New York State Bar Association

Committee on Professional Ethics

Opinion 789 – 10/26/05

Topic: Consultation with a law firm's in-house counsel on matters of professional ethics involving one or more clients of the law firm.

Digest: A law firm may form an attorney-client relationship with one or more of its own lawyers to receive advice on matters of professional responsibility concerning ongoing client representation(s), including on matters implicating the client's interests, without thereby creating an impermissible conflict between the law firm and the affected client(s). The law firm's duty to disclose its conclusions will vary with the circumstances of the matter.

Code: DR 1-102(A); DR 1-104; DR 1-106; DR 1-107; DR 2-101(E); DR 2-102(A); DR 2-103(D); DR 2-105(A); DR 3-102(A); DR 5-101(A); DR 5-105; DR 5-109; DR 9-102; EC 1-8; EC 5-18; EC 7-7; EC 7-8.

QUESTION

1. When a law firm seeks advice from one or more of its own lawyers about the firm's legal and ethical obligations in connection with representing a client, without first obtaining the client's consent, does the consultation create an impermissible conflict between the interests of the law firm and those of the affected client?

OPINION

Background

2. A New York-based law firm has appointed a committee of partners charged with (1) advising the firm and its lawyers on legal and ethical obligations and issues of professional responsibility, (2) assuring the firm's compliance with the law governing lawyers, (3) counseling the firm concerning its systems to facilitate such compliance, and (4) representing the firm in challenges to its professional

conduct. Included among the issues that these in-house advisors confront are considering the limits on a lawyer's duty of zealous representation, interpreting and applying the rules governing conflicts of interest, addressing a client's allegation that the firm behaved unethically, and assessing whether the firm has failed in the performance of professional duties to a client.

3. Many of these issues involve questions of law and ethics in which the interests of the law firm may not coincide with the interests of the client(s) whose matters occasion the consultation. For instance, in addition to the duties owed to the affected client(s), lawyers may owe potentially conflicting duties to other existing or former clients, to a court or a regulatory tribunal, to adverse counsel, or to the legal system as a whole. Assuring compliance with these multi-faceted obligations may frequently present complex issues of law and ethics. The question here is whether a law firm's consultation with one of its own in-house lawyers on these types of issues creates a conflict of interest with the affected client under the Code of Professional Responsibility (the "Code"). We conclude that it does not.

Analysis

4. The question presented is new for this Committee and, as far as our research can find, any ethics committee in the country. Three recent cases – *VersusLaw, Inc. v. Stoel Rives, LLP*, 111 P.3d 866, 878, 127 Wash. App. 309, 332 (2005), *Koen Book Distrib. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo*, 212 F.R.D. 283, 283-85 (E.D. Pa. 2002), and *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 220 F. Supp. 2d 283, 286-88 (S.D.N.Y. 2002) – suggest that an in-house legal counsel's advice to law firms may not be subject to claims of attorney-client privilege as against their then-clients based on the courts' view that the firm's consultation with its in-house lawyers introduced a conflict between the law firm and its clients.[1] The question of the applicability of the privilege is an evidentiary issue for the courts. The question of what constitutes a conflict of interest under Canon 5 of the Code is one on which we are free to opine.

5. We begin with consideration of the background in the Code against which lawyers in law firms seek advice from in-house ethics advisers – various provisions of the Code that provide for or envision a law firm's obtaining in-house advice about obligations to clients and construction of an ethical infrastructure to

[1] The three cases all rest on *In re Sunrise Sec. Litig.*, 130 F.R.D. 560 (E.D. Pa. 1989), which held "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." *Id.* at 597. The *Sunrise* court relied in part on the so-called "fiduciary exception" to the privilege, *see Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970). Other decisions applying that exception, however, such as *Beck v. Manufacturers Hanover Trust Co.*, 218 A.D.2d 1, 17-18 (1st Dep't 1995); *Hoopes v. Carota*, 142 A.D.2d 906, 910-11 (3rd Dep't 1995) (dictum), *aff'd*, 74 N.Y.2d 716 (1989); and *United States v. Mett*, 178 F.3d 1058, 1064 (9th Cir. 1999), find that, when a fiduciary seeks legal advice concerning the fiduciary's *own* potentially conflicting obligations, including with respect to potentially different interests of beneficiaries, the fiduciary may assert privileges against the beneficiaries. *See also* RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. b (1959).

