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## **SOLICITOR-CLIENT PRIVILEGE FOR ETHICS COUNSEL: LESSONS FOR CANADA FROM THE UNITED STATES**

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*Canadian law firms are increasingly designating lawyers within the firm to act as ethics counsel, advising the firm's other lawyers. This article considers whether communications with ethics counsel should be subject to solicitor-client privilege, so that the firm would not be required to disclose them to the client. While there is virtually no analysis of this issue in a Canadian context, it has been raised in both jurisprudence and commentary in the United States. The first part of this article reviews the American position. The article's second part considers the Canadian authorities that bear, at least indirectly, on the issue and makes recommendations for the development of Canadian law.*

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*Les cabinets d'avocats canadiens désignent de plus en plus fréquemment certains de leurs propres avocats pour agir à titre de conseiller en déontologie auprès de leurs collègues du cabinet. Cet article examine la question de savoir si les communications avec les conseillers en déontologie devraient être couvertes par le secret professionnel de façon à ce que le cabinet ne soit pas tenu de les divulguer au client. Bien qu'il n'existe pratiquement aucune analyse de cette question dans le contexte canadien, elle a été soulevée aux États-Unis tant en jurisprudence que dans les commentaires. La première partie de l'article est consacrée à un examen de la position américaine, alors que la deuxième analyse les textes canadiens qui portent, du moins indirectement, sur la question et présente des recommandations pour le développement du droit canadien.*

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## 1. Introduction

Canadian law firms are increasingly designating one or more lawyers within the firm to act as “ethics counsel.” These lawyers advise other lawyers in the firm on ethical issues that arise in the course of their practices. They do this both proactively, implementing policies designed to further ethical conduct, and reactively, counselling lawyers who come to them when a problem arises.<sup>1</sup> Recently Adam Dodek, a leading Canadian legal ethicist, has called on law societies to require every law firm of a certain size to designate one of its members as its ethics counsel.<sup>2</sup> Whether or not this proposal is accepted, the use of ethics counsel by Canadian firms is likely to increase.

The development of the position of ethics counsel raises important ancillary issues. One such issue is the status of communications passing between ethics counsel and other lawyers in the firm. If a lawyer obtains advice from ethics counsel, and the firm’s client asks the lawyer for the details of that advice, does the lawyer have to provide them? What if the client is concerned about whether the lawyer has acted professionally or competently and is looking for reassurance? What if the client suggests that he or she is considering suing the firm for malpractice? What if the client terminates the retainer and subsequently does bring such a claim? In each of these situations, can the client compel the lawyer to disclose internal communications with ethics counsel?<sup>3</sup>

On one view, these communications could not be withheld from the firm’s client. The client has retained the firm, including all lawyers in it, to serve him or her as counsel. Any communications between lawyers in the firm with respect to the client’s matter would, on request of the client, have to be disclosed. This would be consistent with the firm’s fiduciary duty to the client and with the ethical obligations of loyalty and candour.

The aim of this article is to consider an alternative view, namely that communications between a lawyer and the firm’s ethics counsel could, in certain circumstances, be subject to solicitor-client privilege, a privilege

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<sup>1</sup> See Adam Dodek, “Regulating Law Firms in Canada” (2012) 90 Can Bar Rev 381 at 435.

<sup>2</sup> *Ibid.*

<sup>3</sup> Consider, for example, the recent claims by former clients against law firms that issued favourable opinions about tax schemes subsequently found to be illegal; see *Charette v Trinity Capital Corp*, 2012 ONSC 2824, [2012] OJ No 2328 (QL). More generally, a current or former client might seek access to a firm’s internal communications about whether the firm thought it had or had not committed a breach of ethical or professional rules or standards while acting for that client.

operating within the confines of the firm itself, such that the firm would not be required to disclose them to the client.<sup>4</sup> There is virtually no analysis of this issue in a Canadian context. However, the issue has been raised in both jurisprudence and commentary in the United States. Accordingly, the first substantive part of this article reviews the American position on the issue of privilege for communications with ethics counsel. The article's second part considers the Canadian authorities that bear, at least indirectly, on the issue and makes some recommendations for the development of Canadian law.

Three preliminary points should be made about scope and terminology. First, several of the situations under consideration also raise possible issues of litigation privilege.<sup>5</sup> Accordingly this article will also briefly consider the role of litigation privilege, but the central focus will be on solicitor-client privilege. It is better established and of broader potential application. Second, this article focuses on particular lawyers within law firms acting as ethics counsel. The issue of privilege can also arise with respect to communications between a lawyer acting for a client and another lawyer in the firm who is not acting in that role. Establishing privilege in those situations is considerably more difficult. As befits an initial exploration of this topic, this article focuses on the more straightforward situation involving ethics counsel. Third, the literature and jurisprudence uses a wide variety of terms such as in-firm counsel, general counsel and counsel-of-record, often interchangeably, when referring to the role this article calls ethics counsel. The term as used here describes a lawyer who offers legal advice to the firm and its lawyers.<sup>6</sup>

## 2. *The Privilege in the United States*

As will be explained, the law on this issue in the United States is in flux. Aspects of the leading approach have recently been subjected to significant criticism and as a result the law is evolving. Looking to American law for guidance requires a reasonably detailed analysis of these developments before conclusions can be drawn. The approach here is to proceed

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<sup>4</sup> A related but different question is whether such communications could be privileged as against another lawyer in the firm. For example, a partner might sue his or her firm and seek disclosure of such communications. That question is not addressed in this article.

<sup>5</sup> On the distinction between these two privileges, see Dale E Ives and Stephen GA Pitel, "Filling in the Blanks for Litigation Privilege: *Blank v Canada (Minister of Justice)*" (2007) 11 Int'l J Ev & Proof 49.

<sup>6</sup> See Dodek, *supra* note 1 at 435 on this terminology and the merits of using "ethics counsel."

historically, considering how the American position has evolved and is continuing to develop today. This section should be read in conjunction with the Addendum, below, which analyses two notable recent decisions.

### *A) In-House Counsel Generally*

In the United States the development of attorney-client privilege for communications with ethics counsel is rooted in the more general development of a similar privilege for in-house counsel.<sup>7</sup> Facing the need to “constantly go to lawyers,” many corporations prefer to maintain in-house counsel.<sup>8</sup> These lawyers can perform the same tasks as outside attorneys, but are proximate to the business in space, familiarity and loyalty. As a result, in-house counsel have better access to the information they need to represent their employer. Of course, the value of lawyer-client communication is enhanced by confidentiality. Clients tell their lawyers more when they know that their communications will not be used as evidence against them later, and when clients tell their lawyers more, lawyers can give better legal advice. The evidentiary rule which protects this candor, attorney-client privilege, is the “oldest of the privileges for confidential communications known to the common law.”<sup>9</sup> Attorney-client privilege prohibits the compelled disclosure of communications between lawyers and their clients, except under certain conditions, such as when the communications are used for fraud or crime.

American courts have long allowed privilege to attach to communications between in-house lawyers and their corporate clients.<sup>10</sup> The substantive differences between in-house and outside counsel – proximity, pay structure and independence – are insufficient to distinguish the two for the purposes of attorney-client privilege. The “realities of modern corporate law practice” are such that the services performed by in-house counsel are substantially identical to that of outside counsel.<sup>11</sup> The privilege for both is governed by the test in *US v United Shoe Machinery Corp*:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which

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<sup>7</sup> In the analysis of the American law some American terminology will be used, such as “attorney-client privilege” rather than “solicitor-client privilege.”

<sup>8</sup> *Upjohn Co v US*, 449 US 383 at 392 (1981) [*Upjohn*].

<sup>9</sup> *Ibid* at 389.

<sup>10</sup> 89 F Supp 357 at 360 (Mass 1950) [*United Shoe*].

<sup>11</sup> *Ibid*.

the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.<sup>12</sup>

For corporations, then, in-house counsel may be used in lieu of a lawyer from an outside firm and attorney-client privilege covers the relevant internal communications.

### *B) Law Firm Development of Ethics Counsel*

Like other businesses, law firms and individual lawyers within them often need legal advice. Adherence to the laws and rules which govern the practice of law is not an instinctive matter and the price of non-compliance has been rising. Legal malpractice actions have become more common and settlements have become more expensive.<sup>13</sup> Federal regulators have placed additional responsibilities on lawyers and imposed new enforcement mechanisms. Firms need to upgrade their ethical infrastructure to keep pace. Accordingly, an increasing number of American law firms are turning to in-house ethics counsel to create and maintain the needed policies and practices which can keep the firm in compliance and out of trouble.

Furthermore, the American Bar Association's *Model Rules of Professional Conduct* recommend the use of in-house counsel to improve the "ethical atmosphere" of a firm.<sup>14</sup> Firm management has the responsibility to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct,"<sup>15</sup> including establishing such policies and procedures as are necessary to "detect and resolve" potential conflicts.<sup>16</sup> One way that management can satisfy this responsibility is by designating a specialist to formally train, supervise and report on the ethical conduct of lawyers within the firm. While some commentators are sceptical of the ability of a formally-designated in-house

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<sup>12</sup> *Ibid* at 358-59.

<sup>13</sup> Ronald D Rotunda, "Why Lawyers are Different and Why We are the Same: Creating Structural Incentives in Large Law Firms to Promote Ethical Behavior" (2011) 44 Akron L Rev 679 at 685 (citing a jury award of \$103 million).

<sup>14</sup> American Bar Association, *Model Rules of Professional Conduct*, Chicago: ABA, 2010, Rule 5.1 commentary 3 [ABA Model Rules].

<sup>15</sup> *Ibid*, Rule 5.1(a).

<sup>16</sup> *Ibid*, Rule 5.1 commentary 2.

<sup>17</sup> Anthony V Alfieri, "The Fall of Legal Ethics and the Rise of Risk Management" (2006) 94 Geo LJ 1909 at 1928.

counsellor to change the culture of a firm,<sup>17</sup> the training provided by ethics counsel, at the very least, reduces non-compliance based on ignorance of a lawyer's ethical obligations.<sup>18</sup>

The functions of ethics counsel were at first carried out on an *ad hoc* basis, ancillary to the administrative duties of a partner.<sup>19</sup> The firm's policies and procedures relating to solicitation, conflict-management, attorney-client and work order privilege, lateral hiring and departure, billing, withdrawal and the duty to report lawyer misconduct were handled by whoever could most reasonably handle them.<sup>20</sup> The later formalization of the role was partially in response to the reality that someone, usually a partner, was putting considerable time into the position. Busy partners, having little incentive to take on uncompensated management roles, have tended to perform their ethics counsel duties more proactively when the position is formalized and made a component of their compensation.<sup>21</sup> In addition, the creation and administration of policies and procedures to improve the ethical infrastructure of the firm calls for expertise different from that of most partners and can be performed more cheaply by increasing specialization rather than by dispersing responsibility.<sup>22</sup>

There is evidence that law firms that compensate ethics counsel directly develop a more extensive "ethical infrastructure" than those which do not.<sup>23</sup> Full-time specialists can provide a comprehensive package of services such as systems monitoring, training and resource development.<sup>24</sup> They are more proactive than their uncompensated counterparts, often knocking on the doors of junior associates and senior partners alike in their rounds.<sup>25</sup> Other lawyers in the firm are less afraid of imposing on the time of the person who is compensated precisely to answer their questions.<sup>26</sup> It is also easier for young lawyers to admit that they have made a mistake or to express concerns over the behaviour of a senior associate or partner to ethics counsel than to others in the firm.<sup>27</sup>

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<sup>18</sup> Rotunda, *supra* note 13 at 722.

<sup>19</sup> Elizabeth Chambliss and David B Wilkins, "The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms" (2002) 44 Ariz L Rev 559 at 565-66.

<sup>20</sup> *Ibid* at 572.

<sup>21</sup> *Ibid* at 574.

<sup>22</sup> Elizabeth H Gorman, "Explaining the Spread of Law Firm In-House Counsel Positions: A Response to Professor Chambliss" (2006) 84 NC L Rev 1577 at 1580-81.

<sup>23</sup> Chambliss and Wilkins, *supra* note 19 at 575.

<sup>24</sup> *Ibid* at 580.

<sup>25</sup> *Ibid* at 574.

<sup>26</sup> *Ibid* at 580.

<sup>27</sup> Rotunda, *supra* note 13 at 704.

Firm management has generally tried to re-organize firm practices in accordance with profit-maximizing business models. In a competitive market in which firms can no longer be assured of monopolizing their clients, firm management has tried to rationalize the firm's risk-taking to maximize the profit per partner.<sup>28</sup> This shift has moved the focus of ethical training from trying to promote "good character" in individual lawyers to creating a formal system of administrative and management techniques designed to minimize legal liability.<sup>29</sup> Psychological and sociological studies on ethical misconduct in firms suggest that systemic factors are far more determinative of ethical outcomes than individual characteristics.<sup>30</sup> While earlier generations of lawyers were expected to utilize their "intellectual skill and excellence of judgement"<sup>31</sup> to solve ethical dilemmas, rationalized firms seek to minimize individual discretion.<sup>32</sup> Uniform, predictable responses to developments are utilized as guides for lawyers in lieu of personal judgement,<sup>33</sup> and the responsibility for making ethical choices in the practice of law has been shifted to in-firm specialists. Lawyers need only to go to their in-house ethics counsel with their concerns to complete their moral obligations.<sup>34</sup>

The most important factor for ethics counsel in gaining the respect of other lawyers is visible support from managing partners. Lawyers often define right and wrong in terms of what others think,<sup>35</sup> and are in the habit of "looking up and looking around" for guidance.<sup>36</sup> For most lawyers, understanding expectations means understanding what the lawyers above them in the hierarchy expect.<sup>37</sup> Norms, tastes, principles and ethics are all mutable concepts and the "final arbiter" can be the partner for whom one is working.<sup>38</sup> The support of managing partners is therefore critical.

