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PERSPECTIVE

Bar endorses attorneys consulting with firm in-house counsel

By Shawn Shaffie

What ethical obligations arise when an attorney in a law firm consults with outside counsel concerning matters related to the firm's representation of a current client, such as the attorney's ethical compliance or a possible error by the law firm? And do those ethical obligations change if the lawyer consulted is a member of the same law firm and serving as in-house counsel to the attorney seeking the advice?

The answers to these questions are addressed in the recently published Formal Opinion Number 2019-197 of the State Bar of California Standing Committee on Professional Responsibility and Conduct. Based upon a long line of California cases, the opinion acknowledges the potential dual benefits to both clients and attorneys when a law firm utilizes in-house counsel to secure streamlined ethics and risk management advice. The effect of the opinion is to suggest that law firms have a real incentive to set up a system whereby in-house counsel can help firms with ethical compliance by early and streamlined identification of potential problems and mistakes. Such a system would be good for both attorneys and their clients who may benefit through amplified ethical compliance, and in some instances, the possibility of potentially



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redressing mistakes before they become incurable.

Consulting with In-House Counsel Does Not Automatically Trigger a Duty to Disclose, but Discovering a Prejudicial Error Does

The opinion provides a comprehensive analysis of potential ethical implications stemming from an attorney's consulting with in-house counsel. Particu-

lar consideration is given to the Rule of Professional Conduct 1.4(a)(3) regulates attorney communications with clients by stating that a lawyer shall "keep the client reasonably informed about significant developments relating to the representation." See also Business and Professions Code Section 6068(m). Rule 1.7(b) states in pertinent part that "A lawyer shall not without informed written consent ... represent a client if there is significant risk

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the lawyer's representation of the client will be materially limited ... by the lawyer's own interest."

The opinion ultimately concludes that an attorney's seek-

ing legal advice from his or her law firm's in-house counsel regarding a possible error and any resulting ethical obligations to the client, does not in and of itself create a conflict of interest, nor is there any reason why the lawyer must disclose its consultation with in-house counsel to the client. Indeed "there is no conflict that prevents any lawyer from undertaking the preliminary task; [as] in fact the rules require that lawyers consider and analyze potential conflicts."

On the flip side, a hard line is drawn triggering a duty to disclose material facts and seek the client's informed written consent to continued representation once it is concluded that a lawyer actually committed a prejudicial error. Under such circumstances, the firm must consider whether continued representation is even possible (and if so under what terms), or whether the law firm must withdraw.

A Practical Checklist for Attorneys Who Believe They Have Committed a Prejudicial Error

When an attorney makes a blunder in an ongoing matter that could become a malpractice claim, the culpable attorney and affiliated law firm must proceed with caution. The opinion identifies certain steps that must be undertaken. These include:

(1) Considering carefully whether the attorney may ethically continue to represent the client or if they should withdraw. In assessing this, the attorney must reasonably believe it can provide competent and diligent representation, including exercising independent judgment on the subject client's behalf. See Rule of Professional Conduct 1.7(d);

(2) Informing the client of the precise circumstances and facts giving rise to the error;

(3) Informing the client of the conflict of interest;

(4) Advising the client to consider seeking the advice of independent counsel as to whether to continue to be represented by the attorney, and;

(5) Seeking informed, written consent to continue such representation.

Attorney-Client Privilege with Respect to Intra-Firm Communications Between Attorneys and In-House Counsel

In the unfortunate event a malpractice lawsuit is filed, there are certain measures that

can be taken to reduce the risks associated with a dissatisfied client's efforts to compel the disclosure of intra-firm communications between law firm attorneys and their in-house counsel. These include:

(1) *Designating In-House Counsel*: The law firm should designate, either formally or informally, an attorney or attorneys within the firm as "in-house" or "general counsel." To further establish and demonstrate their roles and for purposes of maintaining the attorney-client privilege if a dispute arises in a court of law, firms often fuse the title of "general counsel" into certain attorney email signature lines and/ or incorporate said designation on the firm's actual website, usually under the attorney's biography section. Indeed, if an attorney is designated as "general counsel" prior to the time he or she was consulted, a court is more likely to infer that he or she actually was acting in that capacity.

(2) *The In-House Counsel Consulted Must Not Perform Any Work on the Client Matter*: To further strengthen a law

firm's claim of attorney-client privilege, as well as a court's inference of an authentic attorney-client relationship, it would be recommended that the consulting in-house counsel not perform any work on the particular client matter or even related matters. Indeed, if an attorney has not performed any work on the matter, the inference that the attorney is in-house counsel is strengthened. However, if the attorney does actually perform work, then a court may infer that the subject attorney's in-house counsel role is disingenuous and/ or perhaps conveniently established only after-the-fact.

(3) *In-House Counsel Must Not Bill Client for Time Spent*: Lastly, in-house counsel should not bill the client in the underlying matter for his or her time. To do so may prompt a court to infer that the attorney was acting as counsel to the client, rather than as in-house counsel to the firm and its attorneys.

Conclusion

As Formal Opinion Number 2019-197 demonstrates, law

firms are best served by establishing in-house counsel to examine and scrutinize concerns, risks, and plausible attorney errors. Regardless of firm size, a system can be adopted firm-wide to streamline a firm's ability to provide ethical advice to its own attorneys without creating a conflict of interest with firm clients. Ultimately, both lawyers and clients have an interest in ensuring the lawyer complies with ethical obligations, and a law firm's in-house counsel can help bolster that interest. ■

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