facilitate such consultation. We then consider whether seeking and giving such advice creates a personal conflict for the lawyers involved under DR 5-101(A), and then whether the rendering of such advice to a colleague puts the lawyer in the position of representing two clients with conflicting interests under DR 5-105(A) and (B). Finally, we address the extent to which the law firm is obligated under the Code to disclose to the client the fact of its in-house consultations.

The Code's Support for an Ethical Infrastructure

6. The Code explicitly imposes obligations on a law firm as an institution – a departure from the traditional confinement of ethical codes to regulation of individual lawyers. For example, DR 1-104 requires a law firm to make "reasonable efforts" to assure that its lawyers comply with the Code, mandates adequate supervision of the lawyers in the firm, and allocates responsibility between supervisory and subordinate lawyers in the firm. Other Code provisions also apply to the firm, rather than solely to individual lawyers.[2]

7. These rules necessarily create an obligation to establish protocols, appropriate for the size and practice of the firm, to enable the firm to enforce these standards internally. To envision such a system without access to confidential advice on legal and ethical issues affecting the firm's obligations is difficult. EC 1-8 is but one suggestion to this effect:

> A law firm should adopt measures giving reasonable assurance that all lawyers in the firm conform to the Disciplinary Rules and that the conduct of non-lawyers employed by the firm is compatible with the professional obligations of the lawyers in the firm. Such measures may include informal supervision and occasional admonition, a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a senior lawyer or special committee, and continuing legal education in professional ethics.

8. These rules persuade us that the Code endorses and in some cases requires mechanisms within a law firm to promote obedience to a firm's obligations. Those ethical obligations frequently raise issues potentially or actually implicating the interests of one or more clients. Either a law firm must address these issues with one of its own lawyers, or else look to others for this advice. To hold that a law firm must always seek guidance outside its halls in order to preserve an attorney-client relationship – that is, to hire outside counsel (whose fiduciary duties may extend only to the firm) in every instance in which such an adversity arises – is simply impractical in the day-to-day life of many law firms, when

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[2] *See, e.g.,* DR 1-102(A); DR 1-106; DR 1-107; DR 2-101(E); DR 2-102(A); DR 2-103(D); DR 2-105(A); DR 3-102(A); DR 9-102. *See also* DR 5-105(E) (requiring a system for checking conflicts); N.Y. State 715 (1999); N.Y. City 2003-3 (outlining minimal requirements for conflicts-checking system). Likewise, in issuing its Sarbanes-Oxley attorney conduct rules, the SEC declared that it expects law firms "to put in place procedures to comply with [its] requirements." Press Release, Securities and Exchange Commission 2003-13 (Jan. 23, 2003).

issues of professional responsibility frequently require prompt responses most usefully provided by lawyers knowledgeable about the firm, its client relationships and its culture. It also imagines a world in which a lawyer must hire another lawyer to practice law, thereby depriving the firm of the well-recognized right to represent itself. [3]

9. Further supporting this conclusion is the substantial literature supporting an in-house ethical infrastructure. "[A] law firm that assumes some collaborative responsibility for the moral climate of the firm's practice can improve morale, the quality of work, and, perhaps, the moral standards of the firm's lawyers and other employees." CHARLES WOLFRAM, MODERN LEGAL ETHICS § 16.2.2, at 881 (1986). "Research in other organizational contexts shows that [in-house compliance] specialists tend to promote the development of compliance procedures within firms, and may play a leading role in defining industry standards for compliance." Elizabeth Chambliss & David B. Wilkens, *The Emerging Role of Ethics Advisors, General Counsel and Other Compliance Specialists in Large Law Firms,* 44 ARIZ. L. REV. 559, 560-61 (2002). "Many law firms already have an 'ethics committee' or 'ethics partner' to serve as the firm's internal resource for deciding ethics questions, and firms of more than a dozen lawyers that do not yet have an ethics committee ought to form one." ROY D. SIMON, SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED 68 (2005). "A lawyer confronting something that seems to be an ethics problem should consult a colleague about whether there is such a problem and, if so, how she should go about resolving it." Geoffrey C. Hazard, *The Legal Profession: The Impact of Law and Legal Theory*, 67 FORDHAM L. REV. 239, 247 (1998).[4]

