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ABA Discusses Ethical Issues Related to Law Firm In-House Counsel

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ABA Comm. on Ethics and Professional Responsibility, Formal Op. 453 (2008)

Brief Summary

The ABA has issued an opinion discussing six ethical issues that arise when a lawyer consults firm in-house counsel regarding work for a firm client. Among other things, the ABA concludes that in-house counsel generally have a unique exemption from the mandatory disclosure of attorney misconduct requirement in Rule 8.3.

Complete Summary

The American Bar Association opined on a number of issues that arise when a lawyer seeks ethics advice from another lawyer in the same firm. For purposes of clarity, the former lawyer is referred to as the "consulting lawyer," the latter lawyer is referred to as "in-house counsel," and the term "client" refers to an outside client of the firm unless otherwise noted.

The ABA first addressed whether client confidences may be disclosed during consultations between consulting lawyers and in-house counsel. The opinion noted that ABA Model Rule 1.6(b)(4) expressly permits disclosure of client confidences for purposes of seeking ethical guidance. Further, in-house counsel are impliedly authorized under Rule 1.6(b) to disclose such information within the law firm. Clients may, however, instruct in-house counsel to confine disclosure to specific members of the firm.

The ABA then concluded that a consulting lawyer will typically have no duty to inform the client of a consultation with in-house counsel. But if, for example, in-house counsel concludes that the client's proposed course of action would require the consulting attorney to violate the rules of professional conduct, Rule 1.4 would require the consulting attorney to explain to the client the legal limitations of the firm's assistance and the possible consequences of the client's course of action, including the firm's potential obligation to withdraw.

The next issue was whether the ethics consultation itself creates a conflict between the firm and the client. The ABA opined that this issue will turn on whether the consulting lawyer simply seeks prophylactic advice or has actually engaged in misconduct. In the former scenario, a conflict will not exist; in the latter, a conflict will likely exist. Such a conflict will be imputed to the rest of the firm, and continued representation will either be inappropriate or at least require the client's informed consent.

The ABA then discussed the issue of who in-house counsel may represent. In-house counsel, the ABA



noted, represents the firm but may also represent the consulting lawyer if no concurrent conflicts exists. If the consulting lawyer has not engaged in misconduct, dual representation is likely appropriate. Because the existence of a lawyer-client relationship is determined by the client's reasonable expectations, the ABA advised in-house lawyers to make clear to consulting lawyers whether they are or are not individual clients.

The ABA next discussed what in-house counsel must disclose when a consulting lawyer has committed misconduct. To the extent that such misconduct could cause substantial harm to the firm, in-house counsel must, under Rule 1.13, refer the matter to a higher authority within the firm unless in-house counsel reasonably believes the situation can be corrected through counseling or other means without harming the firm. If and when the highest authority in the firm fails to appropriately address the misconduct and in-house counsel reasonably believes disclosure is necessary to prevent substantial injury to the firm, in-house counsel may disclose misconduct to outside authorities to the extent permitted by Rule 1.6.

Finally, although Rule 8.3 mandates that lawyers disclose the egregious misconduct of their peers, Rule 1.6 protects in-house counsel from such mandatory disclosure. The ABA noted that information about the consulting attorney's misconduct will usually involve information related to both the consulting lawyer's representation of the client and the in-house lawyer's representation of the firm. Both types of information are protected by Rule 1.6. Therefore, both the firm and the client would need to consent to disclosure of the misconduct. The ABA pointed out that Comment [2] to Rule 8.3 suggests that in-house counsel should encourage both the client and the firm to consent to disclosure when doing so would not prejudice either party. This reporting exception for in-house counsel does not apply to other lawyers in the firm.

Significance of Opinion

This opinion highlights the unique ethical issues that arise when an attorney consults his or her firm's in-house counsel about his or her conduct. The opinion demonstrates why in-house counsel must always be cognizant of the interests of the client, the consulting lawyer and the firm. The opinion may also help inform lawyers and firms about when or whether to seek ethics advice from in-house or outside counsel.

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