Keeping Secrets From Your Client: The Attorney-Client Privilege For Lawyers

by John J. Aromando

Introduction

It is a difficult situation for a lawyer to realize, during an engagement, that you may have breached the standard of care while representing a client. What should you tell the client? Do you need to withdraw, or should you help the client avoid the potential adverse consequences of your error? Do you have a conflict of interest? Can the client consent to your continued representation? Should you advise the client to consult independent counsel?

So many questions, but there are two more that should be at the top of your list in this situation: Should *you* consult counsel before talking to your client? And if you do, can you do so in confidence, even from your own client who you still represent?

The greater weight of authority over the previous 25 years[1] answers that last question in the negative when the consultation is with another attorney in your own firm.[2] According to those decisions, fiduciary and ethical obligations to a current client trump the attorney-client privilege for lawyer-to-lawyer communications within the firm. Under the so-called "fiduciary" or "current client" exception to the attorney-client privilege, such "in-house" communications cannot be concealed from the client, even if the purpose of the communications is obtaining confidential legal advice for the lawyer.

A new trend, adopting an approach better serving the interests of lawyers and clients alike, is rapidly gaining momentum, however. These more modern decisions[3] recognize the attorney-client privilege for internal law firm communications about legal duties owed to a current client provided certain conditions are met.

This article first reviews the waning line of authority adopting the fiduciary or current client exception to the attorney-client privilege for intra-firm communications, and why that exception was flawed from inception. It then discusses the modern trend supporting the availability of the attorney-client privilege for such communications, even when—and especially when—they relate to legal duties owed to a current client who may have a claim against the firm. Finally, it covers the specific conditions under which the attorney-client privilege applies to such communications pursuant to these more modern decisions.

The Fiduciary or Current Client Exception to the Attorney-Client Privilege for Lawyers

A lawyer's fiduciary responsibilities to a client during the course of representation are well established in Maine.[4] These include the duties of loyalty,[5] confidentiality,[6] competence,[7] diligence,[8] and communication.[9] They also include, more specifically, the duty to recognize and respond appropriately to conflicts of interest.[10] This may include the duty to withdraw from representation of the client.[11] Analysis of conflicts includes the personal interests of the lawyer,[12] for example an interest to avoid or mitigate a potential legal malpractice claim by a current client.

In general, keeping secrets from your client during representation concerning the subject matter of that representation is contrary to the fiduciary nature of the relationship, and constitutes a breach of the lawyer's ethical obligations. But what if the lawyer needs legal advice concerning a potential conflict with a current client? Can the lawyer consult confidentially with a colleague concerning ethical duties owed to a current client and whether that client might have a claim against the lawyer and the firm?

In the landmark 1989 decision of *In re Sunrise Securities Litigation*,[13] the United States District Court for the Eastern District of Pennsylvania addressed the "novel assertion that a law firm may consult its own attorneys as house counsel to secure legal advice in connection with or related to the firm's representation of a client, and as a result obtain the protection of the attorney client privilege on the basis that it is its own client."[14] The court initially rejected this proposition based on the rationale that the attorney-client privilege requires, among other things, both an attorney and a client, and therefore could not apply to communications "between members of one and the same entity." On reconsideration, however, the court was "persuaded that it is possible in some instances for a law firm, like other business or professional associations, to receive the benefit of the attorney client privilege when seeking legal advice from in house counsel."[15]

The *Sunrise Securities* court then went on to note in this context "problems of conflicting fiduciary duties which seldom arise in corporations and other professional associations." Citing *Valente v. PepsiCo.*,[16] the court drew an analogy to the situation where a lawyer owes separate fiduciary duties to two entities on the same matter, and one entity seeks to invoke the attorney-client privilege against the other with respect to that matter.[17] In that situation, the court observed, these conflicting fiduciary duties prevented the lawyer and the court from honoring a claim of privilege by one entity against the other.[18] From that premise, the court concluded:

> Applied to the situation presented here, the reasoning of Valente would dictate that a law firm's communication with in-house counsel is not protected by the attorney client privilege if the communication implicates or creates a conflict between the law firm's fiduciary duties to itself and its duties to the client seeking to discover the communication. Because I find that the *Valente* court's well-reasoned analysis accommodates the interests of both the fiduciary or attorney and the beneficiary or client, I will adopt it as the controlling rule in this case. The attorney client privilege therefore will protect only those otherwise privileged documents withheld by Blank Rome which do not contain communications or legal advice in which Blank Rome's representation of itself violated Rule 1.7 with respect to a Blank Rome client seeking the document.[19]

In general, keeping secrets from your client during representation concerning the subject matter of that representation is contrary to the fiduciary nature of the relationship, and constitutes a breach of the lawyer's ethical obligations. But what if the lawyer needs legal advice concerning a potential conflict with a current client?

In the wake of the *Sunrise Securities* decision, a number of other courts followed suit.[20] The "fiduciary" or "current client" exception to the attorney-client privilege for in-house law firm communications was born.

Recognizing the Attorney-Client Privilege for In-House Communications Among Lawyers

Even as it gained initial widespread acceptance following the *Sunrise Securities* decision, fundamental problems with the fiduciary or current client exception to the attorney-client privilege became apparent. As described by the United States District Court for the Northern District of California in the 2007 decision of *Thelen Reid & Priest LLP v. Marland*:

> The *court* recognizes that law firms should and do seek advice about their legal and ethical obligations in connection with representing a client and that firms normally seek this advice from their own lawyers. Indeed, many firms have in-house ethics advisers for this purpose. A rule requiring disclosure of all communications relating to a client would dissuade attorneys from referring ethical problems to other lawyers, thereby undermining conformity with ethical obligations. Such a rule would also make conformity costly by forcing the firm either to retain outside counsel or terminate an existing attorney-client relationship to ensure confidentiality of all communications relating to that client. This court declines to follow such a strict rule, preferring one that is consistent with a law firm in-house ethical infrastructure.[21]

Yet *Marland* allowed only a "narrow exception" to the exception.[22] In the words of the court:

> Specifically, while consultation with an in-house ethics adviser is confidential, once the law firm learns that a client may have a claim against the firm or that the firm needs client consent in order to commence or continue another client representation, then the firm should disclose to the client the firm's conclusions with respect to those ethical issues.[23]

Marland held that the law firm "must produce *any communications* discussing claims that [the client] might have against the firm or discussing known errors in its representation of [the client]," as well as "*any communications* discussing known conflicts in its representation of [the client] or other circumstances that triggered [the firm's] duty to advise [the client] and obtain [the client's] consent."[24] In other words, the "exception to the exception" was swallowed by the fiduciary exception itself.

The *Marland* court, it seems, was unable to overcome the inertia from the *Sunrise Securities* line of authority. As noted by that court:

> Thelen cites no case in which an intra-firm communication relating to the firm's representation of a client was withheld *from the client* under a claim of privilege. The court finds *In re Sunrise Sec. Litig.*, 130 F.R.D. 560 (E.D. Pa. 1989) instructive.[25]

During the last few years, however, decisions from several jurisdictions, including Massachusetts and New Hampshire, have found sufficient impetus to adopt a different approach.[26] These courts have inspected the foundations of the fiduciary or current client exception to the attorney-client privilege as articulated by *Sunrise Securities* and its progeny, and exposed major cracks. Freed from the faulty analysis of the prior case law in this area, and building on the concerns raised but not addressed in *Marland*, these decisions reject application of the fiduciary or current client exception to the attorney-client privilege for intra-firm communications.

