

Ouch, the CEO really stepped in it now. This presents serious ethical issues for me. Does he think I am his lawyer? Do I need to make some disclosure outside the company to the SEC, investors or creditors? Am I [gasp] a "gatekeeper?" I should get external ethics advice, but as soon as I call some law firm and give them identifying information to do a conflicts check, I have revealed confidences about a big problem in my company. Life was much easier when I was in a large law firm with hundreds of clients and many ethics-savvy lawyers to provide wisdom. Just how does the inside attorney seek ethical advice?

What Can You Ethically Do When You Don't Know What Ethically to Do?

BY JOHN K. VILLA

The answer: Very gingerly, as the American Bar Association has only recently focused its attention on the unique problems the inside lawyer faces in obtaining separate ethics advice. While many law firms may have their own internal ethics consultants — a practice approved by courts,¹ state ethics commissions² and ABA³ — those consultants usually have a community of interests with the law firm attorney seeking ethical advice. In most instances, the law firm partner wants to know her (and the law firm's) obligations as a client. By contrast, the problem faced by inside lawyers is often quite different for several reasons.

First, few companies have an in-house ethics capability. Second, even if the company did have a legal ethicist "on staff," the advice would often not be available to its lawyers because many times, the attorney is potentially adverse to the company — trying to

determine whether the inside lawyer has some ethical obligation vis-à-vis the company. By definition, the inside lawyer must turn to someone besides company counsel for input. Third, a company lawyer seeking ethics advice essentially reveals a confidence through the very act of asking for help.

Let's start with law firms. Their growing ethics capabilities are an effort to avoid potential civil liability and disqualification problems. Professional conduct rules also require law firm management to make reasonable efforts to ensure that their attorneys comply with ethical standards.⁴ Accordingly, most law firms have created special ethics committees or similar functions to reduce civil liability and fulfill their obligations under these rules.⁵ Since all lawyers within a firm are subject to restrictions, disclosures made during the course of an ethics consultation do

not violate the confidentiality requirements of the ethical rules.⁶ As ABA has recently opined, these disclosures "are clearly 'impliedly authorized'" by the client in order to enable the lawyer to carry out the representation.⁷ In the rare case where the law firm needs to go elsewhere to get ethics advice, the identity of the client is probably not evident because the firm may have many clients and thus the client's identity could conceivably be masked.

Oftentimes, corporate attorneys in the same office or lawyers for the same company cannot answer ethical questions occurring within the general counsel's office. Consultations within the legal department may be problematic simply because of the possibility that the in-house lawyer is potentially adverse to the company.

Prior to the 2002 revisions to the Model Rules of Professional Conduct, the ABA addressed, in a formal opinion, the ethical issues raised in lawyer-to-lawyer consultations involving a consulted lawyer who is not associated with the consulting lawyer and whose services have not been retained by the consulting lawyer.⁸ Recognizing the importance and, in some cases, the necessity of lawyer-to-lawyer consultations,⁹ ABA concluded that disclosures of limited information may be permissible as impliedly authorized. Under the exceptions to confidentiality in Model Rule 1.6,¹⁰ neither the identity of the client nor the actual facts are revealed to the consulted lawyer.¹¹

In order to protect the information disclosed during the consultation, ABA recommended that the consulting lawyer obtain a confidentiality agreement from the consulted lawyer, as well as an agreement not to undertake an adverse representation.¹² In the absence of client consent, however, the



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ABA cautioned that any “disclosure of privileged information specific to an identifiable client” would violate the consulting lawyer’s duty of confidentiality.¹³ The utility of this opinion for inside counsel is limited. Merely naming one’s employer immediately discloses the client identity to a consulted lawyer.

While ABA Formal Opinion 98-411 recognized that certain disclosures of confidential client information may be impliedly authorized under Model Rule 1.6(a) in order to carry out the representation, questions subsequently arose as to the propriety of disclosures made in lawyer-to-lawyer consultations that did not fall within the impliedly authorized exception in subsection (a).¹⁴ To clarify that even these disclosures are ethically proper, the ABA amended Model Rule 1.6 in 2002 to allow a consulting attorney to reveal confidential client information if she reasonably believes it is necessary “to secure legal advice about the lawyer’s compliance with these Rules.”¹⁵ As explained by the drafters of the amended rule, “[i]t is of overriding importance, both to lawyers and to society at large, that lawyers be permitted to secure advice regarding their legal obligations.”¹⁶ It is this amendment that primarily benefits the troubled in-house counsel.

