



## Alerts

### Law Firm's Internal Loss Prevention Communications Are Privileged From Discovery by Client

March 17, 2011

*Lawyers for the Profession® Alert*

*Tattletale Alarm Systems, Inc. v. Calfee, Halter & Griswold, LLP, et al.*, 2011 WL 382627 (S.D. Ohio 2011)

#### Brief Summary

The U.S. District Court for the Southern District of Ohio rendered an important decision in the area of law firm risk management and attorney-client privilege. The court held that when lawyers within a firm communicate internally regarding the firm's potential malpractice in an existing client's matter, those communications are protected from later discovery by the client under the attorney-client privilege unless the client can establish good cause for discovery.

#### Complete Summary

A law firm, upon failing to file a patent maintenance fee for an existing client, engaged in internal communications regarding whether the client might assert a malpractice claim and, if so, what loss prevention efforts could be made. The client eventually did bring a malpractice claim and sought to compel discovery of documents containing the firm's loss prevention communications. The firm claimed that those documents were privileged. The client, however, argued that because the communications took place while the attorney-client relationship was still intact, privilege did not attach.

The U.S. District Court for the Southern District of Ohio, in an attempt to infer how the Ohio Supreme Court would address the issue, held that the loss prevention communications were privileged. The court first noted, contrary to the client's position, that the attorney-client privilege attaches when one attorney seeks legal advice from another lawyer in the same firm. Therefore, in order for the client to prevail, the court would need to fashion an exception to the attorney-client privilege.

The court held that the loss prevention communications did not appear to fall into any existing category of exceptions to the attorney-client privilege. Under Ohio law, according to the court, exceptions to the attorney-client privilege generally exist in three situations: (1) when the underlying communications serve no societal value; (2) when application of the privilege would not further

#### Service Areas

Counselors for the Profession

Lawyers for the Profession®

Litigators for the Profession®



the policy goal of encouraging open communication between attorney and client; or (3) when application of the privilege would prevent a party from proving its case.

Addressing the first two types of exceptions, the court held that it is important for lawyers who may have erred in representing a client to be able to openly discuss loss prevention issues in order to obtain prompt advice regarding how to correct the error and to mitigate any harm to the client. Regarding the third, the court noted that it would be hard to conceive a case in which the client's ability to prove legal malpractice turned on loss prevention communications.

Finally, the court addressed the client's argument that an exception to the attorney-client privilege should be created because the firm had a conflict of interest when the loss prevention communications took place. Such reasoning, the court noted, had formed the bases for opinions from other jurisdictions holding that loss prevention communications are not privileged. Despite the prevalence of such opinions, the court indicated that their foundation was questionable.

The key decision in that line of cases involved a conflict, not between lawyer and client, but rather between two clients. And while that decision held that the clients could not assert privilege against one another, more recent ones have indicated that, even if two clients have a common interest, once that interest dissipates or becomes adverse, attorney-client communications arising thereafter may be privileged as between the clients.

Drawing from a balancing test articulated in one of those more recent decisions, the court held that the client could overcome the privilege here based on a showing of good cause. In determining whether the client had established good cause, the court analyzed factors such as: the extent to which a law firm's conduct may have been either criminal or fraudulent, whether the privileged communications related to past or future conduct, and whether the client had other readily available sources of proof. Those factors, the court held, weighed in favor of the firm in this case.

### **Significance of Opinion**

This opinion potentially marks a major shift in the application of the attorney-client privilege to internal law firm risk management communications that take place while the firm effectively has a personal interest conflict with the client. In addition to holding that such communications are privileged, the court's reasoning largely undermines prior court decisions reaching the opposite conclusion. If the ultimate mark of acceptance is the quality of legal reasoning and the good policy sense inherent in the result, this decision clearly has the potential to provide the foundation for a continuing trend toward its conclusions.

For more information, please contact your regular [Hinshaw](#) attorney.

*This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.*