The turn of the tide began in the 2011 decision by the United States District Court for the Southern District of Ohio in *TattleTale Alarm Systems, Inc. v. Calfee, Halter & Griswold, LLP.*[27] Analyzing the defendant law firm's claim of privilege under Ohio law, the *TattleTale* court remarked on the impressive list of decisions supporting the exception to the privilege urged by the plaintiff client and "that, from a case law perspective, there is not much on the other side of the ledger."[28] The court took a critical look, however, at the "joint client" anal-

These courts have inspected the foundations of the fiduciary or current client exception to the attorney-client privilege as articulated by Sunrise Securities and its progeny, and exposed major cracks. Freed from the faulty analysis of the prior case law in this area, and building on the concerns raised but not addressed in *Marland*, these decisions reject application of the fiduciary or current client exception to the attorney-client privilege for intra-firm communications.

ogy relied on by *Sunrise Securities*[29] based on *Valente v. Pepsico, Inc.*[30] and found it inapt. Specifically, the court noted, the exception to the privilege for joint clients applies only to communications about matters of common interest—it does not apply to matters on which the joint clients are adverse.[31]

The *TattleTale* court also found factors supporting traditionally recognized exceptions to the attorney-client privilege lacking.[32] For example, the court noted, it was not credibly alleged that the communications at issue promoted criminal or fraudulent activity and were therefore unworthy of protection under the crime-fraud exception to the attorney-client privilege.[33] Nor could it be argued that withholding those communications deprived the client of its cause of action. As stated by the court:

> It is simply not the case that a legal malpractice plaintiff will be functionally unable to prove negligence without gaining access to intra-firm communications made during loss prevention efforts. The client still has access to every communication between the client and the firm and to every communication made by the lawyer, whether within the firm or outside of it, that reflects how the lawyer was carrying out the client's legal business. It is hard to conceive of a case where the only evidence of legal malpractice is found within the firm's loss prevention communications.[34]

In the absence of such factors, the court expressed reluctance to interfere with the privilege's well-established goal of promoting full and frank discussion between lawyer and client.[35] In the words of the court:

> As to the question of what values are served by applying the privilege to loss prevention communications, individual lawyers who come to the realization that they have made some error in pursuing their client's legal matters should be encouraged to seek advice promptly about how to correct the error, and to make full disclosure to the attorney from whom that advice is sought about what was done or not done, so that the advice may stand some chance of allowing the mistake to be rectified before the client is irreparably damaged. If such lawyers believe that these communications will eventually be revealed to the client in the context of a legal malpractice case, they will be much less likely to seek prompt advice from members of the same firm. While consultation with outside

> counsel might be a fair substitute in some cases, by the time a matter has progressed to the point where outside counsel are called in, it may be too late to protect the client from damage. All of this suggests that, as a practical matter, there are societal values to be served by allowing members of a law firm to converse openly and freely about potential mis-steps in their representation of a client without worrying about whether the client will eventually be able to use those communications to the lawyer's disadvantage.[36]

Based on similar reasoning, the highest state courts of Illinois,[37] Massachusetts,[38] and Georgia[39] have since adopted the *TattleTale* approach, and rejected the *Sunrise Securities* line of authority.[40] As noted by these courts, the original fiduciary exception to the attorney-client privilege had its roots in the English common law of trusts, arising from the situation where a trustee as fiduciary obtains legal advice on behalf of the beneficiaries to the trust.[41] It was never intended to apply to a situation where the trustee, at its own expense, obtains legal advice on a matter adverse to the beneficiaries to whom it owes fiduciary duties.[42] These courts also separated the issue of compliance with ethical rules, including Rule 1.7 concerning conflicts of interest, from application of the attorney-client privilege.[43] In their view, denial of the privilege is more likely to frustrate ethical compliance than promote it, but in any event is not an intended consequence of the rules of professional conduct.[44] As summed up by the Massachusetts Supreme Judicial Court:

> In law, as in architecture, form should follow function, and we prefer a formulation of the attorney-client privilege that encourages attorneys faced with the threat of legal action by a client to seek the legal advice of in-house ethics counsel before deciding whether they must withdraw from the representation to one that would encourage attorneys to withdraw or disclose a poorly understood potential conflict before seeking such advice. The "current client" exception is a flawed interpretation of the rules of professional conduct that yields a dysfunctional result. As such, we decline to adopt it in Massachusetts. Instead, because applying the privilege in such contexts will often benefit the client and will likely result in increased law firm compliance with ethical obligations, we hold that the attorney-client privilege applies to confidential communications between a law firm's in-house counsel and the law firm's attorneys, even where the communications are intended to defend the law firm from allegations of malpractice made by a current outside client.[45]

The more thoughtful modern view recognizes that broader availability of the privilege for in-house attorney communications fosters, rather than inhibits, the ethical performance of lawyers.

Maine lawyers who follow these guidelines should be able to keep their in-house communications privileged, including from their outside client in the event a claim.

Availability of the Attorney-Client Privilege for In-House Lawyer Communications Pursuant to the Modern Rule

Although uniform in their rationale for rejecting the fiduciary or current client exception to the attorney-client privilege,[46] the modern decisions diverge in their analysis of which intra-firm communications will qualify as privileged. Two separate tests have developed.

Under the test adopted by the Massachusetts Supreme Judicial Court, "[f]or the privilege to apply, four conditions must be met."

1. The law firm must designate formally or informally an attorney or attorneys within the firm to represent the firm as in-house or ethics counsel.

2. That in-house counsel cannot be someone who has worked on the client's matter or a substantially related matter.

3. Time spent communicating with in-house counsel cannot be billed to the outside client.

4. The communications with in-house counsel must be made confidentially and kept confidential.[47]

The Georgia Supreme Court chose a more flexible approach. Rather than requiring "in-house or ethics counsel" specially designated in advance, and enforcing a strict rule that a lawyer serving as in-house counsel cannot have "worked on the client's matter or a substantially related matter," the Georgia test employs four different criteria.

1. There must be a genuine attorney-client relationship between the firm's lawyers and in-house counsel.

2. The communications in question must be intended to advance the firm's interests in limiting exposure to liability rather than the client's interests in obtaining sound legal representation.

3. The communications must be conducted and maintained in

confidence.

4. No recognized exception to the privilege applies.[48]

"The less formality associated with the position, and the more the in-house counsel is involved in the representation of firm clients, the greater will be the significance of other factors, such as billing and record-keeping, in assessing the existence of an attorney-client relationship between in-house counsel and the firm."[49]

What Maine Is Likely To Do

Although the Law Court has yet to address the question squarely,[50] it seems likely Maine will follow the modern trend of recognizing the attorney-client privilege for confidential intra-firm communications, even when—and especially when—the subject of those communications is a potential claim against the firm by a current client, and the conflict of interest created by that potential claim. This trend is now clear and consistent, and the decisions establishing it have completely discredited the older *Sunrise Securities* reasoning. The more thoughtful modern view recognizes that broader availability of the privilege for in-house attorney communications fosters, rather than inhibits, the ethical performance of lawyers.

Regarding the test Maine is likely to use in judging which in-house attorney communications qualify for the privilege, comments from a recent decision by the New Hampshire Superior Court are instructive:

> The Court believes that the flexible approach of *St. Simons Waterfront, LLC* [the Georgia test] is more workable considering the reality of how New Hampshire law firms function than the *RFF Family Partnership, LP* approach [the Massachusetts test], which is applicable to very large, multi-office firms with full-time general and/or ethics counsel. While the bright line approach of *RFF Family Partnership, LP* would be easier for a court to apply, it would, as a practical matter, result in the in-house attorney-client privilege being unavailable to New Hampshire lawyers. The purposes of the *RFF Family Partnership, LP* rules can be satisfied by applying the criteria of *St. Simons Waterfront, LLC* to the case before the Court.[51]

Maine and New Hampshire share similar demographics, each with a substantial rural population served by smaller firms whose lawyers and clients alike will benefit from this flexible approach.

