On occasion, you will feel the need to consult other counsel, regardless of whether he or she is a member of the same firm or is outside counsel, because you suspect that you were negligent and that it has harmed your client. No one would plausibly argue that such consultation is inappropriate. Instead, the question presented is to what extent disclosure of the actionable conduct and of such consultation must be made to the client. This issue was recently addressed by the ethics committee for the State Bar of California.

In Formal Opinion No. 2019-197, issued by the State Bar of California Standing Committee on Professional Responsibility and Conduct, the committee addressed the ethical question of what disclosure, if any, should be made to the client when a lawyer consults with other counsel concerning matters related to the firm’s representation of a current client. Such consultation may concern either ethical compliance or possible negligence on the attorney’s part. This opinion addressed instances where the consultation was with outside counsel or with inside counsel, meaning with a fellow member of the same law firm.

The committee analyzed portions of Rule 1.4 of the California Rules of Professional Conduct, which is not worded exactly the same as Rule 1.4 of the Pennsylvania Rules of Professional Conduct, but has many similarities. It also cites California State Bar Formal Opinion 2009-178. From these and other references, the committee concludes that the lawyer has a “duty of communication, [which] requires, among other things, [that] the attorney...disclose material facts potentially giving rise to any legal malpractice claim against the attorney.” However, once the attorney has received advice that he or she committed malpractice, in the committee’s view, this creates a conflict between the attorney and the client.

The committee agreed with ABA Formal Opinion (No. 08-453), which applies substantially the same language in ABA Model Rule 1.7(a)(2), that “[a] lawyer’s effort to conform her conduct to applicable ethical standards is not an interest that will materially limit the lawyer’s ability to represent the client... In situations...where the lawyer is seeking prophylactic advice to assist in her representation of the client, there is no significant risk that the lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited by the lawyer’s interest in avoiding ethical misconduct.” But the opinion concerns instances where the lawyer had sought advice before he or she has engaged in the conduct in question.

Notwithstanding, what happens when the attorney does not seek advice from other counsel until after he or she had engaged in actual or potential unethical or negligent conduct? If he or she is advised that malpractice or unethical conduct (or both) was committed, then he or she no longer has a potential conflict of interest but now has an actual conflict of interest. The committee reasoned that “[a]n error potentially giving rise to a legal malpractice claim is a ‘significant development relating to the representation.’” This conflict creates a duty of loyalty issue. After all, Rule 1.7(b) of the California Rules of Professional Conduct states in part: “A lawyer shall not, without informed written consent from each affected client... represent a client if there is a significant risk the lawyer’s representation of the client will be materially limited...by the lawyer’s own interests.” Rule 1.7(a)(2) of the Pennsylvania Rules of Professional Conduct contains a similar provision although, contrary to California’s version, informed consent need not be in writing.

Accordingly, now that the attorney has an actual conflict, he or she must have an actual conflict, he or she must have a duty to disclose the advice of other counsel and instead must inform the client to consider retaining separate counsel to advise him or her with respect to the potential claim. Again, in the committee’s view, this does not excuse the duty to disclose to the client the material facts which reveal the negligent conduct.

This leaves, however, the issue of whether counsel is required to advise his or her client that he or she had sought and received advice from other counsel on this issue. Whether such a duty exists, in the eyes of the committee, depends on what advice was received. If the advice was that counsel had not engaged in wrong conduct, then there is no conflict. But if the advice is that counsel had engaged in wrongful conduct, then there is a conflict because the lawyer has his or her own interest in conflict with his or her client’s interest.

The committee considered three hypotheticals. In the first hypothetical, the lawyer sought legal advice from other counsel “concerning her ethical obligations in connection with a discovery matter,” specifically “(1) whether [she] has an actual or potential conflict of interest with the client that requires further action and (2) whether [she] met [her] ethical duty to communicate with client.” The second considered the legal obligations arising from the lawyer’s consultation with outside counsel concerning possible negligence in his representation of the client — he thought that he may have missed a deadline on filing a complaint but wasn’t sure. The third considers whether the lawyer’s ethical obligations and duty of care to his or her client differs when counsel is sought from in-house counsel, i.e., a lawyer in his or her own law firm, instead of consulting with outside counsel.

