

# The Ethics Of Ethics Consulting

BY ROY SIMON

Protecting client confidences and secrets is among a lawyer's most solemn obligations under the Code of Professional Responsibility. A lawyer who breaches client confidentiality without justification is breaching a fiduciary duty and may be liable for damages.

Upholding the integrity of the legal profession is also a lawyer's solemn obligation. The very first Ethical Consideration in the New York Lawyer's Code of Professional Responsibility EC 1-1, states, in part: "Maintaining the integrity ... of the bar to meet the highest standards is the ethical responsibility of every lawyer." Similarly, EC 1-5 states, in part: "A lawyer should maintain high standards of professional conduct and should encourage other lawyers to do likewise." The New York State Bar Association even advises lawyers, in a paragraph at the end of The Lawyer's Code of Professional Responsibility, that a lawyer "may obtain ethical guidance regarding questions concerning the lawyer's OWN professional conduct by writing to the Committee on Professional Ethics

## No Express Authority To Consult In Code

But there is a problem. The Code of Professional Responsibility does not expressly authorize a lawyer to consult a lawyer outside the lawyer's own firm to obtain ethics advice absent the client's consent. Obtaining advice from another lawyer inside the firm is ordinarily no problem because EC 4-2 states, in part: "Unless the client otherwise directs, a lawyer may disclose the affairs of the client to partners or associates of his or her firm." But EC 4-2 gives no help to sole practitioners who have no other lawyers in their firm to consult on ethics matters.

Nor does EC 4-2 help firms that have no expertise in ethics matters, or that have a conflict of interest in answering their own ethics questions. For example, suppose a law firm wonders whether accepting a major new client would create an impermissible conflict of interest with the firm's present or former clients. Lawyers inside the firm have a strong financial interest in accepting the new client, so they might be unable to resolve this question objectively. Indeed, lawyers inside the firm may have a non-waivable conflict of interest because of their financial interests, and may thus be disqualified from counseling their partners regarding the conflict. Or, suppose an associate believes that a partner at the firm has engaged in unethical behavior in connection with a client matter, but does not know whether DR 1-103 requires him (the associate) to report the partner's suspected misconduct to the disciplinary authorities. The associate may well believe that no one inside the firm can objectively advise him on this question.

## Reconciling Practice And Code

How can we reconcile the need for outside ethics advice with the Code's lack of express authority for seeking such advice? The answer, I believe, lies both in custom and practice and in necessity. In my view,

the right to seek outside advice is so firmly established in the customs and practices of the profession, and so necessary to the ethical practice of law, that no Code provision is required to permit it.

Yet this view is unsettling. Isn't DR 4-101 intended to be a complete list of the exceptions to the ethical duty of confidentiality? In theory, it is. But various exceptions to confidentiality are rooted not in the language of the Code but rather in the customs and practices of the profession. For example, lawyers may reveal confidential information to secretaries and paralegals even though nothing in DR 4—101 expressly authorizes such disclosures. Rather, the exception is rooted in "common knowledge." As stated in Ethical Consideration 4-2:

Unless the client otherwise directs, a lawyer may disclose the affairs of the client to partners or associates of his or her firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files .... [Emphasis added.]

Another exception to DR 4-101 is stated in EC 4—3 as follows:

Unless the client directs otherwise, it is not improper for a lawyer to give limited information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided the lawyer exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

Thus, in N.Y. State Bar Op. 473 (1977), quoting EC 4-3, the Committee said that absent a clients express direction to the contrary, lawyers could supply limited confidential information to outside agencies such as accountants and banks — without notice to or consent from clients — to further the "legitimate purposes" of the law firm.

### **Using Common Knowledge**

It is likewise "common knowledge" that lawyers are prohibited from violating the Code of Professional Responsibility and other laws and regulations governing lawyers. And it is probably "common knowledge" among lawyers that lawyers sometimes seek advice from outside counsel to find out whether their conduct as lawyers is ethical. I personally get calls from lawyers all the time asking me whether their conduct is ethical and legal, and grievance authorities apparently don't see anything improper in this practice I am unaware of a single case or ethics opinion in New York suggesting that a lawyer has acted unethically by seeking ethics advice from an outside lawyer. (The ABA recently issued an ethics opinion on the general subject of consulting with outside lawyers, but it did not expressly address ethics consulting. See ABA Formal op. 98-411)

But is the practice of consulting outside ethics experts also common knowledge among clients? Do clients know that their attorneys feel free to consult outside lawyers, without client knowledge or consent, to determine whether their conduct as lawyers is ethical? Is the practice of consulting outside lawyers for ethics advice so firmly rooted in the customs and practices of the legal profession that lawyers need no express authority to do it? Those are more difficult questions.

Unfortunately, no one has ever studied those questions. To help fill that gap, this issue of NYPRR contains a brief questionnaire that will take five minutes or less to fill out. You will help the profession understand the ethics of ethics consulting if you take a few minutes now to fill out and fax your response to this questionnaire.

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