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District of Columbia Professional Responsibility Highlights

September – October 2005

A summary of important recent developments in laws affecting lawyers and law firms in the District of Columbia.

Unbundling of Legal Services

Cost conscious clients, particularly individuals and small businesses, may ask their lawyers to provide legal services for only a portion of the client's legal problem, with the client or some other person responsible for other aspects of it. An example of such a practice is the client who asks a lawyer to prepare a portion of a brief or other pleading that the client is presenting to the court pro se. Another is a request for legal advice on a portion of a corporate restructuring, while other possibly inter-related areas, such as tax or shareholder rights, are excluded from the engagement.

Some lawyers would decline such requests out of concern that the limitations imposed on the scope of the lawyer's services might affect the quality of the legal services provided to the client, just as a physician might decline to provide medical advice to a coughing patient who permits the lawyer to examine his throat but not to listen to his lungs. On the other hand, some requests for limited legal services, known informally as unbundling, may lead to the provision of less expensive legal services to clients.

The Legal Ethics Committee of the District of Columbia Bar, in a July 2005 opinion (No. 330), concluded that it is not ethically impermissible for a lawyer to provide unbundled legal services to a client, including the "ghostwriting" of litigation documents, so long as the client is adequately informed of the limits of the lawyer's services and the lawyer can provide competent service under the circumstances.

Lawyers should, nevertheless, be careful about their arrangements for providing unbundled legal services. Assuming that Legal Ethics Committee Opinion No. 330 is correct (these opinions are advisory only, and not binding on a court or Bar Counsel), it only resolves ethical concerns. A malpractice claim, arising from a lack of success in the client's underlying transaction or litigation, would still be available to the client and would likely allege, with the clarity of hindsight, that the lawyer's services were incomplete or inadequate.

Can Representation of a Corporate Officer Be Deemed to Be Representation of the Corporation for Conflicts of Interest Purposes?

The D.C. Bar's Legal Ethics Committee answered this question "yes, in some circumstances" in its recent Opinion No. 328. In discussing some of the basic ethical considerations in the representation of a corporation, particularly in internal investigations, the Committee noted that such a representation could lead to an implied representation of the corporation's constituents, such as directors and officers, if the circumstances of the lawyer's work and activities could reasonably lead the constituent to believe that the lawyer is representing the constituent also.

The Committee then opined that a reverse implied representation could also occur, that is, a lawyer's representation of a corporate constituent could become an implied representation of the corporation, thereby precluding the lawyer from being adverse to the corporation in another representation. Such an implied representation of the corporation would be based on the lawyer's receipt of information from his client which is confidential to the corporation. According to the Committee:

> Given the cross-fertilization with upper management and the sensitivity of the issues likely to be encountered in such a representation [of a constituent], the organization may have a reasonable expectation that the lawyer will not be adverse to it in another matter. While . . . the determination will be fact-dependent, the lawyer representing a highly placed constituent should be sensitive to such potential conflicts.

The D.C. Bar's Attorney/Client Arbitration Board

From time to time in this newsletter, we will provide brief descriptions of services that the legal profession offers to lawyers and the public to improve the delivery of legal services and lawyer-client relationships. The subject of this issue is the D.C. Bar's Attorney/Client Arbitration Board, or ACAB.

ACAB exists to arbitrate fee disputes and malpractice claims between clients and their lawyers. It consists of an 11 person board, and utilizes trained lawyers and non-lawyers to act as arbitrators, sitting as a single arbitrator or a panel of three, depending on the amount of the claim.

In the District of Columbia, fee disputes with a lawyer are required to be arbitrated before ACAB if arbitration is requested by the client. If arbitration is requested by the lawyer, the client must agree to arbitration. Malpractice disputes may be arbitrated before ACAB only if both parties agree to submit the dispute to arbitration.

ACAB arbitrations, while less formal that commercial arbitrations, nevertheless follow basic arbitration procedures, including a petition and response, motions, and a hearing to receive evidence. ACAB rules to not include provisions for discovery, but witnesses and documents may be subpoenaed for the hearing. Like other arbitral awards, ACAB awards are final, binding, non-appealable and judicially enforceable.

Are Communications with Your In-House General Counsel Protected by Attorney-Client Privilege?

Increasingly, law firms are designating one of their partners to serve as an in-house general counsel, to advise the firm on professional responsibility matters. While some early case law questioned whether intra-firm communications with an in-house general counsel could be subject to an attorney-client privilege, more recent decisions equate such internal communications with those of corporate employees with in-house corporate counsel, where the privilege has been recognized and honored (at least where its traditional requirements, *e.g.*, communication in confidence, for purpose of receiving legal advice, etc. are present).

An unsettled question is whether such intra-firm communications are protected from disclosure to a client or former client when they concern the law firm's representation of the client. Such communications might consist of an inquiry from a lawyer in the firm about whether a conflict of interest has developed during the course of a representation, or whether the lawyer's act or omission might constitute malpractice.

The prevailing caselaw is that the attorney-client privilege does not protect such communications from disclosure to the affected clients, the courts reasoning that the existence of such communications evidences a conflict of interest between the firm's obligations to its client and the firm's self-interest. That conflict of interest prevents the firm from protecting its internal communications from disclosure to the client. *See, e.g., Versuslaw, Inc. v. Stoel Rives LLP*, 111 P. 3d 866 (Wash. App. 2005).

A recent ethics opinion of the New York State Bar Association (No. 789, October 26, 2005 (www.nysba.org)) suggests a different result. In the opinion, the Bar's Ethics Opinion concluded that the reason for the existence of the attorney-client privilege – to encourage persons to seek advice on their legal obligations – applies to lawyers in law firms, who may need advice on how to represent their clients ethically and competently. Lawyers should be able to seek such advice in a confidential manner, and the fact of doing so should not be viewed as a conflict of interest. According to the Committee, only when the law firm has concluded that it has engaged in an ethical breach or that it has made a significant error or omission must it disclose its conclusions to its client.

If the Committee's conflict of interest analysis is accepted by a court, then the conclusion of the existing cases that attorney-client privilege does not protect intra-firm communications with a general counsel may not follow.

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