

# California Court Upholds In-House Counsel Privilege

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[\*Palmer v. Superior Court\*, \\_\\_\\_ Cal.Rptr.3d \\_\\_\\_, 2014 WL 6662053 \(2014\)](#)

## Brief Summary

California's Second District Court of Appeal upheld the in-house counsel privilege for communications concerning a dispute with a current client and, in doing so, declined to adopt the "fiduciary duty" and the "current client" exceptions to the attorney-client privilege.

## Complete Summary

Plaintiff brought a malpractice claim against an attorney and her firm as a result of their short-lived representation of him in an invasion of privacy claim. Two months into the representation, plaintiff began sending emails expressing dissatisfaction with the firm's billings and representation. Nevertheless, plaintiff stated that he continued to rely on defendants for legal advice about his matter. Shortly thereafter, plaintiff filed a malpractice action against defendants and substituted new counsel in the underlying litigation.

During the time of representation, the attorney consulted with other attorneys in her firm — the firm's general counsel, claims counsel, and another "deputized" attorney. The firm did not bill plaintiff for any of the other attorneys' time. In response to deposition questions and discovery requests, the attorney invoked the attorney client privilege for internal communications between the attorney and other firm lawyers acting in their capacity as counsel for the firm and/or documents prepared in anticipation of litigation. Plaintiff filed a motion to compel, which the trial court granted. Defendant filed a petition for writ of mandate or prohibition, requesting the trial court to set aside its order and enter a new order denying the motion to compel.

On appeal, plaintiff cited mostly federal authorities — district court and bankruptcy decisions — that have adopted what have been termed the "fiduciary" and the "current client" exceptions to the attorney-client privilege. The underlying premise for both exceptions is that an impermissible conflict is created when a lawyer advises another lawyer from the same firm regarding an issue with a current client. In this circumstance, the attorney client privilege is subordinate to an attorney/firm's ethical and fiduciary duties to its client.

Defendant cited a number of state supreme courts that rejected the exceptions' application, including Massachusetts, Georgia, and Oregon. The *Palmer* court found the Oregon Supreme Court's decision in [Crimson Trace Corp. v. Davis Wright Tremaine LLP](#), 355 Or. 476, 326 P.3d 1181 (Or. 2014) persuasive. The attorney-client privilege in both states was created by statute, neither of which provided for the "fiduciary duty" nor the "current client" exceptions. The *Palmer* court, like the court in *Crimson*, declined to adopt implicit exceptions to those enumerated in the statute.

The court explained that it was not a foregone conclusion that an attorney's consultation with in-house counsel regarding a client dispute will necessarily be adverse to the client. Seeking legal advice to determine how best to address the potential conflict is appropriate whether that advice comes from in-house counsel or outside counsel. Notably, the court stated although certain internal communications may be privileged, there remains a duty of disclosure. The court explained: "Preserving the privileged nature of [the] communications does not affect a law firm's duty to provide a client with full and fair disclosure of *facts* material to the client's interests."

Importantly, the *Palmer* court noted that the privilege only attaches where the firm establishes a "genuine attorney-client relationship." The *Palmer* court relied upon the Massachusetts Supreme Court's decision in *RFF Family Partnership, LP v. Burns & Levinson, LLP*, 465 Mass. 702 (2013) in making this determination:

(1) the law firm must have designated, either formally or informally, an attorney or attorneys within the firm to represent the firm as in-house or ethics counsel...; (2) where a current outside client has threatened litigation against the law firm, the in-house counsel must not have performed any work on the particular client matter or a substantially related matter; (3) the time spent on the in-house communications may not have been billed to the client; and (4) the communications must have been made in confidence and kept confidential.

Ultimately, the court found that based on the facts, certain communications at issue were not privileged because they were between lawyers in the firm who were handling the case for the client.

### Significance of Opinion

This decision is significant because the issue of whether California should adopt the "fiduciary" or "current client" exceptions in the context of intra-firm communications was one of first impression for a California appellate court. In rejecting those exceptions, the decision reinforces the in-house counsel privilege in California courts — an increasingly important safeguard as firms continue to grow and become more inclined to rely on in-house counsel for day-to-day ethics and claims advice.

For more information, please contact Terrence P. McAvoy or Michael G. Ruff.

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