10. We do not believe that the conflicts rules of Canon 5 were intended to prohibit ethics consultation when it is most helpful: during the client representation.

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[3] *See United States v. Rowe*, 96 F.3d 1294 (3rd Cir. 1996) (recognizing law firm's right to represent the firm *pro se*); *Hertzog, Calamari & Gleason v. Prudential Ins. Co.*, 850 F. Supp. 255 (S.D.N.Y. 1994) (same); *Lama Holding Co. v. Shearman & Sterling*, 1991 U.S. Dist. LEXIS 7987 (S.D.N.Y. June 17, 1991) (same). *See also In re Sunrise Sec. Litig.*, 130 F.R.D. 560, 595 (E.D. Pa. 1989) ("I am not willing to hold that a law firm may never make privileged communications with in house counsel").

[4] *See also* Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721 (2005); Jonathan M. Epstein, *The In-House Ethics Advisor: Practical Benefits for the Modern Law Firm*, 7 GEO. J. LEGAL ETHICS 1011 (1994); Susan Saab Fortney, *I Don't Have Time To Be Ethical: Addressing the Effects of Billable Hour Pressure*, 39 IDAHO L. REV. 305 (2003); Susan Saab Fortney, *Ethics Counsel's Role in Combating the "Ostrich" Tendency*, 2002 PROF. LAW. 131 (2002); Susan Saab Fortney, *Are Law Firm Partners Islands Unto Themselves?*, 19 GEO. J. LEGAL ETHICS 271 (1997); Barbara Gillers, *Preserving the Attorney Client Privilege for the Advice of a Law Firm's In-House Counsel*, 2000 PROF. LAW. 107 (2000); Peter B. Jarvis & Mark Fucile, *Inside an In-House Legal Ethics Practice*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 103 (2000); Milton R. Wessel, *Institutional Responsibility: Professionalism and Ethics,* 60 NEB. L. REV. 504, 512-13 (1981); Gail Cox, *Some Firms Keep Own Counsel*, NAT'L L.J., June 30, 1997, at A1; Jonathan D. Glater, *In a Complex World, Even Lawyers Need Lawyers*, N.Y. TIMES, Feb. 3, 2004, at C1; Peter R. Jarvis, *Ethics Advisors Watch Over Firms*, NAT'L L.J., July 13, 1992, at A15; Gary Taylor, *Legal Costs Are Leading Law Firms, Like Their Clients, To Look Inside for Advice*, NAT'L L.J., July 18, 1994, at A1.

DR 5-101(A): Interests That May Affect Professional Judgment

11. DR 5-101(A) prohibits a lawyer from accepting or continuing employment if the exercise of the lawyer's professional judgment "will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest." DR 5-105(D) imputes this prohibition to every lawyer in the firm. The issue is whether it is a conflict under DR 5-101(A) for a lawyer to seek or give advice on the firm's ethical obligations to its client *while* the firm is representing those clients.

12. We believe that a lawyer's interest in ensuring compliance with the lawyer's ethical duties or obligations, or considering the effects of a possible violation of those duties, does not generally raise issues under DR 5-101(A). A lawyer's interest in carrying out the ethical obligations imposed by the Code is not an interest extraneous to the representation of the client. It is inherent in that representation and a required part of the work in carrying out the representation. It is, in other words, not an interest that "affects" the lawyer's exercise of independent professional judgment, but rather is an inherent part of that judgment. The law firm is not only entitled, but required, to consider the ethical implications of what it does on a daily basis. That the law firm does so through consultation does not change the interest being pursued. Such consultation, moreover, has been a part of law practice for generations and indeed is encouraged by the Code.[5] It is too much a part of the fabric and tradition of legal practice to require specific disclosure and consent.

