

## Consultation with In-House Ethics Counsel Does Not Create Conflict with Client

BY LAZAR EMANUEL

When a law firm is confronted with a legal or ethical issue involving its representation of a client, it has two viable alternatives: it can either turn to a lawyer or a committee of lawyers within the firm knowledgeable in the field of ethics and professionalism, or it can retain outside counsel. Ethics Opinion 789 of the Committee on Professional Ethics of the New York State Bar Association (10/26/05) will encourage law firms to adopt the first of these alternatives.

The Committee rejected the reasoning of a line of cases which suggested that consultation between a law firm and its in-house lawyers created a potential conflict between the firm and its clients and that the in-house lawyers' advice might not be privileged as against an existing client. It concluded, instead, that in-house consultation on issues of professionalism does not create a conflict of interest under the provisions of the New York Code of Professional Responsibility ("Code") and that the client's informed consent is not required before the consultation.

For purposes of the Opinion, the Committee assumed that a New York law firm had charged a committee of its lawyers with responsibility for advising the firm's lawyers on issues of professional responsibility and their legal and ethical obligations to clients. These issues might include, for example: limits on the duty of zealous representation, interpreting and applying the rules on conflicts of interest, responding to a client's claim of unethical conduct, and assessing whether the firm had failed in the performance of its professional duties to a client.

The Committee stressed that the Code considers every law firm to be an institution separate from its individual lawyers and imposes obligations accordingly. For example, DR 1-104 requires every law firm to make "reasonable efforts" to secure compliance with the Code by its lawyers, mandates adequate supervision of the firm's lawyers, and "allocates responsibility between supervisory and subordinate lawyers in the firm." Other provisions of the Code apply to law firms as distinguished from its individual lawyers.

The rules governing law firms create an obligation on each firm to establish "protocols" and measures appropriate for the size and practice of the firm. EC 1-8 describes the scope of this obligation:

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.

A firm's ethical obligations under the Code often raise issues affecting a client's interests. The firm may owe conflicting duties to another existing or former client, to the court, to opposing counsel, or to the legal system as a whole. When this happens, the firm must either resolve the issue internally by consulting with one of its own lawyers or turn to others for advice. To require a firm always to seek the guidance of outside counsel is "simply impractical in the day-to-day life of many law firms." Issues of professional responsibility often require prompt resolution. This is best provided by lawyers knowledgeable about the firm, its client relationships and its culture. To hold otherwise is to create "a world in which a lawyer must hire another lawyer to practice law, thereby depriving the firm of the well-recognized right to defend itself."

The NYSBA Committee found support for its conclusion that consultation with in-house counsel on an ethics issue does not create a conflict with the client's interests in the literature supporting an in-house ethical infrastructure. "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). One commentator has encouraged the expanded use of in-house counselors:

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 have an ethics committee ought to form one. Roy D. Simon, *SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED* 68 (2005).

### **In-house Consultation Does Not Create Conflict**

The Committee deemed the relationship between an in-house ethics advisor and his firm to be the same as the relationship between a corporation and its own corporate legal officer. "The Code treats lawyers who practice as retained advisors to a corporation no different[ly] from other lawyers, and it is clear that in-house lawyers have an attorney-client relationship with the corporation that employs them." The Code defines the term "law firm" to include "the legal department of a corporation or other organization." In the same way as with corporate counsel and their corporate employers, an in-house ethics advisor has an attorney-client relationship with his law firm.

This relationship requires analysis under DR 5-101(A) of the Code.

A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client 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 the prohibitions in DR 5-101(A) to all the lawyers in the law firm and raises this question: is it a conflict under DR 5-101(A) for a law firm to seek advice on the firm's ethical obligations to a client while the firm is representing that client?

The NYSBA Committee did not believe that a firm's interest in ensuring compliance with its ethical duties, or in anticipating and avoiding a possible violation of those duties, usually raises any 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." On the contrary, it is an interest forming the fabric of that relationship and a required part of its duties 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."

A law firm is confronted with ethical and legal issues concerning its clients every day and is required to resolve them. Its decision to resolve them by in-house consultation does not change the nature of its interests. "Such consultation...has been a part of law practice for many generations and indeed is encouraged by the Code. It is too much a part of the fabric and tradition of legal practice to require specific disclosure and consent."

There are circumstances, however, in which the firm's interest in protecting itself can give rise to a conflict under DR 5-105(A) or in which the firm will be required to disclose to the client the conclusions reached in the in-house consultation. For example, it may conclude that the client has a claim against the firm arising from its legal services, or that the firm needs the client's consent to undertake the representation of another client. In these circumstances, the firm may have to disclose its conclusions to the client.

But the obligation to disclose in some cases does not affect the fundamental right to consult with an in-house "ethics resource."

#### **"Differing Interests"**

DR 5-105(A) and DR 5-105(B) together require that a law firm "decline" or "not continue" employment by multiple clients if the multiple representation would be likely to involve the firm in representing "differing interests," unless "a disinterested lawyer would believe that the lawyer can competently represent the interests of each and each consents to the representation after full disclosure...of the advantages and risks involved" [DR 5-105(C)].

Although consultation between a lawyer representing a client of the firm and in-house ethics counsel creates a client-attorney relationship, the Committee found that the firm and the client do not have "differing interests" as that term is defined by the Code. The Code's definition of "differing interests" is "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client..." A law firm's consultation with in-house counsel will facilitate the proper exercise of its professional judgment and the discharge of its duty of loyalty to the client in the same way as a conference between a lawyer of the firm and one of its clients "is intended to facilitate the client's lawful achievement of legitimate objectives." The Committee concluded, "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 interests' that DR 5-105(A) and (B) regulates." It follows that a firm need not get the informed consent of its client before the consultation.

Nor is the law firm required to inform the client that an in-house consultation has occurred. In some cases, however, the firm will be obligated to advise the client of its conclusions. This obligation would

arise, for example, if the firm concludes that the client has a decision to make, or that the firm has committed a significant error or omission, or that the firm has a conflict.

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