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<sup>28</sup> Benjamin P Cooper, "The Lawyer's Duty to Inform His Client of His Own Malpractice" (2009) 61 *Baylor L Rev* 174 at 178.

<sup>29</sup> Alfieri, *supra* note 17 at 1928.

<sup>30</sup> Arthur J Lachman, "Are They Just Bad Apples? Ethical Behaviour in Organizational Settings: An Introduction" (2007) *Prof Law Symp Issue* 33 at 33.

<sup>31</sup> Alfieri, *supra* note 17 at 1928.

<sup>32</sup> Milton C Regan, "Risky Business" (2006) 94 *Geo LJ* 1957 at 1962.

<sup>33</sup> *Ibid.*

<sup>34</sup> See Alfieri, *supra* note 17 at 1939 (argues that this may "diminish a lawyer's individual responsibility for making moral choices ... firm-devised, risk spreading systems may therefore have the effect of inducing a kind of moral apathy").

<sup>35</sup> Kimberly Kirkland, "Ethics in Large Law Firms: The Principle of Pragmatism" (2005) 35 *U Mem L Rev* 631 at 715.

<sup>36</sup> *Ibid* at 643.

<sup>37</sup> *Ibid* at 679.

<sup>38</sup> *Ibid* at 636.

Pressure from insurance companies has provided additional incentive for firms to create designated ethics counsel. As the payments by legal malpractice insurers have grown, their demands for law firms to create a series of policies and practices to better manage risk have grown louder. Insurers expect to be kept informed, not only in regards to which practices are being implemented at firms but also about specific situations which may result in malpractice claims.<sup>39</sup> Among the demands of the insurers has been that firms establish ethics counsel. He or she acts not only as a go-to for ethical compliance crises within the firm but as the liaison to the insurer, keeping it apprised of potential liability claims. The presence of ethics counsel is believed to lower the risk and scope of ethical breaches, and for good reason: firms which have created a full-time ethics counsel have seen reductions in malpractice claims by an average of \$200,000 per year.<sup>40</sup>

Federal regulators, too, have put considerable pressure on firms to comply with their professional and ethical standards. The Enron scandal brought the issue of lawyers aiding their clients in professional misconduct to national attention.<sup>41</sup> The federal government responded to the outcry, indicting an “astonishing number of lawyers” in corporate fraud cases.<sup>42</sup> In the three years after the *Sarbanes-Oxley Act of 2002* was enacted,<sup>43</sup> Securities and Exchange Commission actions against lawyers grew more than ten-fold.<sup>44</sup>

In the United States the use of ethics counsel by firms is widespread and eventually will likely become taken for granted.<sup>45</sup> As ethics specialists become a regular part of firms, they also become a part of firm culture. Given the value of these specialists, demonstrated in lower premium costs, fewer malpractice claims and fewer indictments, lawyers will no doubt continue to lend their support to the use of ethics counsel.

### *C) Ethics Counsel and Privilege*

Not surprisingly, communications between lawyers and ethics counsel became a pre-trial discovery issue in malpractice actions. Memoranda

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<sup>39</sup> Brian Pollack, “Surviving a Screw-Up” (2007) 34 *Litigation* 19 at 24. A professional liability insurance policy typically provides that the firm must notify the carrier of potential claims upon becoming aware of any act, error or omission which could reasonably be expected to form the basis of a claim.

<sup>40</sup> Rotunda, *supra* note 13 at 706.

<sup>41</sup> *Ibid* at 687.

<sup>42</sup> *Ibid*.

<sup>43</sup> Pub L No 107-204, 116 Stat 745.

<sup>44</sup> Rotunda, *supra* note 13 at 698.

<sup>45</sup> Gorman, *supra* note 22 at 1583.

between lawyers, firm management and ethics counsel regarding a firm's liability are key disclosure targets for a plaintiff's lawyer. Whether the firm must provide these documents depends on whether the documents are protected by attorney-client privilege.

In *In Re Securities Sunrise Litigation*, a law firm, Blank Rome, was a defendant in proceedings against a savings and loan association, Sunrise, by former shareholders, outside directors and the Federal Savings and Loan Insurance Corporation.<sup>46</sup> In response to a motion to compel discovery of internal documents, Blank Rome claimed attorney-client privilege for communications between its lawyers and its ethics counsel.<sup>47</sup> The Court originally declined to find that attorney-client privilege could exist between lawyers in a law firm, apparently because the Court believed that in-house counsel could not be sufficiently distinguished from other lawyers in the firm: "only communications from one person or entity, a client, to another person or entity, an attorney, can be protected by the attorney client privilege."<sup>48</sup> The firm and its ethics counsel were "members of one and the same entity."<sup>49</sup>

On a motion for reconsideration, however, the Court was persuaded that a firm's use of ethics counsel was sufficiently analogous to a corporate firm's use of in-house counsel, and accordingly it held that attorney-client privilege could attach to the communications. Noting that to deny privilege would "effectively penalize law firms by holding them to a standard which has no counterpart in any other sphere of the business or professional community," the Court permitted the firm to provide evidence establishing that its intra-firm communications were privileged.<sup>50</sup> Like any other entity, the law firm was required to establish privilege according to the parameters outlined in *United Shoe*.<sup>51</sup>

Recognizing that the fiduciary duty of lawyers created obligations to their clients that other corporations did not owe to other plaintiffs, however, the Court in *Sunrise* created an exception to the attorney-client privilege: "[W]hen a law firm seeks legal advice from its in house counsel, the law firm's representation of itself (through in house counsel) might be directly adverse to, or materially limit, the law firm's representation of another client, thus creating a prohibited conflict of interest."<sup>52</sup> The Court

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<sup>46</sup> 130 FRD 560 at 572 (ED Pa 1989) [*Sunrise*].

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid* at 595.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.* This exception is discussed in detail below.

held that this conflict of interest negates the privilege which would otherwise protect the firm's internal communications.

The scope of the privilege recognized in *Sunrise* has been clarified in subsequent cases. In *US v Rowe* the federal government challenged the assertion of the privilege in respect of internal fact-finding.<sup>53</sup> A senior partner in a law firm, while investigating allegations of misappropriation of client funds by one of the other partners, had two associates assist him. During discovery in the case against the offending partner and the firm, the government requested the documents which detailed the findings of the associates. When the firm claimed privilege over these documents, the government argued that the law firm was being rewarded "just for being a law firm" and that other companies would not be similarly protected if they used their own employees to investigate internal wrongdoing.<sup>54</sup> The Court disagreed, noting that most companies would not use their own employees to conduct an internal investigation of legal wrongdoing but would instead hire lawyers. The fact that it is convenient for law firms to employ their own lawyers in this capacity provided no justification for denying privilege. The Supreme Court in *Upjohn* had observed that "[t]he first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant."<sup>55</sup> Attorney-client privilege, which protects communications for the purpose of giving or receiving legal advice, thus protects fact-finding. The Court concluded that to withhold the privilege from lawyers hired by their own firms would be to punish the firm for being a law firm, which the court declined to do.<sup>56</sup>

Implicit in *Rowe*, and confirmed in subsequent cases, is that intra-firm attorney-client privilege extends to lawyers who are performing legal services for the firm on an *ad hoc* basis. Neither of the associates employed to investigate the partner was an ethics counsel, in any formal sense, for the firm: they had simply been assigned the work by another partner. While *Rowe* was decided on the question of whether the fact-finding efforts of firm employees constituted the performance of legal services when those employees are lawyers, the question of whether intra-firm communications with *ad hoc* in-house counsel is privileged was explicitly affirmed in *Hertzog, Calamari & Gleason v Prudential Insurance Company of America*. The Court denied that there was any "principled reason" to refuse to extend the attorney-client privilege to law firms which use a partner or

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<sup>53</sup> 96 F 3d 1294 (9th Cir 1996) [*Rowe*].

<sup>54</sup> *Ibid* at 1297.

<sup>55</sup> *Ibid* at 1297, quoting *Upjohn*, *supra* note 8 at 390-91.

<sup>56</sup> *Ibid*.

associate as internal counsel: “[S]o long as the individual in question is only acting as an attorney, the privilege attaches.”<sup>57</sup>

The privilege was broadened in *Nesse v Pittman* to include communications between partners who discuss the findings of ethics counsel.<sup>58</sup> A trustee for a former client of the firm was suing over the manner in which the firm had withdrawn from representation. Prior to the proceedings, the law firm, through its ethics counsel, had conducted an internal investigation of the lawyer who had been handling the case, seeking to discover the limits of the firm’s liability. After discovering some of the lawyer’s mistakes, several partners in the firm used the information gathered by the ethics counsel at a meeting held to determine the fate of the lawyer. When documents generated at the meeting were requested during discovery, the magistrate initially held that they were not protected by privilege because their primary purpose was to determine the future of the lawyer.<sup>59</sup> Such considerations were business issues, not legal ones, and were therefore not protected by attorney-client privilege. On an evidentiary hearing, however, the magistrate changed (or, in the magistrate’s own words, refined) the ruling to hold that the purpose for which the information was gathered in the first place would be considered determinative and that the motivation behind a lawyer’s subsequent communication should be disregarded.<sup>60</sup>

#### *D) Exceptions to the Privilege*

Conceptually there is a distinction between an exception to solicitor-client privilege and the absence of a precondition to the privilege. In the former the test for privilege is met whereas in the latter it is not. The analysis in the jurisprudence has, however, tended to blur these issues, tending to treat reasons for denying privilege as exceptions even when, strictly speaking, they might really go to whether there is a privileged communication at all. For example, when a lawyer obtains advice as an agent acting for a principal, the advice is not privileged as against the principal. From the principal’s position, this is a case where there is no privilege, but courts can and do analyze this situation as an exception to privilege, likely because the communication is privileged as against others.

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<sup>57</sup> 850 F Supp 255 at 255 (SD NY 1994).

<sup>58</sup> 206 FRD 325 at 330 (D DC 2002).

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

### 1) *Conflict of Interest*

In *Sunrise* the court reached the conclusion that a conflict of interest trumps attorney-client privilege by borrowing the logic of a corporate shareholder case. In *Valente v Pepsico Inc* a lawyer for Pepsico sat on the board of directors of Wilson, a company of which Pepsico was a majority shareholder.<sup>61</sup> After a takeover of Wilson by Pepsico, some of the minority shareholders of Wilson felt that some statements that Pepsico had made during the negotiation were misrepresentations, and they sued Pepsico.<sup>62</sup> During the discovery process, the minority shareholders sought release of some documents which contained communications from the lawyer to the board of directors of Pepsico, which Pepsico claimed were protected by attorney-client privilege.<sup>63</sup> The Court held that the corporation was not entitled to claim the privilege against its own shareholder.<sup>64</sup> Attorney-client privilege, according to the Court, cannot be asserted against a party to whom one owes a fiduciary obligation:

[W]here a fiduciary represents conflicting interests, particularly where one of those interests is its own, the only purpose to be served by the use of the privilege to withhold information from those to whom the fiduciary obligation runs is fraud. The more general and important right of those who look to fiduciaries to safeguard their interests, to be able to determine the proper functioning of the fiduciary, outweighs the need for the privilege and its base of attorney-client confidence.<sup>65</sup>

Adopting this logic, the Court in *Sunrise* subordinated the attorney-client privilege protecting intra-firm communication to the fiduciary obligation which attorneys owe their clients. Because conflicts of interest threaten the fiduciary relationship, communications which contain evidence of such conflicts cannot be privileged against a current client to whom the duty is owed.

This exception to privilege has become known as the fiduciary exception. That label is somewhat misleading, however. The relationship between lawyer and client is a fiduciary one, and as a result any exception based on some aspect of the relationship could be called a fiduciary exception. This nomenclature fails to separate different aspects of the relationship that could give rise to an exception to privilege. Here, the true nature of the exception is based on the lawyer being in a conflict of interest.

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<sup>61</sup> 68 FRD 361 at 363 (D Del 1975) [*Valente*].

<sup>62</sup> *Ibid* at 363.

<sup>63</sup> *Ibid* at 364.

<sup>64</sup> *Ibid* at 369.

<sup>65</sup> *Ibid*.

The *Sunrise* approach to attorney-client privilege puts a firm in an uncertain situation regarding the confidentiality of its internal communications at precisely the time when its lawyers would most need to consult an ethics advisor. In *Koen Books Distributors v Powell, Trachtman, Logan, Carrie, Bowman & Lombardo PC*, the plaintiffs became dissatisfied with the firm which had been representing them in a bankruptcy proceeding.<sup>66</sup> They informed the firm of their dissatisfaction and indicated that they were contemplating a malpractice claim. In spite of this position, the firm's representation continued for an additional five weeks, during which time the clients secured alternative counsel for their pending malpractice claim. In the malpractice action, the plaintiffs requested discovery of internal firm documents which had been generated during those five weeks.<sup>67</sup> Though sympathetic to the "unenviable situation" of the firm, the court ordered production of the documents, concluding that the firm had engaged in a conflicting representation, which, owing to their fiduciary obligations to the clients, negated the attorney-client privilege which would otherwise have protected the communication.<sup>68</sup> By representing itself, that is, by receiving advice from its ethics counsel regarding the pending action, the firm had created a prohibited conflict of interest and thereby breached its fiduciary duty.<sup>69</sup>

In *Koen* the Court reasoned that there were two options available to the firm which would have been consistent with the duty it owed to the clients.<sup>70</sup> First, the firm could have sought to withdraw as counsel after the allegation of malpractice.<sup>71</sup> This would have allowed the firm to subsequently freely communicate internally about the pending action, because the primary duty is owed only to current clients; firms may communicate internally about a prior client while maintaining the privilege. Second, the firm could have sought the clients' consent to its continued representation after full disclosure and consultation, thereby having the clients waive the conflict and restoring the privilege.<sup>72</sup> It is difficult, however, to see how the firm could have realistically employed either of these strategies. A lawyer who has not been discharged cannot withdraw without taking steps necessary to prevent prejudice to the client. If the representation is before a tribunal, the lawyer must seek the tribunal's permission to withdraw.<sup>73</sup> The pending court appearance in which the firm

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<sup>66</sup> 212 FRD 283 at 284 (ED PA 2002) [*Koen*].