Maine lawyers who follow these guidelines should be able to keep their in-house communications privileged, including from their outside client in the event a claim. Both the Georgia and Massachusetts tests emphasize maintaining the confidentiality of communications, so do not place copies of privileged documents such as e-mails or notes in the outside client's file. And it should go without saying that you must not charge your outside client for time spent advising lawyers within your firm on matters adverse to that current client. Formally designating counsel for the firm to address such matters, although not required under the Georgia test, may help. And like any other privileged communication, only those involved with the rendering of legal advice should be involved.[52] In the end, being clear on the record about whose work you are doing—the firm's or the outside client's—should make the difference in whether the privilege applies.

John Aromando is a partner at Pierce Atwood, LLP. He represents law firms and in matters involving professional liability and ethics. He can be reached at jaromando@pierceatwood.com.

1. *See infra* at note 20.

2. It is generally accepted that a lawyer's confidential communications with outside counsel are privileged. *See, e.g., Landmark Screens, LLC v. Morgan, Lewis & Bockius LLP,* 2010 WL 289858 at *1 (N.D. Cal. 2010); In re SONICblue Inc., 2008 WL 170562 at *11 (Bankr. N.D. Cal. 2008)("Research has not uncovered any decision where a court denied the application of the privilege between a law firm and its outside counsel due to the law firm's breach of a fiduciary duty owed to its own client.")

3. *See infra* at note 26.

4. *Sargent v. Buckley*, 1997 ME 159, ¶ 9.

5. *See* M.R. Prof. Conduct 1.7-1.10, 1.13.

6. *See* M.R. Prof. Conduct 1.6.

7. *See* M.R. Prof. Conduct 1.1.

8. *See* M.R. Prof. Conduct 1.3.

9. *See* M.R. Prof. Conduct 1.4.

10. *See* M.R. Prof. Conduct 1.7.

11. *See* M.R. Prof. Conduct 1.16.

12. *See* M.R. Prof. Conduct 1.7(a)(2).

13. 130 F.R.D. 560 (E.D. Pa. 1989).

14. *Id.* at 572.

15. *Id.* at 595. It is by now well accepted that the privilege for communications with in-house counsel, see *Upjohn Co. v. United States*, 449 U.S. 383, 389-97 (1981), extends to law firms. *See, e.g., United States v. Rowe*, 96 F.3d 1294 (9th Cir. 1996); *Nesse v. Pittman,* 206 F.R.D. 325, 328 (D.D.C. 2002); *Hertzog, Calamari & Gleason v. Prudential Ins. Co. of Am.*, 850 F. Supp. 255 (S.D.N.Y. 1994); Restatement (Third) of the Law Governing Lawyers § 73 comments c and i (2000).

16. 68 F.R.D. 361 (D. Del. 1975).

17. 130 F.R.D. at 596-97.

18. *Id.* The Maine Rules of Evidence contain an exception to the attorney-client privilege as between joint clients concerning the subject matter of the joint representation. M.R. Evid. 502(d)(5). That exception applies, however, only to communications "relevant to a matter of common interest between" them. *Id.* In the event the interests of those joint clients become adverse, it is "the black-letter law" that "the communications are privileged against each other." *In re Teleglobe Communications Corp.*, 493 F.3d 345, 368 (3d Cir. 2007), citing *Eureka Inv. Corp. v. Chicago Title Ins. Co.*, 743 F.2d 932, 937-38 (D.C. Cir. 1984). Of course, once the interests of joint clients become adverse, the lawyer should withdraw from the joint representation, *see* M.R. Prof. Cond. 1.16(a)(1) and 1.7(a)(1), but it is "widely accepted" that the availability of the privilege to each of the joint clients does not depend on the separate issue of the lawyer's ethical compliance. *Teleglobe*, 493 F.3d at 369.

19. 130 F.R.D. at 597.