13. This is not to say that the firm's interest in protecting itself can never give rise to a conflict of interest under DR 5-101(A), or that the firm has no obligation to disclose to the client the conclusions resulting from its seeking or giving advice on its ethical obligations or exposure. A firm's conclusion that it has failed to comply with its ethical obligations might, in some circumstances, reasonably be expected to affect its exercise of professional judgment. As we discuss below, when a law firm learns that a client may have a claim against the law firm arising out of the law firm's rendition of legal services, or that the firm may need client consent in order to commence or continue another client representation, or in other circumstances where the client is called upon to act or decide, then the firm may need to disclose to the client the firm's conclusions with respect to the ethical issues.[6] But we do not believe that the consultation of an in-house ethics resource itself raises issues under DR 5-101(A).

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[5] EC 1-8.

[6] N.Y. State 734 (2000).

DR 5-105(A) & (B): "Differing Interests"

14. DR 5-105(A) and (B) require a lawyer to "decline" or "not continue" multiple employment if the "exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by" the lawyer's "acceptance" or "representation" of "another client," or "if it would be likely to involve the lawyer in representing differing interests, except to the extent" permitted by DR 5-105(C). This latter rule permits multiple employment "if a disinterested lawyer would believe that the lawyer can competently represent the interests of each and if each consents to the representation after full disclosure of the implications of the simultaneous representations and the advantages and risks involved." We here treat the relationship between an in-house ethics adviser and the lawyers whom he or she is advising like that of an in-house corporate legal officer. The Code treats lawyers who practice as retained advisers to a corporation no different from other lawyers, and it is clear that in-house advisers have an attorney-client relationship with the corporation that employs them.[7] Thus, the question is whether an in-house ethics advisor represents interests "differing" from those of clients.

15. We think not. The Code defines "differing interests" to mean "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse or other interest."[8] The key phrase is that the interest must be one that will "adversely affect *either the judgment or the loyalty of a lawyer to a client*." Because the Code requires adherence to its rules in service of the many duties a lawyer owes, a law firm's consideration of its own legal and ethical obligations in connection with its representation of one or more clients cannot be said to implicate a "differing interest" that will adversely affect the lawyer's exercise of professional judgment nor the loyalty due a client within the meaning of the Code.[9]

16. To suggest otherwise is counter to everything the Code embodies. The purpose of consultation on a lawyer's ethical and legal obligations is to facilitate the

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7 *See*, *e.g.,* Code, Definitions ("law firm" defined to include "the legal department of a corporation or other organization"); DR 5-109(A) ("lawyer employed or retained by an organization" has the same duty of loyalty to the organization as client); EC 5-18 (same); ABA Model Rule 1.13(a) ("lawyer employed or retained by an organization represents the organization"); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §96 cmt. b ("A lawyer may represent an organization either as an employee of the organization [inside legal counsel] or as a lawyer in private practice retained by the organization [outside legal counsel]. In general, a lawyer's responsibilities to a client organization are the same in both capacities.") *See also Rossi v. Blue Cross and Blue Shield*, 73 N.Y.2d 588, 592, 542 N.Y.S.2d 508, 509 (1989) ("The privilege applies to communications with attorneys, whether corporate staff counsel or outside counsel . . . .")