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid* at 286.

<sup>69</sup> *Ibid* at 285.

<sup>70</sup> *Ibid* at 286.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> ABA Model Rules, *supra* note 14, Rule 1.16.

was to represent the client may have made it impossible for the firm to withdraw.<sup>74</sup> It is also unlikely that the clients would have waived the privilege of the firm that they intended to sue.

So the firm in *Koen* was placed in a predicament of being unable to withdraw from the representation and being forced to divulge the contents of their intra-firm communications regarding the pending malpractice action against it. In such a position it is little wonder that one observer suggested that firms respond to the *Sunrise/Koen* decisions by making “every attempt to limit internal firm communication regarding possible mistakes, and resulting ethical obligations, to verbal discussions, rather than written communications.”<sup>75</sup> The fiduciary exception makes the privilege for communications with ethics counsel of very limited value.

The *Sunrise*-style implementation of the fiduciary exception starts with an absolute rule, imported from *Valente*, that the lawyer cannot claim privilege against a client when the two are in conflict. Yet the rule from *Valente* was itself a misapplication of the rule from an earlier case, *Garner v Wolfenbarger*.<sup>76</sup> In *Garner*, shareholders had brought a class action against a corporation and its officers, who claimed that certain documents the shareholders wanted to access were protected by attorney-client privilege.<sup>77</sup> The Court, while acknowledging both the importance of privilege to the corporate client and the proper functioning of the attorney-client relationship as a whole, held that the shareholders were entitled to demonstrate why privilege should not be applied in the particular instance.<sup>78</sup> The effect of *Valente*'s interpretation of *Garner* was to change an exception into a rule.

The special access to the communication was justified by the Court in *Valente* by claiming that fraud is the only reason why the fiduciary would seek to maintain secrecy against the person to whom the fiduciary duty is owed.<sup>79</sup> The Court offered no proof for this statement. It is true that clients often become unilaterally vulnerable to their lawyers.<sup>80</sup> And lawyers need to minimize the risk to clients by achieving a high standard of honesty and

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<sup>74</sup> Elisabeth Chambliss, “The Scope of In-Firm Privilege” (2005) 80 *Notre Dame L Rev* 1721 at 1752.

<sup>75</sup> Pollack, *supra* note 39 at 25.

<sup>76</sup> 430 F 2d 1093 (5th Cir 1970) [*Garner*].

<sup>77</sup> *Ibid* at 1095.

<sup>78</sup> *Ibid* at 1103-04.

<sup>79</sup> *Supra* note 61 at 369.

<sup>80</sup> Tyler Condlin, “What’s Love Got to Do With It?” in Elliot D Cohen and Michael Davis with Frederick A Elliston, eds, *Ethics and the Legal Profession*, 2d ed (New York: Prometheus, 2009) at 153.

fair-dealing.<sup>81</sup> But lawyers have no duty to make themselves vulnerable in turn. They have a right to defend themselves against accusations from clients and are not required to wait until an action is commenced to prepare their defence.<sup>82</sup>

One way around this jurisprudence is a narrower conception of a conflict of interest. In a recent case, *Garvy v Seyfarth*, the Appellate Court of Illinois ruled that there was no conflict of interest in a firm's self-representation because the firm's interest in protecting itself against a malpractice claim and a client's interest in zealous representation were not common interests.<sup>83</sup> Garvy had argued that the ethics counsel had represented both the firm and him, giving rise to a prohibited conflict.<sup>84</sup> The Court disagreed, finding that dual representations are only problematic if there is a "common interest" in both.<sup>85</sup> Because the malpractice claim by the client and the original matter for which the firm was retained were not common interests, there was no conflict in the firm's ethics counsel representing "both" the firm and the client.<sup>86</sup>

According to the Model Rules, a conflict of interest exists if "the representation of one client will be directly adverse to another" or if there is a "significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer."<sup>87</sup> A material limitation exists if there is a "significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client" is compromised by a lawyer's "other responsibilities and interests."<sup>88</sup> The duty of loyalty which lawyers owe to their clients is such that a lawyer may not act as an advocate against the client, without consent, "even when the matters are wholly unrelated."<sup>89</sup>

So even under the approach in *Seyfarth*, in some cases there will be a conflict of interest. Facing a potential malpractice action, the lawyer clearly has interests which pose a significant risk of impairing the lawyer's ability to serve the client. The lawyer might want to settle the matter in

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<sup>81</sup> *Ibid.*

<sup>82</sup> ABA Model Rules, *supra* note 14, Rule 1.6 commentary 10. See also Rule 1.6 commentary 9 (lawyers are permitted to reveal confidences to secure "confidential legal advice about the lawyer's personal responsibility with these rules").

<sup>83</sup> 966 NE 2d 523 at 538-39 (Ill App 1st Dis 2012) [*Seyfarth*].

<sup>84</sup> *Ibid* at 538.

<sup>85</sup> *Ibid* at 538-39.

<sup>86</sup> *Ibid.*

<sup>87</sup> ABA Model Rules, *supra* note 14, Rule 1.7(a)(1) and (2).

<sup>88</sup> *Ibid*, Rule 1.7 commentary 8.

<sup>89</sup> *Ibid*, Rule 1.7 commentary 6.

which he or she represents the client quickly, to hide the mistake or mitigate the damages to which the client may be entitled.<sup>90</sup> Conversely, the lawyer may want to stretch the matter out to validate the original advice, notwithstanding that the client may be best served by a quick resolution.<sup>91</sup> The lawyer's concern may have become, to some extent, the resolution of the client's matter in a way that is most favorable to the lawyer or firm rather than the client. This is the very heart and soul of a conflict of interest.

On the other hand, there is no reason a lawyer must be assumed to be preparing for a malpractice claim every time that he or she consults with ethics counsel. The lawyer may be merely trying to discern how best to perform his or her duties, consulting the in-house advisor to avoid a future indiscretion rather than to deal with the consequences of a prior transgression. In this scenario, the lawyer has no interest beyond that of performing his or her professional duties properly. This does not conflict with any interest of the client.

The New York State Bar Committee on Professional Ethics concluded that no conflict of interest between the firm and client is created when a law firm, without prior client consent, seeks advice from ethics counsel regarding the firm's legal and ethical obligations in relation to the representation of the client.<sup>92</sup> The Committee noted that, under the state code, lawyers are prohibited from representing a client if their professional judgement "will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests."<sup>93</sup> The attorney-client relationship requires lawyers to act in accordance with their controlling ethical obligations, if necessary by checking to ensure that they are acting within them.<sup>94</sup> Therefore, a lawyer's interest in meeting the ethical obligations of the code is not "extraneous to the representation of the client" but a necessary component of it.<sup>95</sup>

There is nothing wrong with the proposition that lawyers should be able to make such inquiries as are necessary to ascertain the nature of their professional duties and that such inquiries do not create conflicts in and of themselves. But when the purpose of such an inquiry is to establish the

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<sup>90</sup> Cooper, *supra* note 28 at 185.

<sup>91</sup> *Ibid.*

<sup>92</sup> New York Bar Association Committee on Professional Ethics Opinion 789 (Oct 26, 2005) at para 3 [Opinion 789].

<sup>93</sup> *Ibid* at para 11, citing the New York State Code - DR 5-105(A).

<sup>94</sup> ABA Model Rules, *supra* note 14, Rule 1.6(b)(4) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to secure legal advice about the lawyer's compliance with these Rules").

<sup>95</sup> Opinion 789, *supra* note 92 at para 12.

scope of the liability which the firm may have towards a client, because of a mistake which the lawyer has made, the lawyer and firm have motivations which do not align with the client, interests which may “have an adverse effect on the representation of a client” as the lawyer and firm try and mitigate their liability.<sup>96</sup> The ABA recommends a purposive evaluation of the extent to which an in-house consultation creates a conflict of interest between firm and client.<sup>97</sup> In a formal opinion on in-house consultation, the ABA noted that while some consultations serve the purpose of enabling the lawyer to advise the client (or himself or herself) about the legality of a particular action, there may be a significant risk to the representation of a client when the consultation serves the interest of the firm or lawyer with respect to an action already taken.<sup>98</sup> It is therefore the nature, and not the mere fact, of an in-house consultation which should determine whether the interests of the firm and client have become adversarial.

## 2) *Imputation of Conflict*

If the conflict is based on the lawyer having an interest in the outcome of a potential malpractice claim, and there can be no privilege for a fiduciary who has a conflict with those to whom he or she owes a duty, then why should it matter whether the firm is employing an internal or an external lawyer? It is surely no more disloyal to prepare to fight the client in court with a lawyer on the firm’s payroll than one who is hired from without. In either case the lawyer and firm have an interest which is adverse to that of the client, which, by the logic of *Valente* as applied in *Sunrise*, should negate attorney-client privilege under the fiduciary exception.

But since no case has ruled against the privilege with respect to the consulting of outside counsel, and some have impliedly allowed the use of outside counsel,<sup>99</sup> it appears that the perceived conflict is specific to in-house counsel. The phrase used in *Sunrise*, and subsequently repeated in other current-client cases, is that the conflict stems from the firm’s representation of itself through its ethics counsel. The firm is acting as attorney for the client and as the client of the ethics counsel and, as such, has conflicting duties which jeopardize the representation of the original client.

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<sup>96</sup> ABA Model Rules, *supra* note 14, Rule 1.7 commentary 10.

<sup>97</sup> American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 08-453 at 3.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Sunrise*, *supra* note 46 at 597.

The principle that each lawyer in a firm is imputed to share the conflict of all the others is governed by Rule 1.10 (a) in the Model Rules, which states that no lawyer in a firm “shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so” by the conflict of interest rules.<sup>100</sup> The commentary to Rule 1.10 explains that the principle of imputation derives from the premise that all lawyers within a firm are “essentially one lawyer for the purposes of the rules governing loyalty to the client.”<sup>101</sup> In cases where the ethics counsel has been consulted, then, the conflict of the original lawyer is imputed to the ethics counsel.

The ethics counsel, if he or she is conflicted, is surely less conflicted, however, than the firm as a whole or the consulting lawyer. Using money as an indicator of interest for the purposes of a conflict analysis,<sup>102</sup> ethics counsel have less at stake than the lawyer who is consulting them. While the client may represent a significant component of the lawyer’s billable hours, that one client likely accounts for a fairly small portion of the firm’s total income.<sup>103</sup> It is true that most ethics counsel are partners at their firm, and are likely to be concerned about the firm’s bottom line, which will affect their ultimate compensation. The degree to which ethics counsel with an equity partnership will be affected by the dissatisfaction or loss of a given client, however, will be much less than the partner or associate who is handling the client.<sup>104</sup> Further, many ethics counsel are paid exclusively for their ethics work.<sup>105</sup> Their function is one of risk management, not client satisfaction or partner gratification. They are therefore in a unique position within the firm to offer frank advice to a lawyer whose misconduct has come to their attention. They are concerned with managing the risk to the firm, not with providing the best outcome for the individual lawyer.

This ideal of a detached, broad-thinking ethical advisor has limits. It is no doubt easier to tell a junior associate that he or she has committed malpractice, and inform firm management of the misconduct, than it is to challenge the conduct of the firm’s top rainmaker.<sup>106</sup> Further, however

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<sup>100</sup> ABA Model Rules, *supra* note 14, Rule 1.10.

<sup>101</sup> *Ibid*, Rule 1.10 commentary 2.

<sup>102</sup> It is likely a reliable indicator; see Cooper, *supra* note 28 (arguing that “lawyers most frequently deceive their clients for economic reasons” at 188). See also Randal Graham, *Legal Ethics: Theories, Cases, and Professional Regulation*, 2d ed (Toronto: Emond Montgomery, 2011) at 1-10 more generally on economic incentives for lawyers to violate ethical rules.

<sup>103</sup> Rotunda, *supra* note 13 at 702.

<sup>104</sup> *Ibid* at 704.

<sup>105</sup> Chambliss and Wilkins, *supra* note 19 at 573.

<sup>106</sup> Kirkland, *supra* note 35 at 668.

small the ethics counsel's interest in avoiding a claim against the firm for financial reasons, he or she still works with the firm's other lawyers in a shared community of interests. It would be strange to discover that some feelings of loyalty to other lawyers in the firm, or to the firm itself, did not exist. Such feelings, however modified to accommodate the necessities of professional duty, are part of the reason why conflicts have been imputed to all members of a firm, ethics counsel included.

The constraints which imputed conflicts place on firms have been a topic of some controversy within the ABA over the past ten years. Disqualification for conflicts which have been imputed from lawyers following lateral moves from other firms can be costly to the firm and frustrating to clients. In 2002, the ABA House of Delegates voted 176 to 130 against a proposal to allow screening mechanisms to replace the absolute prohibition of Rule 1.10. The majority was concerned that allowing screened lawyers immunity from conflict imputation would place former clients at risk.<sup>107</sup> But the image of a firm full of lawyers who all speak to one another and work closely together is antiquated. If it was an appropriate description of a law firm in the nineteenth century, it bears little resemblance to the large firms of today.<sup>108</sup> In the 1950s, only 38 law firms in the United States had more than 50 lawyers.<sup>109</sup> In 2006, over 20 law firms had over a thousand lawyers, some more than three thousand.<sup>110</sup> Many of these mega-firms stretch over multiple cities or even continents.<sup>111</sup> This has created a qualitative difference in intra-firm relations. Few lawyers will know all of the partners, and fewer still know all of the associates. While the super-sizing of firms creates its own ethical challenges,<sup>112</sup> it does seriously challenge the claim that each lawyer in a firm knows what every other lawyer does. Furthermore, the broader geographic scope of larger firms makes it more realistic that screening can be effective.