20. *See, e.g., Koen Book Distributors., Inc.*

*v. Powell, Trachtm*an, *Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, 284-87 (E.D. Pa. 2002); *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*, 220 F.Supp.2d 283, 287 (S.D.N.Y. 2002); *Versuslaw Inc. v. Stoel Rives,* 127 Wash. App. 309, 334, 111 P.3d 866 (2005); *Burns v. Hale & Dorr LLP*, 242 F.R.D. 170, 173 (D. Mass. 2007); *Thelen Reid & Priest LLP v. Marland*, 2007 WL 578989 at *6-7 (N.D. Cal. 2007); *In re SONICblue Inc.*, 2008 WL 170562 at *8-10 (Bankr. N.D. Cal. 2008); *Asset Funding Group, LLC v. Adams & Reese*, LLP, 2008 WL 4948835 at *1-*4 (E.D. La. 2008); *Cold Spring Harbor Lab. v. Ropes & Gray LLP*, 2011 WL 2884893 (D. Mass. 2011); *E-Pass Technologies, Inc. v. Moses & Singer, LLP,* 2011 WL 3794889 at *2-*3 (N.D. Cal. 2011).

21. 2007 WL 578989 at *7.

22. *Id.*

23. *Id.* at *8 (citing ABA Model Rule of Prof. Conduct 1.7). Although beyond the scope of this article, there is ongoing debate about whether a lawyer must disclose to a current client the "conclusion" that the client has a claim against the lawyer, as opposed to the *facts* material to that potential claim. *See RFF Family Partnership, LP v. Burns & Levinson, LLP*, 465 Mass. 702, 991 N.E.2d 1066, 1076 (2013) ("Preserving the privileged nature of these communications does not affect a law firm's duty to provide a client with full and fair disclosure of facts material to the client's interests." (Citation omitted, emphasis in original.)) The better view is that the lawyer need not, and should not, advise the client that the lawyer committed "malpractice" or that the client has a claim against the lawyer and the firm. *See, e.g.*, Colorado Ethics Op. 113 (2005); New York City Ethics Opinion 1995-2 (1995); T. Pierce & S. Anderson, *What to Do After Making a Serious Error*, 83 Wisconsin Lawyer No. 2 (Feb. 2010); *Leonard v. Dorsey & Whitney LLP,* 553 F.3d 609, 629-30 (8th Cir. 2009); *but see* New York Ethics Op. 734 (2000); Wisconsin Ethics Op. E-82-12 (1982); *In re Tallon*, 447 N.Y.S.2d 50, 51 (App. Div. 1982). Rules of professional conduct are typically silent on this point, and the Restatement provides only the unhelpful comment that "[i]f the lawyer's conduct of the matter gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose *that* to the client," without explaining what "that" is. Restatement (Third) of the Law Governing Lawyers § 20 comment c (2000) (emphasis added).

24. 2007 WL 578989 at *8.

25. *Id.* at *6 (emphasis in original).

26. *See, e.g., RFF Family Partnership, LP v. Burns & Levinson, LLP*, 465 Mass. 702, 991 N.E.2d 1066 (2013); *Moore v. Grau,* No. 2013-cv-150 (N.H. Super. Ct., Dec. 15, 2014); *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn,* 293 Ga. 419, 746 S.E.2d 98 (2013); *Garvy v. Seyfarth Shaw LLP*, 359 Ill. Dec. 202, 966 N.E.2d 523 (2012); *TattleTale Alarm Sys., Inc. v. Calfee, Halter & Griswold*, 2011 WL 382627 (S.D. Ohio 2011); *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 355 Or. 476, 326 P.3d 1181 (2014); *Palmer v. Superior Court*, 231 Cal. App. 4th 1214, 180 Cal. Rptr. 3d 620 (2014).

27. 2011 WL 382627 (S.D. Ohio 2011).

28. *Id.* at *7-8.