8 Code, Definitions.

9 *See generally* Marc I. Steinberg & Timothy V. Sharp, *Attorney Conflicts of Interest: A Need for a Coherent Framework*, 66 NOTRE DAME L. REV. 1 (1990); *Developments in the Law – Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244 (1981); Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823 (1992).

inquirer's adherence to applicable law and rules. Seeking advice from an in-house ethics advisor is intended to facilitate the lawyer's proper exercise of professional judgment and a lawyer's appropriate discharge of the duty of loyalty owed to the client in the same way that an outside client's consultation with a lawyer in the firm is intended to facilitate the client's lawful achievement of legitimate objectives. Considering a lawyer's ethical obligation to represent a client within the bounds of the law, for instance, does not give rise to any rightful claim that such consideration alone adversely affects the lawyer's professional judgment or loyalty, for this is what lawyers are supposed to do. This is true whether the issue at hand is how to conduct oneself in the future or whether conduct in the past was a violation of the Code, for consideration of both questions is part of what clients and the legal system expect lawyers to do, serves to reinforce ethical behavior, and informs future conduct. Simply put, seeking advice on how best to accommodate a lawyer's multi-faceted obligations in service of one or more clients does not, without more, entail the kind of "differing interest" that DR 5-105(A) and (B) regulates. It follows that such consultation does not require compliance with DR 5-105(C) mandating, among other things, advance informed consent to the law firm's representation of itself.

Disclosure Obligations

17. Having concluded that a law firm need not obtain advance informed consent before consulting its own in-house counsel on matters that implicate a client's interests, we must resolve whether a law firm is obliged to advise the client that the firm has consulted with its in-house counsel about a matter of professional responsibility affecting the client. In our opinion, no such obligation exists. Rather, a law firm may in certain circumstances owe the client a duty to advise the client of the firm's *conclusions* about the firm's legal or ethical obligations, but the firm has no duty to advise the client that the law firm has consulted with its own in-house counsel in reaching those conclusions.

18. This result naturally flows from the conclusion preceding it. Clients are entitled to counsel who comply with applicable standards of professional responsibility. Those lawyers are entitled to seek advice on how best to comply with those standards, and to do so without apprehending that seeking the advice is itself a violation of those standards. The Code does not obligate a lawyer to tell a client how the lawyer has reached a conclusion concerning a particular matter of professional responsibility.

19. Whether a law firm has a duty to disclose the fact of its own internal consideration of ethical issues should not be confused with a law firm's duty, in many circumstances, to disclose the products of that consideration. Nothing in this opinion is intended to alter the lawyer's duty to advise a client of circumstances requiring a client to act. Thus, obviously, when a law firm concludes that the firm may not continue to represent the client under DR 5-101 or DR 5-105, then the firm must so advise the client. The timing and extent of a firm's disclosure obligations will vary with the circumstances. For example, if a firm is considering whether to represent differing interests, disclosure obligations arise when the firm determines that a client has a decision to make – that is,

when the firm concludes that a client's informed consent is or later may become a prerequisite to its representation of this or another client. In that circumstance, the firm's duty is to provide the affected client(s) with all the information material to the client's decision whether to establish or continue the attorney-client relationship.[10]

20. Similarly, we have previously opined that "whether an attorney has an obligation to disclose a mistake to a client will depend on the nature of the lawyer's possible error or omission."[11] Because "lawyers have an obligation to keep their clients reasonably informed about [a] matter and to provide information that their clients need to make decisions relating to the representation," lawyers have an obligation to a client to disclose "the possibility that they have made a significant error or omission."[12] Whether an error or omission must be disclosed depends on all the relevant facts, such as whether the error or omission gives rise to a colorable malpractice claim, is capable of correction or is injurious to the client.[13]

CONCLUSION

21. In considering its obligations to its clients, a law firm may consult with one or more lawyers in the Firm without thereby violating the Code's prohibition on the unauthorized representation of differing interests or the Code's prohibition on continuing employment if the exercise of the lawyer's professional judgment might be affected by personal interests. The law firm does not ordinarily need to disclose to the clients the fact of such consultation, but may need to disclose the conclusions reached, as when the firm concludes that it has a conflict or that it has made a significant error or omission.

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10 *See* EC 7-8 ("A lawyer should exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations."); CHARLES WOLFRAM, *supra*, § 7.2.4, at 343-46.

11 N.Y. State 734 (2000).

12 *Id.*; *see* N.Y. State 396 (1975); EC 7-7; EC 7-8.

13 N.Y. State 734.