ABA suggests it is “prudent” that the in-house lawyer secure separate ethical advice as the only permissible option.¹⁷ There are several avenues for attaining such guidance. Where the matter does not involve a conflict between the attorney and her corporate client, the corporation may retain an outside law firm or law school professor to provide advice on the issue. Where, however, the matter involves a potential conflict between the lawyer and her corporate client on a legal or ethical issue, she must receive advice from independent counsel whose loyalty would be to the attorney, not to the corporation.¹⁸

An inside lawyer could hire a law firm to provide independent advice,

But that carries both financial costs and employment risks — company management may view the inquiring lawyer as disloyal. So despite the ethical propriety of lawyer-to-lawyer consultations, counsel in a corporate legal department may be reluctant to retain an outside attorney.

What other options are available? State and local bar associations may provide informal opinions on ethical issues presented by lawyers on an anonymous basis; however, the time that elapses before a query is answered may render the opinion moot or of little use. A more viable option may be the use of appropriate internet list serves, which enable users to ask questions and receive responses while remaining anonymous. For example, like many state and local bar associations, various ACC committees host list serves on the ACC website, which provide a means for members to discuss issues or post questions pertinent to the committee’s interest area.¹⁹

Other potential options include, for major companies, hiring on retainer an outside ethics expert who is *not* counsel to the corporation and who is available to give confidential advice to company lawyers. The consultant would be paid by the company but be counsel only to the individual lawyers. While innovative, there are parallels in union-hired counsel to provide group legal services to union members at no charge or at a discount.

In the final analysis, this problem is neither widespread nor highly-publicized — except if it impacts you. Just remember, it is always better to get advice than to pick up the pieces later. ■

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NOTES

- 1 See Thelen Reid & Priest LLP v. Marland, No. C 06-2071 VRW, 2007 WL 578989, at *7 (N.D. Cal. Feb. 21, 2007).
- 2 See N.Y. State Bar Ass’n Comm. on

Prof’l Ethics, Op. 789, 2005 WL 3046319, at *2 (2005).

- 3 See ABA Model Rules of Prof’l Conduct, Rule 5.1(a), cmt. [3]; see also ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 08-453 (2008) (addressing ethics issues arising with respect to intra-firm ethics consultations).
- 4 See ABA Model Rules of Prof’l Conduct, Rule 5.1(a).
- 5 See ABA Formal Op. 08-453, *supra*, n.3.
- 6 See ABA Model Rules of Prof’l Conduct, Rule 1.6.
- 7 ABA Formal Op. 08-453, *supra*, n.3, at 4.
- 8 See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 98-411 (1998).
- 9 *Id.* at n. 2 (referencing Model Rule 1.2, setting forth a lawyer’s duty to provide competent representation to a client, and the commentary to the rule, suggesting consultation with a colleague as a means for gaining the requisite competence in a particular matter).
- 10 Model Rule 1.6(a) prohibits a lawyer from revealing information relating to a representation “unless... the disclosure is impliedly authorized in order to carry out the representation[.]” ABA Model Rules of Prof’l Conduct, Rule 1.6(a).
- 11 *Id.* at Part I. In order to minimize the risk of disclosing privileged or identifiable client information, ABA suggests the use of hypotheticals without reference to a real client or an actual situation. *Id.* at Part III.
- 12 *Id.* at Part ID.
- 13 *Id.* at Part IA, IB.
- 14 See ABA Ethics 2000 Commission, Reporter’s Explanation of Changes to Model Rule 1.6, at ¶ 5.
- 15 ABA Model Rules of Prof’l Conduct, Rule 1.6(b)(4); see ABA Ethics 2000 Commission, Reporter’s Explanation of Changes to Model Rule 1.6, at ¶ 5.
- 16 ABA Ethics 2000 Commission, Reporter’s Explanation of Changes to Model Rule 1.6, at ¶ 5.
- 17 See ABA Formal Op. 08-453, *supra*, n.3, at ¶ 5 (noting that Model Rule 1.6(b)(4) “accommodates a prudent lawyer’s decision to seek ethical guidance.”).
- 18 See generally J. Villa, *Corporate Counsel Guidelines*, § 3:35 (Thomson/West 2008).
- 19 For a listing of committee list serves on the ACC website, see www.acc.com/community/listserves/index.cfm.