Accordingly, facing the realities of the modern legal profession, by 2009 23 states had adopted rules which allowed some form of lateral screening.<sup>113</sup> There was thus increasing discordance between the Model

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<sup>107</sup> Robert A Creamer, "Three Myths about Lateral Screening" (2002) 13 Prof Lawyer 20 at 20.

<sup>108</sup> *Ibid* at 20.

<sup>109</sup> Rotunda, *supra* note 13 at 686.

<sup>110</sup> *Ibid*.

<sup>111</sup> *Ibid*.

<sup>112</sup> *Ibid* (arguing that large law firms create an environment of anonymity which increases the likelihood of ethical deviance: "The moral calculus changes when you do not even know the names of your partners or what they look like.").

<sup>113</sup> American Bar Association Standing Committee on Ethics and Professional Responsibility. *Majority Report on Resolution 109* at 9.

Rules and the general trend towards allowing screening mechanisms. The pressure to harmonize forced the ABA's Board of Governors to address the issue again in 2009, when it voted 267 to 182 to allow lateral screening. As the Standing Committee noted in the Majority Report, "one of the primary objectives of the Model Rules of Professional Conduct is the achievement of uniformity in the ethical principles adopted nationwide. This objective has not yet been realized because the ABA has not provided practical, effective and up-to-date advice on this important issue."<sup>114</sup>

The Committee, examining the effects of screening, received responses from disciplinary counsel, state bar association officials and practicing lawyers in those jurisdictions which had adopted screening mechanisms. It found that properly established screens had effectively protected confidentiality.<sup>115</sup> Concerned to discover how the courts were responding, "the Committee considered the applicable case law, and found that courts have exhibited no difficulty in reviewing and, where screening was found to have been effective, approving screening mechanisms."<sup>116</sup>

The increased tolerance of legal regulators and courts to accept screening in situations of potential conflict demonstrates that universally imputing conflicts to ethics counsel is, going forward, unnecessary. It is contrary to attempts by state bar associations, the ABA and the courts to modify the rules of imputation to reflect the reality of modern firms. For while ethics counsel could act as both lawyer to the firm and lawyer to the client, in practice they work exclusively for the firm; their job is to advise the firm on its own legal obligations. Many ethics counsel maintain no practice of their own and never meet with clients. If they have a conflict with the client it is surely only through imputation. By allowing ethics counsel to be appropriately screened, the law could surely eliminate whatever appearance of impropriety that the role of ethics counsel is thought to create.

The jurisprudence on imputation of conflicts demonstrates the courts' willingness to allow a rebuttal of imputed conflicts if a firm can demonstrate that effective institutional mechanisms, such as paper walls or screens, are in place. When firms prove the efficacy of their screens, the courts may allow such firms to continue in their representation, satisfied that the danger of conflicted representation has been eliminated by

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<sup>114</sup> *Ibid* at 15.

<sup>115</sup> *Ibid* (the Committee found "no reported disciplinary cases or lawsuits [which] demonstrated any significant problem with the efficacy of screens").

<sup>116</sup> *Ibid* at 11.

effectively isolating the lawyer whose confidences cannot be shared.<sup>117</sup> Factors which courts have identified as being indicia of protected confidences include a ban on information-sharing amongst lawyers in a firm, locked files with secure keys and prohibitions on fee sharing. Even uncontroverted affidavits have been considered sufficient evidence to rebut the presumption of shared confidences and removed the imputation of conflict.<sup>118</sup> And attorneys at larger firms are thought to be less likely to break confidence than those at smaller firms.<sup>119</sup>

If the correct analysis is situation-specific, rather than generic as under the broad rule in *Sunrise*, there are thus several steps a firm could take to rebut the imputation of conflict of interest in respect of its ethics counsel. It could require the ethics counsel to swear affidavits to the effect that he or she will not share or receive information unrelated to the representation of the firm from other firm lawyers. This would include information which other lawyers in the firm are required to keep confidential under their standard obligation to their clients. Policies can be implemented which prohibit him or her from sharing files. Top-level partners, by showing their support for the position of ethics counsel, can create a firm-wide culture in which it is understood that the ethics counsel works for the firm and not for any clients of the firm. Additionally, ethics counsel can be prohibited from fee-sharing, removing financial incentive relating to the outcome of the particular case. Chambliss recommends that ethics counsel clearly bill the firm for the services they provide in offering advice, avoiding billing any hours for services performed for clients.<sup>120</sup> This identifies ethics counsel as distinct from the other lawyers at the firm and removes a financial interest. As long as a firm does not bill the client for ethics counsel's time, it should be fairly clear that the firm is the source of the funds which pay the lawyer. The pay structure for ethics counsel should make it fairly obvious that the firm is his or her real client.

There is no bright line to rebut imputed conflicts: each case is considered in light of the circumstances.<sup>121</sup> Law firms are larger than ever, and if an irrebuttable presumption that each lawyer's conflict must necessarily be imputed to all lawyers was ever reflective of the actual conditions within law firms, that time has passed. Many state bars now

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<sup>117</sup> *Cromley v Board of Education of Lockport High School District 205*, 17 F 3d 1059 at 1065-66 (7th Cir CA Ill 1994).

<sup>118</sup> *Ibid* at 1065.

<sup>119</sup> *Solow v WR Grace & Co*, 83 NY 2d 303 at 311 (NY 1994) (in larger firms, "the risk of conflict is so minimal that the danger is outweighed by policy considerations militating against an irrebuttable presumption").

<sup>120</sup> Chambliss, *supra* note 74 at 1749.

<sup>121</sup> *Kala v Aluminum Smelting & Refining Co*, 81 Ohio St 3d 1 at 11 (1998).

allow screening mechanisms, and the ABA has finally changed its Model Rules in an attempt to harmonize the legal regulatory world. Courts, too, have recognized that an absolute rule imputing knowledge and conflicts to each lawyer at a firm is overly broad.

### 3) Agency

Since 1989 an increasing body of law supported the *Sunrise* application of the fiduciary exception to attorney-client privilege.<sup>122</sup> However, no appeal court had ruled on the matter. Then in 2011 the Supreme Court addressed the fiduciary exception to attorney-client privilege, albeit in the context of trusts, not in-house counsel. In *US v Jicarilla Apache Nation* the plaintiff sued the federal government for mismanagement of revenues derived from natural resources which had been extracted from its lands.<sup>123</sup> During discovery, the plaintiff moved to compel the government to produce certain documents related to the investment of the funds. The government refused, arguing that the documents were protected by attorney-client privilege. The plaintiff argued that the fiduciary duty which the government owed it trumped the privilege, such that it could not be maintained against it.<sup>124</sup> The Court refused to compel the government to produce the documents, holding that the fiduciary exception did not apply to the claim. Applying *Riggs National Bank of Washington, DC v Zimmer*, the “leading American case on the fiduciary exception,” the Court found that the exception, properly applied, is quite narrow.<sup>125</sup>

First, the Court explained that the exception applies when the trustee who obtains the legal advice acts as a “mere representative” of the beneficiary.<sup>126</sup> Any legal advice sought regarding the trust must have been obtained in the best interest of the beneficiary, who is the “real client” of the lawyer.<sup>127</sup> When the beneficiary is the real client, the trustee is acting as an agent and cannot withhold from the principal the contents of the legal advice received on the principal’s behalf. The Court identified several factors which determine who the real client is. These include (1) whether there were pending adversarial proceedings between the trustees and beneficiaries, (2) whether the legal advice appears to have been actually intended for the purpose of benefitting the trust, and (3) whether the law

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<sup>122</sup> See e.g. *Cold Spring Harbor Lab v Ropes & Gray LLP*, 2011 US Dist LEXIS 77824 (D Mass 2011).

<sup>123</sup> 131 S Ct 2313 at 2318 (2011) [*Jicarilla*].

<sup>124</sup> *Ibid* at 2319.

<sup>125</sup> *Ibid* at 2321-22, citing *Riggs National Bank of Washington, DC v Zimmer*, 355 A 2d 709 (Del Ch 1976) [*Riggs*].

<sup>126</sup> *Ibid*.

<sup>127</sup> *Ibid*.

firm is paid out of trust assets.<sup>128</sup> The final indicator, the source of the payment for the legal services, is considered to be a “strong factor” in determining who the client is.<sup>129</sup>

Second, the Court supported the conclusion in *Riggs* that the “trustee’s fiduciary duty to furnish trust-related information to the beneficiaries outweigh[s] their interest in the attorney-client privilege.”<sup>130</sup> The policy of full disclosure is more important than the need to protect the confidence of the trustee in their communications with the attorney of the trust.

The implications of the Supreme Court’s decision in *Jicarilla* for the fiduciary exception to attorney-client privilege for ethics counsel are likely to be significant. The Court’s reasoning mirrors very closely the key issues involving communications with ethics counsel: whether the representation has become adversarial, on whose behalf the advice is given, who pays for the advice and the extent of the obligation to disclose. Furthermore, it is critical to appreciate that *Jicarilla* is looking at a different notion of the fiduciary exception than one based on conflict of interest. Its focus is on the issue of whether the lawyer has consulted ethics counsel as a client or as the agent of the firm’s client.

In a case mentioned earlier in the context of what constitutes a conflict of interest, *Garvy v Seyfarth*, the Illinois Court of Appeals adopted this different notion of the fiduciary exception in declining to apply it to privileged intra-firm communications, citing the decision in *Jicarilla*. Garvy, sued his law firm, Seyfarth, for legal malpractice, fraud and breach of fiduciary duty.<sup>131</sup> Much like the client in *Koen*, Garvy continued to retain Seyfarth after informing it of his intention to sue and having retained other lawyers for that purpose.<sup>132</sup> During discovery, Garvy requested some of the intra-firm communications between Seyfarth lawyers and its ethics counsel relating to the malpractice action.<sup>133</sup> While the District Court compelled production of the documents, holding that the fiduciary obligation of the firm outweighed the privilege, the appeal court reversed that decision, applying *Jicarilla*’s interpretation of *Riggs* to the ethics counsel context.<sup>134</sup> The appeal court held that the fiduciary exception “does not ... apply to legal advice rendered concerning the personal liability of the fiduciary or in anticipation of adversarial proceedings

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<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> *Supra* note 83 at 529.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid* at 530.

<sup>134</sup> *Ibid* at 536.

against the fiduciary.”<sup>135</sup> Lawyers have the right to protect themselves against legal action and ethics counsel comprise the first line of defence. Far from the reasoning in *Sunrise* and its progeny, which found the conflict to be the very reason for applying the exception, the Court in *Seyfarth* held that documents sought when the situation has turned adversarial are clearly protected by the attorney-client privilege.<sup>136</sup>

While the decision of the Illinois court is not binding outside of Illinois, the dismantling of the arguments from *Sunrise* will surely give courts deciding future ethics counsel privilege cases pause. Although the Supreme Court’s ruling in *Jicarilla* on the fiduciary exception is binding only on trust cases, its application in the ethics counsel context was persuasively illustrated in *Seyfarth*. Its approach downplays an analysis based on conflict of interest, especially one based on broad imputed conflicts, and stresses the importance of the nature of the relationship between the lawyer and ethics counsel.

Even more recently, the Court of Appeals of Georgia has released an important decision on solicitor-client privilege and ethics counsel. In *Hunter, Maclean, Exley & Dunn v St Simons Waterfront LLC*, the defendant law firm Hunter Maclean represented the plaintiff during the latter’s development and sale of condominiums.<sup>137</sup> The plaintiff became dissatisfied with the firm and the lawyers handling the case contacted the firm’s ethics counsel and began to prepare a defence against a possible action by the client. The plaintiff continued to be represented by the firm, but eventually that representation ceased and the plaintiff sued the firm alleging breach of fiduciary duty, legal malpractice and fraud. During the discovery process the plaintiff sought to compel the production of several documents, including a memo drafted for the ethics counsel by one of the lawyers handling the case. The firm argued that attorney-client privilege protected the memo. Relying on the *Sunrise* reasoning, the trial court found that because the ethics counsel was a partner at the firm, the conflict of interest which the lawyers acting for the plaintiff were in during the continued representation was imputed to the ethics counsel. That conflict of interest negated any privilege, under the fiduciary exception, and thus the trial court granted the plaintiff’s motion to compel.<sup>138</sup>

The Court of Appeals overturned this decision. Although the Georgia *Rules of Professional Conduct*, like the Model Rules, provide that no

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<sup>135</sup> *Ibid* at 535.

<sup>136</sup> *Ibid* at 536.

<sup>137</sup> 730 SE 608 (Ga App 2012), varied 746 SE 2d 98 (Ga Sup Ct 2013) [*St Simons*]. The Supreme Court of Georgia’s decision is discussed further in the Addendum.

<sup>138</sup> *Ibid* at 616.

lawyer in the firm may “represent a client when any one of them practising alone would be prohibited from doing so” and that a “firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client,” the Court adopted the approach that courts should not automatically impute a conflict to ethics counsel.<sup>139</sup> The Court noted the difficulties with such a bright-line rule:

A lawyer who has a nonwaivable conflict of interest with a client no doubt must withdraw, but a firm concerned with whether a client has a malpractice claim against it will often need to carefully consider that question. Yet, a lawyer who must withdraw clearly cannot do so in a way that violates his ethical obligations to the client. What then is a conflicted lawyer to do when there are multiple ongoing representations and, despite the lawyer’s reasonable efforts, replacement counsel is unable to quickly step in and take over the representation?<sup>140</sup>

There is no reason, according to the Court, to place the firm in such a position. Instead of presuming that ethics counsel is conflicted, courts should examine the nature of the particular ethics counsel position to determine if a conflict should be imputed. When ethics counsel do not represent outside clients, they should not be deemed to be conflicted when representing the firm. The ethics counsel role can be effectively segregated by “ensuring that its function is known and understood throughout the firm, that its compensation is not significantly determined by firm profit, and other similar measures.”<sup>141</sup> Thus, so long as ethics counsel is distinguished from other lawyers within the firm, there is no reason why he or she should be conflicted in the representation of the firm.<sup>142</sup>

*St Simons* is completely consistent with the position taken by most of the critics of *Sunrise* and its progeny. It harmonizes the opinions of the ABA and the New York State Bar Association with the realities of modern legal practice. By refusing to automatically impute conflict to ethics counsel, the court has joined the trend, as evidenced by the ABA’s recent amendments to Rule 1.10, of allowing firms to use screening measures to rebut a presumption of imputed conflict. By placing the focus on the nature of ethics counsel’s relationship to the client, rather than on the conflict between the firm and the client, the courts can examine the duties of counsel in the proper context.

