

ABA: ok TO Contact In-House Counsel

BY LAZAR EMANUEL

The ABA has issued a new Ethics Opinion on an issue that has apparently never been decided in New York: May a lawyer representing a client in a matter communicate with the adversary's inside counsel about the subject of the matter without first obtaining the consent of the adversary's outside counsel? (Formal Opinion 06-443). The Opinion applies the terms "inside counsel" or "in-house counsel" to lawyers who are employees of an organization and who act as lawyers for the organization.

Model Rule 4.2 provides as follows:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

[Editor's note: New York's DR 7-104(A) contains virtually the same language.]

As the ABA points out, the purpose of MR 4.2 was to foreclose communication between an opposing lawyer and relatively unsophisticated employees of an adversary who may be "in the position of making uninformed decisions or statements or inadequate disclosures harmful to the organization." To further this purpose, Comment 7 to MR 4.2 describes employees who are out of bounds to the opposing lawyer as "... a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability."

The ABA's opinion conforms to the statement in The Restatement (Third) of the Law Governing Lawyers that corporate inside legal counsel is not generally within the scope of the no-contact rule. The reasons cited for permitting access to inside counsel revolve essentially around three basic realities:

1. Inside counsel is not likely to make inadvertent disclosures harmful to his employer;
2. Inside counsel is in a position to foster settlements and mediate the details of a dispute;
3. Inside counsel can intervene to discourage improper or obstreperous tactics by outside counsel

The Opinion recognized, however, that inside counsel are sometimes off-limits to contact by the opposing lawyer. This occurs especially when the inside lawyer himself is a "constituent of the Organization" as defined in Comment 7, *supra*. Example: "when the lawyer participated in giving business advice or in making decisions which gave rise to the issues which are in dispute." Inside counsel is off-limits as well when he himself is a party to the action and is represented by the same outside counsel as the organization.

In New York, the issue of contact with in-house counsel was raised – but left unresolved – in *Tylena M. v. Heart Share Human Services*, 2004 WL1252945, (S.D.N.Y. 2004). Defendant Heart Share moved to disqualify Tylena M's attorney, David Lansner, who admitted that he had contacted HeartShare's inside counsel

without the permission of the company's outside counsel. His purpose in making contact was to advise HeartShare's inside counsel that the fees of its outside counsel were being paid by an excess-coverage insurance carrier and that its interests would be better served by aligning itself with plaintiff. Lansner argued that communication with inside counsel was "justifiable" because outside counsel's failure to challenge denial of coverage by the carrier raised concern's about counsel's loyalty; HeartShare's inside counsel was not a party to the litigation; and the facts did not raise any of the problems DR 7-104 was intended to prevent.

The Court denied the motion to disqualify. Relying on its essential hostility to disqualification of counsel, the court said it was not "general overseer of the ethics" of lawyers appearing before the court unless their conduct "taints the trial." Motions to disqualify are particularly disfavored because disqualification has "an immediate adverse effect on the client by separating him from counsel of his choice" and because "disqualification motions are often interposed for tactical reasons." The court also found that HeartShare's counsel had not met the "heavy burden of proving facts required for disqualification", that there was no proof that Lansner's contact with inside counsel had prejudiced the defendant, and that Lansner and his firm had spent significant time and energy on the matter and would "suffer severe prejudice" if they were disqualified.

The court also denied defendant's request to impose sanctions on Lansner himself, but it said, "In denying sanctions, however, the Court does not intend to suggest that it condones Mr. Lansner's communication with HeartShare's in-house counsel" and it reminded defendant's counsel that they were free to report Lansner's conduct to the appropriate disciplinary body.

Roy Simon's Comments

In his discussion of DR 7-104 [Simon's New York Code of Professional Responsibility Annotated, 2006 edition, pp.1057-58], Roy Simon discusses the pros and cons of permitting contact by opposing counsel with in-house counsel for the adversary. He distinguishes between large corporations with a sizeable in-house legal department and small, closely-held corporations in which a lawyer who happens to be either an owner or an officer doubles as in-house counsel. In the former case, the policies behind DR 7-104 are not likely to be threatened and contact may well be beneficial; in the latter case, communication with in-house counsel may lead to damaging admissions by the relatively unsophisticated in-house lawyer to the more sophisticated and experienced litigator representing the adversary, as well as to a breakdown of the relationship between the adversary and his outside counsel. As Professor Simon advises:

In between these extremes will fall many situations, each one different from the next. ... The result is that direct communications with an opposing party's in-house lawyers without the consent of its outside counsel are ethically risky. I do not think courts and disciplinary authorities should condemn all such communications, but until we receive definitive guidance from courts and ethics committees, the terrain will continue to be essentially unmarked. The ABA's Opinion 06-443 has helped to define the terrain.

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