

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES

An incisivemedia publication

## PROFESSIONAL CONDUCT

### Potential Pitfalls of Feeling at Home With In-House Counsel

BY ELLEN C. BROTMAN  
AND MICHAEL B. HAYES

*Special to the Legal*

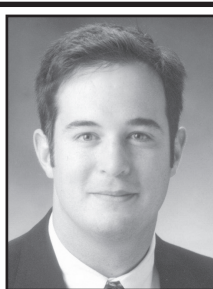
This month we discuss another trend in law firm management that arises out of our increasingly complex legal environment: the in-house ethics counsel. More midsized and large firms have designated a specific partner or group of partners to provide ethics advice to firm attorneys. Ethics counsel can respond to attorneys' specific questions, review firm policies, organize continuing legal education classes and foster an atmosphere supportive of ethical decision-making. In-house counsel's office can be a place to talk through problems in a zone of safety and privacy. But before you get to feeling too cozy, you need to ask yourself: Is in-house counsel the law firm's lawyer or also, perhaps, your own? This question raises some potentially thorny issues concerning confidentiality, conflicts of interest and the attorney-client privilege. The American Bar Association's standing committee on ethics and professional responsibility recently addressed some of these issues in Formal Opinion 08-453, issued Oct. 17. (The Formal Opinion is available for review at <http://www.abanet.org/cpr/08-453.pdf>.)

The following hypothetical illustrates some of the potential pitfalls discussed by the standing committee: Attorney Jane, a senior associate at law firm A, discloses to ethics counsel that she blew the statute of limitations on an important matter for a new client, X Corp. Jane explains that she sent the necessary verification to the client two weeks prior to the running of the statute.



**BROTMAN**

**ELLEN C. BROTMAN** serves as of counsel to Montgomery McCracken Walker & Rboads' white collar crime and government investigations group and chairwoman of its professional responsibility group, after several years of being a principal in the firm of Carroll & Brotman. Brotman is also a former assistant federal defender with the Philadelphia Community Defenders Organization.



**HAYES**

**MICHAEL B. HAYES** is a senior litigation associate with the firm and is a member of the firm's professional responsibility practice group. Prior to joining the firm, Hayes served as a law clerk to Justice Russell Nigro of the Pennsylvania Supreme Court.

Despite repeatedly reminding the client that the verification had to be returned as soon as possible, the client failed to return the verification until a day after the statute had run. Jane filed the complaint the same day she received the verification. Opposing counsel has since filed what Jane believes is a very strong motion for summary judgment based upon the running of the statute. Jane has not yet notified the client of these issues.

Jane's conversation with ethics counsel raises a number of important issues. First, has the consultation created an attorney-client relationship between Jane and ethics counsel? Does ethics counsel owe a duty of confidentiality to Jane vis à vis the firm? How about vis à vis X Corp.? Has an

impermissible conflict of interest between the firm and X Corp. arisen as a result of the consultation? Can, should, or must ethics counsel report Jane to the Disciplinary Board for a failure to act diligently for her client under Rule 1.3? Is the ethics consultation protected from disclosure by the privilege?

#### WHO IS THE CLIENT?

Under Rule 1.13, Organization as Client, ethics counsel's client is the law firm itself "acting through its duly authorized constituents." Here, Jane's failure to file within the statute of limitations and her failure to notify the client of the running of the statute creates a risk for the firm that should be reported to firm management and the firm's insurers. The firm might decide that Jane exercised poor judgment, or worse, and should no longer be employed at the firm. The outside client, X Corp., might assert claims against either or both of them.

In-house counsel represents the firm, not the individual lawyer, and everyone should understand that. Ethics counsel should reinforce that understanding at the outset of each particular consultation. If the consulting attorney's disclosure to ethics counsel does not raise a conflict of interest under Rule 1.7 with a firm partner or employee or with a firm client, then ethics counsel generally will be able to represent the consulting attorney as well.