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<sup>139</sup> *Ibid* at 620-21.

<sup>140</sup> *Ibid* at 620.

<sup>141</sup> *Ibid* at 621-22.

<sup>142</sup> The Court remanded the issue to the trial court so that it could evaluate, through additional findings of fact, the particular relationship between ethics counsel and the firm; see *ibid* at 624.

### *E) Some Conclusions*

The American law on attorney-client privilege for communications with ethics counsel is in flux. There is no single approach to which Canadian courts can turn for comparative assistance, but there are some developing trends that offer guidance. At root, if the ethics counsel is exclusively the lawyer for the firm and not the lawyer for the client then the distinction between in-house ethics counsel and outside counsel should become meaningless. It is no more disloyal for a firm to use an inside rather than an outside lawyer to examine ethical issues, including those relating to possible claims against the firm. The complexity of modern ethical rules and the tension which may exist between them (as when a lawyer both must and cannot ethically withdraw) necessitates that lawyers obtain advice from experts in order to ensure they have complied with their obligations. To require firms to seek outside counsel to discuss possible claims against them adds transaction cost and is not justified on a modern understanding of the nature of intra-firm relationships. Forcing firms to retain outside counsel would reduce the likelihood that lawyers will seek advice on ethical matters. Allowing firm management to establish that their ethics counsel is effectively segregated from the client with whom a conflict has arisen, or may arise, allows firms access to the legal advice needed to meet their ethical obligations while still placing on them the burden of protecting the client from conflicted representation.

There is no need for an absolute, *Sunrise*-type rule that a law firm cannot keep communications with its ethics counsel privileged as against current clients. Instead, the courts should adopt an approach similar to the one in *Jicarilla* and applied in *Seyfarth* and *St Simons*. The fiduciary exception was never intended to give a beneficiary (or client) an unfair advantage in litigation by removing one of the most basic privileges from the fiduciary. Rather, the exception gives to the beneficiary that which it already has: access to legal communications with a lawyer when the beneficiary is the real client.

### *F) Work-Product Privilege*

In many of the American cases in which the law firm has claimed attorney-client privilege for intra-firm communications with ethics counsel, it has also claimed work-product privilege. This privilege protects the memoranda, briefs and communications which a lawyer prepares in contemplation of litigation.<sup>143</sup> Not all communications between a lawyer in a firm and the ethics counsel will be in contemplation of litigation

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<sup>143</sup> *Hickman v Taylor*, 329 US 495 at 508 (1947) [*Hickman*].

against the lawyer and the firm, but many will. A detailed analysis of work-product privilege and its application to ethics counsel is outside the scope of this article. For present purposes, however, one important point should be stressed. The courts which have denied attorney-client privilege to intra-firm communications have likewise denied the claim of work-product privilege.<sup>144</sup>

The courts, applying the privilege, have recognized that lawyers require a “certain degree of privacy” in order to work effectively and that the privacy should not be lightly intruded upon.<sup>145</sup> A heavy burden lies on the party requesting production to establish the justification for infringing on lawyers’ court preparation.<sup>146</sup> The concern with the fiduciary relationship between lawyer and client has, however, driven the courts to disallow the claim for work-product privilege as concerns communications with ethics counsel. This is primarily on the basis that the lawyer cannot subordinate the duty of one client for his or her own interest or for the benefit of a third party. Under the newer analysis in *Jicarilla*, *Seyfarth* and *St Simons*, using a narrower approach to the exceptions to solicitor-client privilege, we might expect a similar narrowing and thus more claims of work product privilege to succeed.

Even in the absence of a conflict, the work product doctrine may not allow a lawyer to restrict a client’s access to the materials which the lawyer “created or amassed” while representing the client.<sup>147</sup> In *Spivey v Zant* the Court ruled that unless the lawyer could demonstrate some “particularized and superior” reason to withhold the material, the client was entitled to access the lawyer’s entire file.<sup>148</sup> It is difficult to apply the work-product privilege to ethics counsel, however, because identification of the client becomes conflated with the firm’s representation of itself. If the file the client wishes to review is that of the lawyer who was handling the matter, and it is related to the representation, then the rule from *Spivey* ought to govern: the lawyer should produce the documents, including any notes made relating to the consultation with ethics counsel. But if the file the client wishes to view is that of ethics counsel, he or she is only the lawyer of the client in the sense that all lawyers at a firm are the lawyer of each client in accord with Rule 1.10 of the Model Rules. If the client of the

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<sup>144</sup> *Koen*, *supra* note 66 at 286; work-product privilege “cannot shield a lawyer’s papers from discovery in a conflict of interest context any more than can the attorney-client privilege.” See also *St Simons*, *supra* note 137 at 626.

<sup>145</sup> *Hickman*, *supra* note 143 at 510.

<sup>146</sup> *Ibid* at 513, where the Court remarked that it would be a “rare situation” which would justify production of documents protected by work-product privilege.

<sup>147</sup> *Spivey v Zant*, 683 F 2d 881 at 885 (CA Ga 1982) [*Spivey*]

<sup>148</sup> *Ibid*.

ethics counsel is truly the firm, then it is only the firm which should be granted automatic access to the file.

### 3. *The Canadian Position*

There are currently no Canadian decided cases that explicitly address the question of privilege for a law firm's communications with its ethics counsel. A court faced with a claim of privilege would have to determine if Canadian law should accept that the privilege applies in this context. The American law, as outlined above, would be of considerable assistance in the analysis. But the issue is not simply whether the privilege should be recognized. As in the United States, one would expect considerable debate in the Canadian context about the scope of any exceptions to that privilege. That debate will not be in terms identical to the one in the United States because of some important differences in the law on privilege between the two countries. For example, solicitor-client privilege has been elevated to a constitutional principle in Canada, which favours maintaining the privilege rather than having it defeated by exceptions.

#### *A) Solicitor-Client Privilege in Canada*

Over the past twenty years the privilege has evolved from a rule of evidence to a substantive legal rule and a constitutionally-protected right.<sup>149</sup> The privilege is now seldom set aside in favour of other rights. The transition from a mere rule of evidence to a constitutional right began with *Solosky v The Queen* which considered whether the privilege shielded an inmate's communications with his lawyer from the prison authorities. Dickson J described the need to "depart from the current concept of privilege" and approach the issue from the perspective that communication with one's legal advisor is a "fundamental civil and legal right."<sup>150</sup> He also outlined the criteria required to establish the solicitor-client privilege in Canada. The privilege protects "(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties."<sup>151</sup> There is no requirement that the communication be related to litigation: it covers any consultation for legal advice.<sup>152</sup>

Less than three years later, in *Descoteaux v Mierwinski*, Lamer J ruled that solicitor-client privilege could no longer be considered a mere rule of evidence but was a substantive rule of law which protects communication

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<sup>149</sup> *R v McClure*, 2001 SCC 14, [2001] 1 SCR 445 [McClure].

<sup>150</sup> [1980] 1 SCR 821 at 839 [*Solosky*].

<sup>151</sup> *Ibid* at 837.

<sup>152</sup> *Ibid* at 834.

between lawyers and their clients.<sup>153</sup> Nearly two decades later in *R v McClure* Major J held that privilege was a principle of fundamental justice:

Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented.<sup>154</sup>

As Major J stated, “[S]olicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.”<sup>155</sup>

In recent cases the courts have entrenched the protections offered by privilege and expanded its scope. For example, in *Blood Tribe Department of Health v Canada (Privacy Commissioner)*<sup>156</sup> the Supreme Court of Canada refused to interpret section 12 of the *Personal Information Protection and Electronic Documents Act*,<sup>157</sup> which gives the Privacy Commissioner the power to compel people to “produce any records and things that the Commissioner considers necessary to investigate the complaint ... whether or not it would be admissible in a court of law,” as allowing the Commissioner the right to compel production of privileged documents. Binnie J reaffirmed the requirement from *Descoteaux* that legislation which infringed on the substantive right to confidentiality must be interpreted restrictively and that the goal of any such legislation must be to infringe upon the privilege as little as is absolutely necessary.<sup>158</sup> Since the legislation did not explicitly give the Commissioner the power to examine privileged material, the legislation was interpreted as not authorizing him or her to do so.<sup>159</sup>

The considerable strength with which the courts have imbued solicitor-client privilege in recent years raises important considerations. Holding that a firm could claim privilege in respect to communications with ethics counsel should be seen as a significant decision, given the

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<sup>153</sup> [1982] 1 SCR 860 at 875 [*Descoteaux*].

<sup>154</sup> *McClure*, *supra* note 149 at para 2.

<sup>155</sup> *Ibid* at para 35.

<sup>156</sup> 2008 SCC 44, [2008] 2 SCR 574 [*Blood Tribe*].

<sup>157</sup> SC 2000, c 5, s 12.1(1)(a).

<sup>158</sup> *Blood Tribe*, *supra* note 156 at para 31.

<sup>159</sup> *Ibid* at paras 31-34.

strength of the privilege. It should not be made lightly. As a corollary, if the privilege is recognized in that context, it would appear to be difficult to displace it through any exceptions.

### *B) In-House Counsel and Privilege*

Confidential communications with in-house counsel are protected by solicitor-client privilege as long as the communication concerns legal and not business advice.<sup>160</sup> This qualification necessitates that the courts must determine whether privilege applies on a case-by-case basis, depending on the “nature of the relationship, the subject-matter of the advice, and the circumstances in which it is sought and rendered.”<sup>161</sup> These elements have considerably more ambiguity in the corporate context, where business and legal advice may be difficult to separate, than in the traditional solicitor-client relationship where the reason for the consultation by the client is, *prima facie*, the acquisition of legal advice. Although the Supreme Court of Canada has ruled that communicating with an in-house, as opposed to an outside, lawyer “does not remove the privilege, or change its nature,”<sup>162</sup> establishing solicitor-client privilege between a corporation and its in-house counsel may be more difficult than for an individual.

The Canadian position on in-house privilege was adopted from the classic statement by Lord Denning MR in *Alfred Crompton Amusement Machines Ltd v Commissioner of Customs and Excise (No 2)*:

The law relating to discovery was developed by the Chancery courts in the first half of the 19th century. At that time nearly all legal advisors were in independent practice on their own account. Nowadays it is very different. Many barristers and solicitors are employed as legal advisors, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the government itself, like the Treasury Solicitor and his staff. In every case these legal advisors do legal work for their employer and no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer. For that reason the judge thought that they were in a different position from other legal advisors who are in private practice. I do not think this is correct. They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the

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<sup>160</sup> *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 SCR 809 [Pritchard]; see also *R v Campbell*, [1999] 1 SCR 565.

<sup>161</sup> *Pritchard*, *ibid* at para 20.

<sup>162</sup> *Ibid* at para 21.

same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges.<sup>163</sup>

Lord Denning was clear that the “same privileges” to which communication between salaried legal advisers or in-house counsel and their clients are entitled is protection from discovery of legal, not business, advice.<sup>164</sup>

In *Pritchard v Ontario (Human Rights Commission)* the Supreme Court of Canada reaffirmed this approach.<sup>165</sup> Major J recognized that in-house counsel, often consulted about legal and business matters, cannot be subjected to a one-size-fits-all rule for the application of privilege to their confidential communications with their clients. Instead, each claim for privilege would need to be assessed based on the facts of the case. In particular, whether privilege attaches depends on the nature of the relationship, the subject-matter of the advice, and the circumstances in which it is sought and rendered.<sup>166</sup> In-house counsel communication, like all solicitor-client communication, is thus required to meet the privilege threshold adopted by Dickson J in *Solosky*.

First, the nature of the relationship must be such as to make the identities of the parties clear: the privilege is not labelled “solicitor-client” for nothing. The requirement that the communication be between a lawyer and a client derives from the widely-held belief that a “confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.”<sup>167</sup> An in-house counsel’s client is the organization itself. According to the Federation of Law Societies of Canada’s (FLSC) *Model Code of Professional Conduct*, “[w]hen an individual consults a lawyer in a representative capacity, the client is the corporation, partnership, organization or other legal entity that the individual is representing.”<sup>168</sup> Although communications will occur through the employees and directors of the organization, the lawyer “should ensure that it is the interests of the organization that are served and

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<sup>163</sup> [1972] 2 QB 102 at 129 (CA).

<sup>164</sup> *Ibid.*

<sup>165</sup> *Supra* note 160.

<sup>166</sup> *Ibid* at para 20.

<sup>167</sup> *Blank v Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 SCR 319 at para 26 [*Blank*].

<sup>168</sup> Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: Federation of Law Societies of Canada, 2012), Rule 1.1-1 definition of “client” commentary 2 [FLSC Model Code]. Employees, directors and the like are considered mere “near-clients,” though a solicitor-client relationship may be established with an individual if there is evidence that he or she had a “reasonable expectation” that he or she enjoyed such a relationship with the in-house counsel (commentary 3).

protected.”<sup>169</sup> This definition allows solicitor-client privileged communications to occur through a plethora of interactions between an in-house lawyer and representatives of the client.

