsel" (as was done by the defendant in *Edwards Wildman* itself), even after becoming aware of a pending suit. Many small firms do not have a sufficient number of attorneys to hold one in reserve just in case an outside client threatens suit and the firm wishes to deputize an in-house counsel.

Because so many legal malpractice lawsuits settle, it may take time before the state Supreme Court examines the *Edwards Wildman* rule. In the interim, sophisticated clients may wish to avoid large law firms that have designated in-house counsel. Clients may even be motivated to bring their legal business to law firms lacking the resources or desire to designate an in-house counsel and the dual representation that designation fosters.

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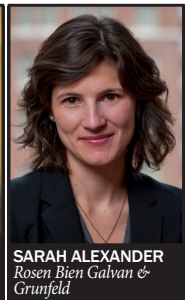

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