In all three hypotheticals, the committee reached the same conclusion — disclosure to the client that counsel had sought the advice of other counsel depends on whether the “consultation with [other] counsel is itself a ‘significant development’ that the lawyer is required to disclose.” It defines “significant development” as where the “lawyer’s consultation with outside counsel seeking advice concerning his ethical obligations and compliance does not itself create a conflict between lawyer and client.”

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continued on page 12
Interest in Pennsylvania Law Schools, Law Careers on the Rise

continued from page 10

DiPolvere said PSU is “mindful that interested students are looking for legal education for a changing society that includes meaningful experiences, personalized attention and access to individualized career placement when considering law school. Our focus is on recruiting the strongest possible class. We want to help all of our graduates find meaningful legal employment and successfully pass the bar in the jurisdiction where they intend to practice. Our innovative initiatives focus on preparing our students to lead in a changing legal environment.”

The landscape is different for Penn State Law now than it was in 2011 when it had a two-campus law school model. DiPolvere said, “Today, we’re committed to being a nimble and innovative law school that provides its students with the skills and experience they need to succeed in our rapidly changing society. Penn State Law combines traditional doctrinal classroom study with experiential learning in interdisciplinary clinics and externships with a comprehensive mentoring program, access to cutting-edge legal technology and collaborations across the university that prepare our students to lead.”

The Bar News editor also contacted Duquesne University School of Law, and the University of Pennsylvania School of Law for this article but was unable to talk to admissions staff because of vacation schedules and summer breaks. According to data from ABA, enrollment in 2018 was nearly what it was in 2012 at Duquesne University, and the University of Pennsylvania is also close. The number of applications for Duquesne and Penn were up in 2018.

Avoiding Liability

continued from page 4

...is required by these rules. . .” In all three hypotheticals, the committee found that the lawyer had no duty to disclose that he or she had consulted other counsel because the advice given in that consultation with other counsel did not create a conflict of interest between attorney and his or her client. Moreover, the committee saw no basis to draw a distinction between consults with a fellow member of the same firm and consults with outside counsel. The committee found that this approach was supported by “important policy reasons [which] support [the conclusion, including the desire to encourage lawyers to seek legal advice to understand ethical and other obligations to their client and to promote early detection of potential problems, which is usually in the client’s best interest as well].”

Lawyers should not hesitate to seek appropriate advice regarding representation of a client and should act according to the rules based on that advice. Nothing is gained by pretending that a mistake hasn’t happened; that only makes matters worse.

Upcoming Events

Unless otherwise noted, find more information in the PBA Events Calendar at www.pabar.org or call the PBA Member Services Center at 800-932-0311.

Sept. 13-14  PBA/Pennsylvania Medical Society Physicians Legal Issues Conference, Penn State Dickinson Law, Carlisle
Sept. 23  PBA Diversity Team Meeting, PBA Headquarters, Harrisburg
Sept. 24  PBA 2019 Civil Litigation Section Pittsburgh Regional Dinner, Duquesne Club, Pittsburgh
Sept. 26-27  PBA Workers’ Compensation Law Section Fall Meeting, Hershey Lodge, Hershey
Oct. 3-4  PBA 30th Minority Attorney Conference, PBI CLE Conference Center, Philadelphia
Nov. 1-2  PBA Women in the Profession Fall Retreat, Omni Bedford Springs, Bedford
Nov. 14  PBA Committee/Section Day, Red Lion Hotel, Harrisburg
Nov. 14  Pennsylvania Bar Foundation Night Out, Sheraton Harrisburg Hershey Hotel, Harrisburg