Second, the subject-matter of the advice must be legal and not business for the privilege to attach. Discerning one from the other can be challenging. For example, if a corporate client asks its in-house counsel to appraise the likely financial costs of possible litigation, and the lawyer responds with a settlement estimate and the costs to the legal department, is that legal or business advice? Prudent in-house counsel will separate business and legal advice.<sup>170</sup>

Third, consideration of the circumstances under which the advice is sought and rendered requires courts to examine whether the communication was intended to be confidential. In *Toronto-Dominion Bank v Leigh Instruments Ltd (Trustee of) Winkler J* found that the widespread circulation of a memo, along with the lack of a confidentiality heading on its face, demonstrated that its drafters had not intended it to be confidential and it therefore was not protected by privilege.<sup>171</sup>

### *C) Privilege and Ethics Counsel*

While there is no Canadian authority on point, the American experience indicates that a Canadian law firm should be able to establish a solicitor-client relationship with its own ethics counsel. Law firms, like any other business, may consult internal counsel as they would outside counsel, and privilege attaches to legal advice or a request for legal advice which is intended to be confidential. To refuse to apply solicitor-client privilege for law firms would, as the court in *Sunrise* aptly noted, punish them by “holding them to a standard which has no counterpart in any other sphere of the business or professional community.”<sup>172</sup> There is no principle in the Canadian jurisprudence which indicates that law firms possess some characteristic which would justify disqualifying them from having privileged communication with counsel. While it is true that lawyers have duties to their clients as fiduciaries, and that such concerns may impact the assertion of privilege for communications which relate to the representation of a current client, the threshold of establishing privilege in the first place should be no higher for law firms than for other firms. So long as the firm consults the ethics counsel for legal advice, and pays the lawyer for those services, as opposed to simply having the function carried out as an

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<sup>169</sup> *Ibid*, Rule 3.2-3 commentary 1.

<sup>170</sup> Ken Mills, “Privilege and the In-House Counsel” (2003) 41 *Alta L Rev* 79 at 97.

<sup>171</sup> (1997), 32 OR (3d) 575 at 584 (Gen Div).

<sup>172</sup> *Supra* note 46 at 595.

unbilled component of the duties of one of the managing partners, the relationship should be seen as one of lawyer and client. The policies which firms establish regarding the consultation of the ethics counsel can mandate a level of discretion which should establish the requisite level of confidentiality.

#### *D) Exceptions to the Privilege*

The more difficult question is whether, as in the United States, exceptions to this privilege will significantly erode its utility. As we have seen, one exception arises when the ethics counsel is in a position of conflict of interest. In the Canadian context, a conflict of interest can arise as a result of concerns about confidential information and it can also arise as a result of concerns about loyalty to the client. Another exception relates to the question of agency, looking at whether the lawyer consults ethics counsel on behalf of the client or as client himself or herself.

##### *1) Conflict of Interest Based on Confidential Information*

The courts that decided *Sunrise* and similar cases held that a conflict of interest occurred when a law firm represents itself by consulting its ethics counsel in matters regarding a current client. By preparing itself for litigation against a current client, the firm cannot maintain its objectivity in its handling of the client's case. The interest of the firm and the interest of the client are therefore at odds. Because the courts were prepared to accept the use of outside counsel for defence against a current client, it was the use of in-house ethics counsel, rather than the act of preparing a defence against a current client in itself, which created the conflict. This, as we have seen, rested in part on the assumption that each lawyer in the firm is the lawyer of the client and that a conflict of any one lawyer is imputed to them all.

How would Canadian law handle concerns about ethics counsel having confidential information about the client's matter? In particular, the concern is that that ethics counsel would have the same information as the lawyer in the firm who is handling the client's matter. This is different from the situation in which the firm retains outside counsel. In that context, the firm is permitted to disclose confidential information in order to obtain advice.<sup>173</sup> In accordance with the general importance of preserving confidentiality, however, that disclosure should be limited to the information necessary for that purpose.<sup>174</sup> Outside counsel would have

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<sup>173</sup> See FLSC Model Code, *supra* note 168, Rule 3.3-6.

<sup>174</sup> It should be noted that most of the exceptions to confidentiality under the Model Code expressly provide that a lawyer "must not disclose more information than is

sufficient information to provide advice but would not typically have the same amount of confidential information about the client and his or her matter than the lawyer handling that matter.

The leading case in Canada on conflicts of interest, both actual and imputed, based on confidential information is *MacDonald Estate v Martin*.<sup>175</sup> Sopinka J identified three competing values: (1) the integrity of the justice system, which demands a high standard for lawyers; (2) the availability of choice of counsel to a litigant; and (3) allowing “reasonable mobility” for lawyers.<sup>176</sup> The first of these values is of special importance.<sup>177</sup> The standards of conflict of interest for lawyers must not retreat in the face of some of the new challenges faced by law firms:

When the management, size of law firms and many of the practices of the legal profession are indistinguishable from those of business, it is important that the fundamental professional standards be maintained and indeed improved. This is essential if the confidence of the public that the law is a profession is to be preserved and hopefully strengthened. Nothing is more important to the preservation of this relationship than the confidentiality of information passing between a solicitor and his or her client.<sup>178</sup>

The confidence of the public was seen as an essential element in allowing a firm to rebut the claim of conflict via confidential information. To prevent a finding of a disqualifying conflict of interest, the firm would need to satisfy the reasonably informed member of the public that no use of confidential information would occur.<sup>179</sup> Two questions need to be answered to discover whether such use may be expected: “(1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?”<sup>180</sup> Once it has been demonstrated that there is a previous relationship which is sufficiently related to the retainer, the courts will presume that confidential information was transferred,

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required”: see for example Rules 3.3-3, 3.3-4 and 3.3-5. It is curious that this language is not contained in Rule 3.3-6. Nevertheless, it is difficult to imagine that the intention of that omission is to allow lawyers to disclose more of a client’s confidential information than is necessary to obtain the advice.

<sup>175</sup> [1990] 3 SCR 1235 [*MacDonald Estate*]; see generally Graham, *supra* note 102 at 298.

<sup>176</sup> *Ibid* at 1243.

<sup>177</sup> See *R v Neil*, 2002 SCC 70, [2002] 3 SCR 631 at paras 14-15 [*Neil*].

<sup>178</sup> *MacDonald Estate*, *supra* note 175 at 1244.

<sup>179</sup> *Ibid* at 1259-60.

<sup>180</sup> *Ibid* at 1260.

although the firm may rebut this presumption. According to Sopinka J, “This will be a difficult burden to discharge.”<sup>181</sup>

Although finding a “strong inference” that lawyers who work together share confidences, Sopinka J insisted that the courts would not impute knowledge, either to the lawyer who is transferring firms or to the lawyers at the firm to which the lawyer transfers.<sup>182</sup> Recognizing that imputed knowledge rests on the assumption that the knowledge of one lawyer is the knowledge of all, Sopinka J dismissed imputing conflicts as “unrealistic in the era of the mega-firm.”<sup>183</sup>

To rebut the presumption of shared confidences, the firm is required to present “clear and convincing evidence” that reasonable measures, such as paper walls and cones of silence, have been implemented.<sup>184</sup> While accepting these institutional arrangements as evidence of a firm successfully preventing the disclosure of confidential information, Sopinka J refused to allow undertakings and affidavits the same evidentiary weight. The public, he argued, could not be satisfied with an arrangement which amount to “no more than the lawyer saying ‘trust me.’”<sup>185</sup> Sopinka J seemed to be suggesting that any screening device would have to be independently verifiable, and that paper walls and cones of silence fulfil this requirement in a way in which undertakings and affidavits do not.<sup>186</sup>

The question of which institutional mechanisms serve to rebut the presumption of shared confidences relates only to knowledge which may have been shared. A lawyer with actual knowledge will be disqualified for having a conflict of interest, irrespective of any arrangement by the firm:

A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere.<sup>187</sup>

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181 *Ibid.*

182 *Ibid* at 1262.

183 *Ibid* at 1261.

184 *Ibid* at 1262.

185 *Ibid* at 1263.

186 Archie Rabinovitch and Neil Rabinovitch, “More About Imputing Knowledge from One Member of Firm to Another: *MacDonald Estate v Martin*” (1992) 13 *Adv Q* 370 at 374-75.

187 *MacDonald Estate*, *supra* note 175 at 1261.

A lawyer who has no knowledge of the events, having satisfied the court that he or she is in the possession of neither actual or presumed knowledge which is sufficiently related to the retainer, will not be disqualified from handling a client's case. But it is not necessary that the lawyer have no information. Rather, it is a question of whether a lawyer has relevant information.<sup>188</sup> The retainers in *MacDonald Estate* concerned the same litigation. The test established in that case, however, provided that the client asserting a conflict of interest must demonstrate that the two matters are "sufficiently related." This requires an examination of the initial retainer, as Goudge JA for the Ontario Court of Appeal explained in *Chapters Inc v Davies, Ward & Beck LLP*:

There may be cases in which a simple description of the two retainers shows them to be so closely connected that the court will infer the possible misuse of confidential information and hence find the retainers to be sufficiently related. More commonly ... an outline of the nature of the confidential information passed to the lawyer pursuant to the first retainer will be needed. In the end, the client must demonstrate that the possibility of relevant confidential information having been acquired is realistic, not just theoretical.<sup>189</sup>

In the context of a firm's attempt to maintain solicitor-client privilege as against its current client, the concern is that ethics counsel is in a conflict of interest because he or she, as a lawyer within the firm, has acquired confidential information about the client's matter. The *MacDonald Estate* guidelines are applicable to this problem by analogy: the firm must demonstrate that the ethics counsel is not in conflict, while the party seeking disclosure will need to demonstrate that the possibility of a conflict is more than theoretical.

As with protecting current clients against conflicts of interest which arise from lateral moves, the resolution of the presumed conflict of the ethics counsel is best achieved by a variety of screening mechanisms. The Court in *St Simons* recognized that the conflict identified in *Sunrise* could only be realised by imputation, and, although the Georgia Rules support the principle that every lawyer is the client's lawyer,<sup>190</sup> it declined to apply the fiduciary exception, holding that the conflict of the individual lawyer or firm should not "automatically" be imputed to the ethics counsel. Lawyers need to be able to demonstrate that conflicts based on confidential information have been appropriately contained. The era of the large firm is

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<sup>188</sup> *Kaila v Khalsa Diwan Society*, 2004 BCCA 236, 29 BCLR (4th) 56 at para 49.

<sup>189</sup> (2001), 52 OR (3d) 566 (CA) at para 30.

<sup>190</sup> Canadian rules of professional conduct also support this basic view; see the definitions of "client," "lawyer" and "law firm" in the FLSC Model Code, *supra* note 168, Rule 1.1-1.

ripe with potential conflicts and imputed conflicts or presumptions of shared confidence could create unnecessary disqualifications or other consequences of alleged conflicts, such as the *Sunrise*-style fiduciary exception. It is important for firms to demonstrate that their ethics counsel is a distinct entity within the firm.

The screens which should be used to satisfy the reasonably informed member of the public that the ethics counsel has not breached his or her ethical obligations may be different from those which are required to demonstrate that no confidential information has been passed. What institutional screening such as paper walls and cones of silence provide is a demonstration that the ethics counsel is a distinct entity within the firm, someone who can possess confidential information which may be relevant to the client without creating any danger for the client, without even “the appearance of impropriety.” Further, ethics counsel should be paid separately, so that their compensation is related to the advice they provide rather than tied to the outcome of any one matter or the firm’s overall profitability. The more that an ethics counsel is like an outside lawyer who just happens to be located within the firm, the more satisfied the public should be that these lawyers present no danger to their interests, or, at the very least, that they present no danger which an outside lawyer would not equally present.

On this issue, Canadian courts arguably place greater emphasis on public perception than the American authorities, which rely almost exclusively on jurisprudence and the state bar rules. While each court from *Sunrise* to *St Simons* considered the state bar rules to be determinative and the jurisprudence to be an interpretive guide to the proper application of these rules, the Supreme Court of Canada denies that the courts must follow the rules set by lawyers, instead using the reasonably informed member of the public as the proper unit of analysis. Accordingly, avoidance of the “appearance of impropriety,” a term fallen into disuse in the United States, assumes a central place in the Canadian analysis.<sup>191</sup> Ultimately, Canadian courts will need to be convinced that there is no danger to a client in the maintenance of privilege between lawyers and ethics counsel. Put another way, they will need to be convinced that a reasonably informed member of the public would be so convinced. The most effective way of accomplishing this, as noted by Chambliss and adopted by the Georgia Court of Appeal in *St Simons*, is to demonstrate that ethics counsel has no conflict because he or she is not like the other lawyers in the firm. The firm must have the opportunity to prove that the lawyer should not be deemed to have a conflict, that the “identity and role” of ethics counsel is such that he or she is “completely separate from any

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<sup>191</sup> *MacDonald Estate*, *supra* note 175 at 1246.

representation of the client.”<sup>192</sup> Ethics counsel can and should be segregated, with a distinct function “known and understood throughout the firm.”<sup>193</sup> The separation must be at the institutional level. Undertakings from individual lawyers not to share information not related to the matters brought to the ethics counsel in their official capacity will be insufficient. In *MacDonald Estate* the court ruled out the use of undertakings and affidavits as amounting to no more than lawyers asking clients to take them at their word. Presumably the top-down, firm-wide articulation of policy carries more evidentiary weight than the execution of such arrangements at the individual level. As noted above, lawyers tend to respond to the culture of a firm and especially the desires, stated or otherwise, of their superiors. If a firm’s partners are insistent that ethics counsel be approached in a particular manner, and adhere to the rules, there is good reason to believe that associates will adopt the same habits.

Accordingly, provincial law societies can be of great assistance in creating a profession-wide culture of the segregation of ethics counsel. The courts have suggested that they will not accept screening devices as sufficient evidence of effective screening without prior approval of the methods by the law societies. The current dearth of authority provides an opportunity for the law societies, and in particular the FLSC, to take a leadership role in defining the appropriate context within which ethics counsel should operate. Screening procedures have already been adopted in the FLSC’s Model Code in the guidelines to Rule 3.4-26 which addresses lateral hires. Similar guidance can be provided so mechanisms to allow ethics counsel to function effectively can be adopted.