29. *In re Sunrise Securities Litigation*,130 F.R.D. 560, 596-97 (E.D. Pa. 1989). As observed by the *TattleTale* court, the Eastern District of Pennsylvania relied on the same "joint client" analogy to reach the same result 13 years later in *Koen Book Distributors, Inc. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, 285 (E.D. Pa. 2002).

30. 68 F.R.D. 361 (D. Del. 1975).

31. 2011 WL 382627 at *8, citing *In re Teleglobe Communications Corp*., 493 F.3d 345, 368 (3d Cir. 2007). *See also supra* at note 17.

32. *Id.* at *4-6.

33. *Id.* at *5. *See* M.R. Evid. 502(d)(1).

34. *Id.* at *6.

35. *Id.* at *4, *citing Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

36. *Id.* at *5. *See also id.* at *10 ("The Court also takes into account the fact that recognition of the privilege promotes the affected attorneys' ability promptly to seek advice and to obtain it based on a complete disclosure of the circumstances which led them to believe that some loss prevention communication was warranted.")

37. *Garvy v. Seyfarth Shaw LLP*, 359 Ill. Dec. 202, 966 N.E.2d 523 (2012).

38. *RFF Family Partnership, LP v. Burns & Levinson, LLP,* 465 Mass. 702, 991 N.E.2d 1066 (2013).

39. *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 293 Ga. 419, 746 S.E.2d 98 (2013).

40. Courts in Oregon and California have also declined to recognize the fiduciary or current client exception to the attorney-client privilege, but have done so based on the rationale that the privilege in those jurisdictions is legislatively adopted and therefore not subject to judge-made exceptions. *Crimson Trace*, 326 P.3d at 1192-95; *Palmer*, 231Cal. App. 4th at 1227-34.

41. The Massachusetts Court actually analyzed the "fiduciary" exception separately from the "current client" exception. *RFF Family Partnership,* 991 N.E.2d at 1074-79. Most decisions discussing the exception to the attorney-client privilege created by *Sunrise Securities* use those terms interchangeably.

42. *Garvy*, 966 N.E.2d at 535 (the "fiduciary-duty exception does not, however, apply to legal advice rendered concerning the personal liability of the fiduciary or in anticipation of adversarial legal proceedings against the fiduciary"); *RFF Family Partnership*, 991 N.E.2d at 1074-75; *St. Simons Waterfront*, 746 S.E.2d at 107-08.

43. The Maine Rules of Evidence contain an exception to the Lawyer-Client Privilege for "Breach of Duty by Lawyer or Client." M.R. Evid. 502(d)(3) ("The lawyer-client privilege does not cover any communication relevant to an issue of the lawyer's breach of a duty to the client, or of the client's breach of a duty to the lawyer.") The purpose of this exception is to permit a lawyer to disclose communications between the lawyer and the client as necessary for the lawyer's defense in the event of a controversy between between the client and the lawyer. Field & Murray, Maine Evidence § 502.6 at 222 (6th ed. 2007). It is not intended to eliminate the privilege when the lawyer is the client, seeking confidential advice concerning a separate current client representation.

44. *RFF Family Partnership*, 991 N.E.2d at 1077-79; *St. Simons Waterfro*nt, 746 S.E.2d at 108; *Garvy*, 966 N.E.2d at 538.

45. *RFF Family Partnership*, 991 N.E.2d at 1080.

46. These decisions also reject any similar exception to the work product doctrine in this context. *See, e.g., St. Simons Waterfront,* 746 S.E.2d at 109; Garvy, 966 N.E.2d at 539.

47. *RFF Family Partnership*, 991 N.E.2d at 1080.

48. *St. Simons Waterfront*, 746 S.E.2d at 108.

49. *Id.* at 105.

50. *Cf. Board of Overseers of the Bar v. Warren*, 2011 ME 124, ¶¶ 20-24.

51. *Moore v. Grau,* No. 2013-cv-150, Slip Op. at 16-17 (N.H. Super. Ct., Dec. 15, 2014).

52. *See* M.R. Evid. 502(b).