If the firm or ethics counsel fails to take reasonable steps to ensure that the consulting attorney understands the duties and role of ethics counsel, the consulting attorney may expect that an attorney-client relationship exists or will develop with ethics counsel,

implicating Rule 1.18 (Duties to Prospective Clients). Disclosures made based on this perceived relationship may create a duty of confidentiality between in-house counsel and the consulting lawyer. See Rule 1.9(c). This duty of confidentiality could be in conflict with other obligations ethics counsel has to the firm under Rule 1.13, including reporting the attorney to a higher authority within the firm. In-house counsel is required to protect the organization when counsel has knowledge that an attorney associated with the firm “engaged in action ... that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization.”

Has Jane’s conversation with ethics counsel given rise to any conflicts of interest?

According to Formal Opinion 08-453, there is no per se conflict of interest created by a consultation with ethics counsel. If an attorney is seeking advice about a future course of action, no conflict of interest will be created because a lawyer is required to abide by the rules of ethical conduct in his or her representation of a client. By contrast, if the attorney is seeking advice to protect her own interests in light of some act of misconduct on her part, there is a significant risk that the attorney’s continued representation of the firm’s client may be materially limited because of the attorney’s conflicting interest, i.e., to protect herself.

In our hypothetical example, Jane’s purpose in seeking advice is, in part, to protect herself. This could create a risk that Jane will not be able to provide the client with objective advice as the matter moves forward. In

that case, Jane will be unable to continue to represent the client, and under Rule 1.10(a), Jane’s conflict will be imputed to all of the lawyers in the firm. If, however, the firm believes that one or more firm lawyers can provide competent representation of the client, notwithstanding Jane’s conflict, then the firm can seek the client’s consent to waive Jane’s conflict of interest.

Can/should/must ethics counsel report Jane to the Disciplinary Board for her failure to file the client’s complaint within the applicable statute of limitations?

If no attorney-client relationship has formed between ethics counsel and Jane, ethics counsel is subject to the reporting requirements set forth in Rule 8.3. Under Rule 8.3, ethics counsel is obligated to report Jane’s misconduct if counsel “knows” that Jane “has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” A consulting attorney such as Jane should be aware that ethics counsel is not exempt from the duty to report a colleague’s conduct so long as no attorney-client relationship has developed. It should be noted, however, that if the consulting attorney’s disclosure involves information relating to the firm’s representation of a client or of ethics counsel’s representation of the firm, then ethics counsel may first need to obtain the informed consent of X Corp. and the firm before reporting the information pursuant to Rules 1.6 and 8.3.

Lastly, is Jane’s conversation with ethics counsel discoverable by the client in a later proceeding?

Ethics counsel should be aware that ethics consultations might not be protected by the attorney-client privilege from disclosure if the client brings a related malpractice or similar action against the firm. In *Koen Book Distributors v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo P.C.*, the U.S. District Court for the Eastern District of Pennsylvania ordered the production of firm e-mails concerning the possibility of a malpractice action and whether the firm could continue to represent the client. The district court held that the attorney-client privilege failed to shield the firm e-mails from discovery because “permeating the documents [was] consideration of how best to position the firm in light of a possible malpractice action.” Thus, the district court found that the firm was operating under an impermissible conflict of interest under Rule 1.7 which vitiated the otherwise privileged nature of the e-mails at least as to the client’s discovery request.

The practice of law has gotten more complex but, in our view, these issues really boil down to something very simple: You have a duty to your client and to your firm to disclose. Or as our mothers taught us, honesty is the best policy. If you have made a mistake, tell in-house ethics counsel about it. Together you can find the quickest and best means to make appropriate disclosures and minimize any harm to your clients, which in turn should reduce the risks to you and your firm. Not only will you be doing your duty, you’ll sleep better at night.

*Litigation associate Kristine Mehok assisted with the research and drafting of this article.* •