Any of these measures will have to be sensitive to the particular Canadian context. In the aggregate law firms in the United States are much larger than those in Canada and as a result they are in a better financial position to employ full-time ethics counsel, screened and separate from the firm’s practice. It is unclear how many Canadian firms would consider such a position financially viable. A related issue is whether a firm would generate enough ethical issues so as to provide a steady stream of work for its ethics counsel. A possible solution would be to combine the role of ethics counsel with other responsibilities that do not involve working for the firm’s clients such as knowledge management or recruiting. Under such an approach it is very likely that several Canadian firms – in particular the thirty or so with more than one hundred lawyers, representing roughly ten thousand lawyers in total – could utilize a lawyer in this way. Beyond those firms, it would be significantly more difficult to have a designated but part-time ethics counsel who also worked on various client matters. It

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<sup>192</sup> *St Simons*, *supra* note 137 at 622.

<sup>193</sup> *Ibid.*

would be much more difficult to uphold a claim of solicitor-client privilege in such a situation.<sup>194</sup>

## 2) *The Duty of Loyalty*

In *R v Neil* the Supreme Court of Canada considered whether a conflict of interest could occur even if the lawyer possessed no confidential information relevant to a matter in which the lawyer was acting against the client.<sup>195</sup> In deciding that such conflicts could indeed occur, Binnie J articulated the “bright-line” rule which expanded the scope of conflicts:

[I]t is the firm and not just the individual lawyer, that owes a fiduciary duty to its clients, and a bright line is required. The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client – *even if the two mandates are unrelated* – unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.<sup>196</sup>

In *Strother v 3464920 Canada Inc*, Binnie J clarified the *Neil* “bright-line” test, noting that the relevant client interests were legal interests rather than commercial interests.<sup>197</sup> Such interests must be protected by the lawyer as a component of the duty of loyalty to the client.<sup>198</sup> This notion of loyalty has thus created a further way in which a lawyer can have a conflict of interest.

In regards to the duty to avoid conflicting interests, Binnie J found that the firm in *Neil* had “put themselves in a position where the duties they undertook to other clients conflicted with the duty of loyalty which they owed to [their original client]” and had therefore breached their duty of loyalty.<sup>199</sup> Having set out the “bright-line” test, he also referenced the “substantial risk” test from the *Restatement Third of the Law Governing Lawyers*,<sup>200</sup> finding that a conflict occurs when there is a “substantial risk that the lawyer’s representation of the client would be materially and

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<sup>194</sup> This point was noted in the introduction. The issues raised in this article are all equally important considerations in whether the law can evolve a privilege that operates in the context of smaller firms. As noted, it makes sense to first consider it in the context of the larger firms.

<sup>195</sup> *Supra* note 177.

<sup>196</sup> *Ibid* at para 29 [emphasis in original].

<sup>197</sup> 2007 SCC 24, [2007] 2 SCR 177 at para 54 [*Strother*].

<sup>198</sup> *Ibid* at para 55.

<sup>199</sup> *Neil*, *supra* note 177 at para 31.

<sup>200</sup> American Law Institute, *Restatement Third of the Law Governing Lawyers* (St Paul, MN: American Law Institute Publishers, 2000).

adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person."<sup>201</sup> This test is narrower than the "bright-line" test, which provides for the disqualification of a lawyer even if the two mandates are unrelated.

In its *Final Report on Conflicts of Interest*, released in 2008, the Canadian Bar Association (CBA) suggested that the "bright-line" test and the "substantial risk" principle lead to different outcomes when used as the basis for a conflict analysis.<sup>202</sup> The CBA concludes, however, that the two rules are reconcilable:

the appropriate interpretation of *Neil* and *Strother* (which also reconciles the minority reasons in *Strother*) is that, absent proper consent, a lawyer may not act directly adverse to the immediate interests of a current client unless the lawyer is able to demonstrate that there is no substantial risk that the lawyer's representation of the current client would be materially and adversely affected by the new unrelated matter.<sup>203</sup>

This articulation of the decisions in *Neil* and *Strother* has been substantially rejected by the FLSC. The FLSC Model Code defines a conflict of interest as "a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest of the lawyer's duties to another client, a former client, or a third person."<sup>204</sup> The commentary goes on to describe the rule's relationship to the decisions in *Neil* and *Strother*, noting that in cases involving current clients "a lawyer must not represent one client whose legal interests are directly adverse to the immediate legal interests of another client without consent. This duty arises even if the matters are unrelated."<sup>205</sup> The FLSC, in other words, would not discard the "bright-line" rule from *Neil* in its conflict guidelines. The FLSC suggested that, whatever the merits of the CBA's argument, the Model Code could not contradict the decisions of the Court.<sup>206</sup> Lawyers, risking disqualification, breach of fiduciary duty and professional sanctions, must be certain of their obligations. The FLSC's Advisory Committee declared that "the duties that flow from the lawyer-client relationship require that both conduct that would have an adverse impact on the representation of the

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<sup>201</sup> *Neil*, *supra* note 177 at para 31.

<sup>202</sup> Canadian Bar Association Task Force on Conflicts of Interest, *Conflicts of Interest: Final Report, Recommendations and Toolkit* (August 2008), online: CBA <<http://www.cba.org>> at 42.

<sup>203</sup> *Ibid* at 44.

<sup>204</sup> *Supra* note 168, Rule 3.4-1 commentary 1.

<sup>205</sup> *Ibid*, commentary 6.

<sup>206</sup> Federation of Law Societies of Canada Advisory Committee on Conflicts of Interest, *Final Report* (June 2010), online: FLSC <<http://www.flsc.ca>> at 7.

client and conduct that might impair the relationship between a lawyer and the client be prohibited.”<sup>207</sup> Recently in *Canadian National Railway Co v McKercher LLP* the Supreme Court of Canada confirmed the existence and clarified the scope of the “bright-line” rule, holding that the substantial risk test only comes into play in cases not falling within the scope of that rule.<sup>208</sup>

How would these principles be applied to ethics counsel? A key question is whether the firm’s interests are directly adverse to the client’s interests. The answer in many cases may be in the negative. The client’s lawyer may seek advice from ethics counsel to determine how to best legally or ethically advance the client’s interests.<sup>209</sup> In other cases, however, the answer will be in the affirmative. There will be a tension between the interests of the client and the interests of the firm. The argument would then be that in these cases, under the *Neil* “bright-line” test no lawyer in the client’s firm could act for the firm where the firm’s interests might be contrary to those of the client. The result in such cases might not be much different under the CBA’s approach, since it is relatively easy to conclude that where the interests conflict there is a substantial risk that the firm’s representation of the current client would be materially and adversely affected by ethics counsel’s representation of the firm. On this approach to the duty of loyalty, for ethics counsel to act for the firm would require ceasing to act for the client, typically by referring the client to alternate counsel.

Such an approach has parallels to the problematic American law flowing from *Sunrise*. It would deny the privilege, because of the conflict of interest flowing from the breach of the duty of loyalty, in cases where the firm acted both for itself and for the client at the same time. As discussed earlier, this makes the privilege of much reduced utility. Firms would have to decide, without the benefit of the internal advice on which they want to rely, whether to either cease acting for the client or continue to act and not be able to claim privilege over communications with ethics counsel. Accordingly, it is important to consider whether any other approach to the duty of loyalty can be sustained.<sup>210</sup>

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<sup>207</sup> Federation of Law Societies of Canada Standing Committee on the Model Code of Professional Conduct, *Report on Conflicts of Interest* (November 2011), online: FLSC <<http://www.flsc.ca>> at 4.

<sup>208</sup> 2013 SCC 39, rev’g 2011 SKCA 108, 375 Sask R 218.

<sup>209</sup> As discussed in the next section, these types of cases are better understood as ones in which the advice is actually sought by the lawyer in the firm as agent for the client.

<sup>210</sup> See Alice Woolley, *Understanding Lawyers’ Ethics in Canada* (Markham: LexisNexis Canada Inc, 2011) at 238 (“How far the duty of loyalty extends has yet to be fully determined.”). See also Richard Devlin and Victoria Rees, “Beyond Conflicts of

The duty of loyalty has been formulated in terms of competing client representations. Arguably, different considerations are at play when the competition is between a client on one hand and the firm itself on the other. Several areas of legal ethics support this view. For example, it would not be contrary to the duty of loyalty for a firm to resist allegations of overbilling by a client. To take another example, in the face of allegations of malpractice, a lawyer has the right to defend himself or herself, even if such a defence would require the divulging of confidential client information. Clearly the client's interest would be best served by the lawyer capitulating to the client. But this would be an absurd understanding of loyalty. In this sense, a lawyer may place his or her interest in securing a favorable outcome ahead of the interest of the client. These situations are understood not to violate the duty of loyalty, largely because that duty must still allow a lawyer or a firm scope to safeguard its own position.

The use of ethics counsel arguably is defensible on a similar footing. A reasonable client would understand that a firm might require advice to address a possible conflict of interest it might have with the client and would understand that such advice might be obtained from within the firm itself. As such, that practice would not violate the duty of loyalty. In light of the many benefits, canvassed earlier, of allowing firms to use ethics counsel as a resource, we should adopt an approach to the duty of loyalty in this context that condones, rather than criticizes, such a practice.

### 3) Agency

In *Pritchard*, Major J, citing *R v Dunbar and Logan*,<sup>211</sup> described the "common interest" exception to solicitor-client privilege. It arises in the context of two parties jointly consulting one lawyer:

The authorities are clear that where two or more persons, each having an interest in some matter, jointly consult a solicitor, their confidential communications with the solicitor, although known to each other, are privileged against the outside world. However, as between themselves, each party is expected to share in and be privy to all communications passing between each of them and their solicitor. Consequently, should any controversy or dispute arise between them, the privilege is inapplicable, and either party may demand disclosure of the communication.<sup>212</sup>

Yet it would be a considerable stretch to draw from this that both the firm's client and the firm are clients of ethics counsel such that this exception

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Interest to the Duty of Loyalty: From *Martin v Gray* to *R. v Neil*" (2006) 84 Can Bar Rev 433.

<sup>211</sup> (1982), 138 DLR (3d) 221 (Ont CA).

<sup>212</sup> *Supra* note 160 at para 23.

applies. The retainer in both cases is quite distinct: the outside client would retain the firm as lawyer, while the firm would retain ethics counsel as lawyer.

However, Major J went on to remark that the law has been extended to include affiliations in which there is no joint retainer but a fiduciary relationship between the two parties:

The common interest exception originated in the context of parties sharing a common goal or seeking a common outcome, a “selfsame interest” as Lord Denning M.R. described it in *Buttes Gas & Oil Co v Hammer (No. 3)* ... It has since been narrowly expanded to cover those situations in which a fiduciary or like duty has been found to exist between the parties so as to create common interest. These include trustee-beneficiary relations, fiduciary aspects of Crown-aboriginal relations and certain types of contractual or agency relations, none of which are at issue here.<sup>213</sup>

These sorts of relationships are similar to the agency and fiduciary relationships discussed by the United States Supreme Court in *Jicarilla*. According to the reasoning in that case, party A, owing a fiduciary or analogous relationship to party B, is presumed in certain circumstances to be acting on behalf of party B when consulting a lawyer for advice related to their duties. Party B has something akin to a proprietary interest in the legal advice which is given and no privilege attaches to such communications as against him or her. It is possible that going forward a Canadian court would use a similar analytical framework to determine whether a law firm could successfully maintain a claim of privilege against a client.

There are some agency law cases that relate to the question of whether the legal advice sought is for the firm’s client or for the firm itself. In Canada a beneficiary has a right to examine communications between the trustee and the trustee’s legal counsel which are related to the trust. This is premised on the idea, similar to the principle in *Jicarilla* that the beneficiary is the real client of the lawyer, that the legal advice is only given to the trustee for the benefit of the client, to whom the legal advice properly belongs. In *Froese v Montreal Trust Co of Canada*,<sup>214</sup> Master Joyce quoted from *O’Rourke v Darbishire*, a decision of the House of Lords:

If the plaintiff is right in saying that he is a beneficiary, and if the documents are documents belonging to the executors as executors, he has a right to access to the documents which he desires to inspect upon what has been called in the judgments in this case a proprietary right. The beneficiary is entitled to see all trust documents

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<sup>213</sup> *Ibid* at para 24.

<sup>214</sup> 1993 CarswellBC 2482 (WL Can) (SC) [*Froese*].

because they are trust documents and because he is a beneficiary. They are in this sense his own. Action or no action, he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else's documents. The proprietary right is a right to access to documents which are your own. No question of professional privilege arises in such a case.<sup>215</sup>

Master Joyce was careful to note that this proprietary right was limited to communications "obtained or prepared by the trustee in administration of the trust and in the course of the trustee carrying out his duties as trustee."<sup>216</sup> By analogy, such a right would extend to a client only if the lawyer were seeking legal advice related to the retainer.

The obligation of the fiduciary to allow the party whose best interest he or she is required to protect to access information has been recognized in relationships other than that of trustee-beneficiary. In *Ontario (Children's Lawyer) v Ontario (Information and Privacy Commissioner)*, where a minor was attempting to access certain records from the Children's Lawyer, the court found that the fiduciary relationship "carries with it the duty to act with utmost good faith and loyalty, and the obligation to grant access to information received or created by the Children's Lawyer in relation to the minor's cases."<sup>217</sup> While acknowledging that the information which was contained in these records may be harmful to the interest of the Children's Lawyer, "the right of the client to learn from the study of the file what was done, and not done, on her behalf, and why" was considered to be more valuable than the need to protect the fiduciary from harm.<sup>218</sup> Other classes of fiduciaries who are required to share their confidential communications have been recognized.<sup>219</sup> Further, the Supreme Court of Canada, adopting a principled approach to determining which situations fall outside the ambit of solicitor-client privilege, disavowed the notion that exceptions must remain static or be created only in reference to previously enumerated classes. As Wilson J stated in *Goodman Estate v Geffen*:

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<sup>215</sup> [1920] AC 581 at 626-27 (HL).

