

A Screw-Up; Now What?

From the Committee on Professional Responsibility, William Freivogel, Chair

Eighteen months ago you represented the borrower in a loan transaction. Your client is now in deep trouble and may be headed for bankruptcy court. One of the bankruptcy lawyers in the firm, while reviewing the loan transaction, notices that the remedies opinion in your closing opinion did not contain a critical provision dealing with bankruptcy. The bankruptcy lawyer comes to you and asks whether that omission was intentional. In looking at your notes you quickly realize that your assistant had misinterpreted one of your edits. This could further complicate life for your already shaky client. You go to your firm's general counsel and ask for guidance. She pulls in another partner for a second opinion about what should have been done.

While the above scenario raises many issues, we will just look at several of them. First, what must you tell your client? Second, are any of the communications that have just occurred protected by the attorney-client privilege? This second issue will almost certainly arise if either your client or the lender sues you and your law firm for the mistake. Last, when should the law firm notify its malpractice carrier or broker?

Keeping the client informed. Model Rule 1.4 ("Communication") has several sub-parts; however, it is clear that the rule, taken as a whole, requires you to advise your client of the mistake as soon as you have analyzed its severity and possible impact. A leading, and frequently cited, case on this point is *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 662 A.2d 509, 514 (N.J. 1995).

Privilege. A law firm of any size now has one or more lawyers whose roles may include handling claims against the firm and analyzing ethics issues that arise, either in connection with a claim, or otherwise. Titles we have heard include, "claims counsel," "ethics counsel," "loss prevention partner," "general counsel," and the like. Increasingly, law firms are consolidating these functions into a position called "general counsel." The general counsel may have specialized deputies to handle claims, ethics inquiries, and so forth. For brevity, we will use "general counsel" in lieu of the other titles. The privilege issues regarding all such persons should be the same.

Return to your loan transaction. You have now communicated with the bankruptcy partner, the general counsel, and another partner in your department. In addition, you may have reported the matter to the firm's managing partner. Or, perhaps, the general counsel has. Can the other side discover these communications in a malpractice suit against your firm? Or, does your law firm enjoy an internal attorney-client privilege just like that of a corporation.

The most recent case to address the privilege-in-law-firms issue is *Asset Funding Group, LLC v. Adams & Reese, LLP*, Civ. No. 07-2965, 2008 U.S. Dist. LEXIS 96505 (E.D. La. Nov. 17, 2008), *reh'g denied* 2009 U.S. Dist. LEXIS 48420 (E.D. La. June 5, 2009) (both opinions helpful). In the first opinion the court discussed twenty years of decisions in various federal courts. The court concluded, as did the earlier cases, that law firm internal communications could be protected by the privilege. However, the court also concluded, as did several prior opinions, that where the relationship with the client was in

existence at the time of the communications, the privilege did not protect the communications from discovery. That is because the communications created a conflict of interest between the client being discussed, a current client, and the law firm.

Return yet again to your loan transaction. If your law firm continues to represent the shaky client, there is a good chance that some court in litigation will hold that your internal communications must be produced. Even if the representation had terminated prior to the communications, you cannot be sure that all communications are protected. Clearly, your consultation with the general counsel should be protected. Likewise, the general counsel's report to the firm's managing partner should be protected. Beyond that, there is no clear guidance how wide the circle of participants can be and still maintain the privilege.

What to do? It is good practice to keep all these initial communications about problems oral. No memoranda. No E-mails. Is this an underhanded practice? Not at all. The problem is that many lawyers, when confronted with a possible mistake, initially make wrong assumptions and draw wrong conclusions. When a writing becomes appropriate, the relevant personnel can discuss who should be doing the writing and have a clear understanding about what really happened. Granted, oral communications are just as discoverable as written communications. But, one can see how much better off the firm will be absent a hasty, ill-considered, memorandum or E-mail.

When should the law firm notify the client about what happened? We have been privy to discussions of this issue by wise and seasoned law firm personnel. The consensus seems to be that the law firm should inform the client only after a careful analysis by objective lawyers within the firm. Sometimes, that may include getting input from lawyers outside the firm.

When should the law firm notify its malpractice insurance carrier or broker? That depends upon the terms of the policy. Depending upon the carrier or broker, it may have lawyers on staff who are experienced at assisting firms in coping with mistakes, or other issues, at the very earliest stages.