<sup>216</sup> *Froese*, *supra* note 214 at para 26.

<sup>217</sup> (2003), 66 OR (3d) 692 at para 87 (Div Ct).

<sup>218</sup> *Ibid* at para 86.

<sup>219</sup> In the wills context, see e.g. *Ontario (Attorney General) v Ballard Estate* (1994), 20 OR (3d) 350 at 353 (Gen Div), where Lederman J held that both the executor and beneficiary of a will have a joint interest in the communications of the solicitor with the executor and that the beneficiaries were therefore entitled to access these otherwise privileged documents: "They are said to belong to the beneficiary not because he or she literally has an ownership interest in them but, rather, because the very reason that the solicitor was engaged and advice was taken by the trustees was for the due administration of the estate and for the benefit of all beneficiaries who take or may take under the will."

In the present case the respondents argue that no analogy can be drawn between these wills cases and the situation here. I disagree. It is implicit in their argument that the common law has as yet only recognized an “exception” to the general rule of the privileged nature of communications between solicitor and client when dealing with the execution, tenor or validity of wills and wills alone. Their argument is reminiscent of earlier days when the “pigeon hole” approach to rules of evidence prevailed. Such, in my opinion, is no longer the case. The trend towards a more principled approach to admissibility questions has been embraced both here and abroad ... a trend which I believe should be encouraged.<sup>220</sup>

The principle which supports an agency-based exception is that agents cannot withhold information from their principals. Communication between an agent and an expert who is consulted in the course of the agent’s duty is made on behalf of the principal; it cannot be withheld from him or her, even when protected by solicitor-client privilege.<sup>221</sup> Equally, “An agent is free to communicate with a solicitor regarding legal advice for his or her own purposes, including for the purpose of obtaining advice about the agent’s relationship with the principal.”<sup>222</sup>

What these cases do not do is provide guidance as to when ethics counsel will have been retained by an agent of the client or by the firm as principal. Accordingly, it would be prudent for Canadian courts to consider the factors identified in *Jicarilla*. As explained, these include whether there were pending adversarial proceedings between the trustees and beneficiaries, whether the legal advice was intended for the purpose of benefitting the client and whether the law firm is paid by the client.

#### *D) Litigation Privilege*

If solicitor-client privilege protects communications within a firm between lawyers and ethics counsel, then there is no need to consider whether the same communications are also protected by litigation privilege. On the other hand, if it does not, an alternative would be to consider the role of litigation privilege. For example, if a firm is sued by a former client, internal firm communications after the solicitor-client relationship ended may not be caught by solicitor-client privilege, especially such communications

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<sup>220</sup> [1991] 2 SCR 353 at 387; see also Ronald D Manes and Michael P Silver, *Solicitor-Client Privilege in Canadian Law* (Markham, Ont: Butterworths, 1993) at 64.

<sup>221</sup> See *McKinlay Transport Ltd v Motor Transport Industrial Relations Bureau of Ontario (Inc)*, [1991] OJ No 1410 (QL) (Master), aff’d [1992] OJ No 5 (QL) (Gen Div); *Chersinoff v Allstate Insurance Company* (1969), 3 DLR (3d) 560 (BCCA).

<sup>222</sup> *Chan v Dynasty Executive Suites Ltd* (2006), 30 CPC (6th) 270 at para 53 (Ont Sup Ct).

that are not with ethics counsel. This would be because they are not communications with the firm's lawyer. But if they are communications for the dominant purpose of the litigation, they would be caught by litigation privilege. The more difficult question is whether litigation privilege has a role to play in respect of current clients of the firm.

The Supreme Court of Canada has recently articulated the differences between the two privileges. In *Blank v Canada (Department of Justice)* Fish J explained that although both privileges aim to achieve the effective administration of justice, the two are in fact "distinct conceptual animals."<sup>223</sup> While solicitor-client privilege protects the relationship between lawyers and their clients, allowing clients the freedom to speak candidly about their situation, litigation privilege is concerned to provide a "zone of privacy" in which to prepare for pending or apprehended litigation.<sup>224</sup> To be able to claim that the communication was protected by litigation privilege, an ethics counsel should have been consulted with the "dominant" purpose of litigation, though it need not be the sole purpose. As Fish J explained:

I see no reason to depart from the dominant purpose test. Though it provides narrower protection than would a substantial purpose test, the dominant purpose standard appears to me consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure.<sup>225</sup>

To determine if the dominant purpose test is met, courts inquire as to the expectation of litigation. It must be "apprehended" by the party which claims the privilege. The Ontario courts have had an opportunity to articulate this standard in the context of insurance company investigations. In *General Accident Assurance Co v Chursz* the Court of Appeal determined whether the communications between the adjuster, counsel for the insurer and the insurer were protected.<sup>226</sup> Carthy JA referred to a "reality of litigation" as the threshold to meet for the dominant purpose test:

In my view, an insurance company investigating a policy holder's fire is not, or should not be considered to be, in a state of anticipation of litigation. It may be that negotiations and even litigation will follow as to the extent of the loss but until something arises to give reality to litigation, the company should be seen as conducting itself in good faith in the service of the insured. The reality of anticipation of litigation arose in this case when arson was suspected and Eryou was retained. Chrusz was presumably a suspect

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<sup>223</sup> *Supra* note 167 at para 7.

<sup>224</sup> *Ibid* at para 34.

<sup>225</sup> *Ibid* at para 60.

<sup>226</sup> (1999), 45 OR (3d) 321 (CA).

if this was a case of arson and litigation privilege attached to communications between Bourret and Eryou or from Bourret through General Accident to Eryou so long as such litigation was contemplated. The dominant purpose test is satisfied.<sup>227</sup>

So it was the suspicion of wrongdoing and not the investigation itself which lent reality to the apprehended litigation. In *Scopis Restaurant Ltd v Prudential Assurance Co of England Property & Casualty (Canada)*,<sup>228</sup> another case of suspected arson, Sanderson J held the standard to be a “reasonable prospect” of litigation:

The fact that the investigation continued after that time does not detract from this conclusion. An insurer is obliged to keep an open mind and to continue to investigate even after a reasonable prospect of litigation exists. The claim for privilege is not dependent on the date of the commencement of legal proceedings, or the communication of a denial of coverage to the insureds.<sup>229</sup>

The dominant purpose test requires something more than a standard procedure, such as the opening of a claim or the commencement of an investigation, though there need not be certainty. This point was made in *Klair v Security National Insurance Co*, an arson case, where Lederman J said that litigation privilege “will come into play at some point between mere suspicion of arson and a conclusion that arson has been committed.”<sup>230</sup>

As has been the case in the United States, it should be expected that a law firm will be able to satisfy the test for litigation privilege in respect of communications with ethics counsel in particular circumstances. As discussed above, in the United States the courts have generally applied the same exceptions to litigation privilege as they have to solicitor-client privilege. It does not necessarily follow that a Canadian court would do so, but it seems likely. It would be open for a court to conclude that ethics counsel was in a position of conflict of interest but that the conflict should not preclude the ability to rely on litigation privilege as against the client. This would, however, be a significant break with the American authorities which do hold that the conflict prohibits reliance on the privilege, just as with solicitor-client privilege. And as discussed earlier, litigation privilege is a weaker privilege than solicitor-client privilege and so more vulnerable to countervailing considerations. As Fish J remarked in *Blank*, “While the solicitor-client privilege has been strengthened, reaffirmed and elevated in recent years, the litigation privilege has had, on the contrary, to weather the

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<sup>227</sup> *Ibid* at 338.

<sup>228</sup> (1999), 29 CPC (4th) 99 (Ont Gen Div).

<sup>229</sup> *Ibid* at para 12.

<sup>230</sup> (2006), 37 CCLI (4th) 306 at para 30 (Ont Sup Ct).

trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process.”<sup>231</sup>

The other main exception, based on agency, seems to have no role to play in the context of litigation privilege. If the communications with ethics counsel were for the dominant purpose of preparing for litigation with the client, virtually by definition the communications were between the ethics counsel as lawyer and the firm as client. It is difficult to see how a factual situation that triggered litigation privilege would somehow also fall within the agency exception on the basis that the client, and not the firm, was the true client of ethics counsel.

#### 4. Conclusion

Canadian law should evolve in directions that support the use of ethics counsel by law firms. One dimension of such an evolution is that Canadian courts should accept that solicitor-client privilege can arise in respect of communications between ethics counsel and other lawyers at his or her firm. Law firms should not be treated differently in this regard than other service firms like those in accountancy, insurance, banking, finance and telecommunications. Beyond this basic principle, the difficulties then lie in working out, on a case-by-case basis, whether the appropriate preconditions to privilege exist and whether the privilege is defeated by any exceptions.

Law firms face something of a dilemma in consulting ethics counsel. If there is no tension between the firm's interests and the client's, the agency exception might defeat the privilege. On the other hand, if there is such a tension then the resulting conflict of interest, most notably as a violation of the duty of loyalty, might have the same effect. To avoid having the privilege defeated, the advice from ethics counsel must be sought by the firm as client rather than as agent for the firm's client. The advice must also be provided in a manner sensitive to concerns about conflict of interest. That requires law firms to take certain structural steps in organizing the position of ethics counsel. It also requires a particular understanding of how the duty of loyalty operates in this context. This article has outlined several steps law firms can take to maximize the likelihood of a successful claim of privilege. These include segregation of ethics counsel within the firm and unique compensation arrangements. These steps could be sufficient for courts to conclude that the communications are protected. The law is more likely to evolve in that direction, however, if law societies provide some specific guidance, in the rules of professional conduct, for the role of ethics counsel. Evidence that

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<sup>231</sup> *Supra* note 167 at para 61.

a firm has followed such guidance would carry weight with a court considering a claim for privilege.

### 5. *Addendum*

This article has noted that the American law on this topic is in flux, and that claim is borne out by two important recent decisions, each of which expressly remarked on the lack of binding precedent. In July 2013 the Supreme Court of Georgia, that state's highest court, released its decision in *St Simons*.<sup>232</sup> Like the Court of Appeals, it disagreed with the trial court's order that the firm produce the communications with its ethics counsel. However, its analysis was quite different from that in most of the jurisprudence on this issue. It held that Georgia's ethical rules were irrelevant to the issue of privilege.<sup>233</sup> Even if the firm had violated one or more ethical rules, such as those on conflict of interest, whether any communications were privileged was not affected. The court held that "the same basic analysis that is conducted to assess privilege ... in every other variation of the attorney-client relationship should also be applied to the law firm in-house counsel situation."<sup>234</sup> While this is a tenable approach to the law of privilege, one of its chief deficiencies is that it does not provide any answers to the complex and important inter-related questions raised by the ethical rules: they are simply sidestepped. It provides little practical comfort to firms to uphold the privilege but leave them at the risk of being in violation of their professional obligations.

The Supreme Court of Georgia's decision does contain helpful discussion on two key points. First, it declined to apply the fiduciary exception to the privilege. In part this flowed from its uncoupling of ethical issues and privilege,<sup>235</sup> but in part it relied on *Jicarilla* and *Seyfarth* in concluding that the exception did not apply in the ethics counsel context.<sup>236</sup> Second, it stressed the need, under the traditional analysis of solicitor-client privilege, to determine on a case-by-case basis whether the firm is truly the client and noted that in doing so the factors identified by other courts and commentators should be considered, such as the creation of a formal ethics counsel position, the billing procedures used and the separation of files and other materials.<sup>237</sup>

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<sup>232</sup> *Supra* note 137.

<sup>233</sup> *Ibid* at 105.

<sup>234</sup> *Ibid* at 102.

<sup>235</sup> *Ibid* at 108.

<sup>236</sup> *Ibid* at 107-108.

<sup>237</sup> *Ibid* at 104-05.

Also in July 2013 the Supreme Judicial Court of Massachusetts, that state's highest court, rendered its decision in *RFF Family Partnership LP v Burns & Levinson LLP*.<sup>238</sup> The court held that communications between a firm's lawyers and its ethics counsel were privileged as against a current client of the firm provided that four conditions were satisfied. The conditions are:

- (1) the law firm has designated an attorney or attorneys within the firm to represent the firm as in-house counsel, (2) the in-house counsel has not performed any work on the client matter at issue or a substantially related matter, (3) the time spent by the attorneys in these communications with in-house counsel is not billed to a client, and (4) the communications are made in confidence and kept confidential.<sup>239</sup>

The Court rejected an approach to privilege that would have the effect of depriving lawyers and firms of valuable professional advice at a time when it was greatly needed.<sup>240</sup>

The Court's decision has two distinct strands. In one, it reached the same conclusion as the Supreme Court of Georgia, separating the privilege question from the ethics violation question. It held that "a client should not be deprived of the benefit of the attorney-client privilege because of its violation of rule 1.7, even if that 'client' is a law firm and the 'attorney' is an in-house counsel within that same firm."<sup>241</sup> Importantly, the Court did not use this reasoning as a basis for not addressing the ethical questions. In the second strand of the decision, it considered imputation, holding that "nothing in ... the rule of imputation was meant to prohibit an in-house counsel from providing legal advice to his [or her] own law firm in response to a threatened claim by an outside client."<sup>242</sup> On loyalty, it noted that "a law firm is not disloyal to a client by seeking legal advice to determine how best to address the potential conflict, regardless of whether the legal advice is given by in-house counsel or outside counsel."<sup>243</sup> These conclusions are consistent with the view of the jurisprudence advocated in this article.

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<sup>238</sup> 465 Mass 702, 991 NE 2d 1066 [*RFF Family Partnership*].

<sup>239</sup> *Ibid* at 703.

<sup>240</sup> *Ibid* at 722.

<sup>241</sup> *Ibid* at 721, relying on *In Re Teleglobe Communications Corp*, 493 F 3d 345 at 369 (3d Cir 2007).

<sup>242</sup> *Ibid* at 719.

<sup>243</sup> *Ibid* at 720.