speaking of ethics

By Ernest T. Lindberg

Contact With In-House Counsel

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Recently, the D.C. Bar Legal Ethics Committee approved Opinion 331, which considers the status of in-house counsel when outside counsel is representing an entity. The question of whether a lawyer is precluded by Rule 4.2 of the D.C. Rules of Professional Conduct from discussing a matter with in-house counsel absent consent from outside counsel was not raised by a formal inquiry, but because of its frequency in practice, the committee considered the issue sua sponte. The committee concluded that generally a lawyer may communicate with in-house counsel about a matter without obtaining prior consent of outside counsel.

In arriving at its conclusion, the committee looked to the purpose of the prohibition of communicating directly with a party represented by counsel as it was articulated to the D.C. Court of Appeals by the D.C. Bar Board of Governors in proposing the current version of Rule 4.2. Its "basic purpose . . . is to prevent a client, who on the one hand is presumed to be relatively unsophisticated legally but who on the other hand has ultimate substantive control over the matter, from making uninformed or otherwise irrational decisions as a result of undue pressure from opposing counsel." *See* Proposed Rules of Professional Conduct and Related Comments 187 (Nov. 19, 1986).

Since in-house counsel are lawyers, the concerns about protecting the organization from undue pressure or deception by the lawyer initiating the communication are obviated, and application of the anti-contact rule to circumstances in which in-house counsel are representing their clients on a matter would have an unintended result. The possibility that an organization's outside counsel may complain that by going directly to in-house counsel the lawyer has interfered with the outside counsel's attorney–client relationship is not considered to be addressed by Rule 4.2. Nor does the Legal Ethics Committee believe that is an issue under the D.C. Rules of Professional Conduct.

Noting that the structure of Rule 4.2 is more elaborate than the American Bar Association model rule, Opinion 331 examines the applicable language of subparagraphs (a), (b), and (c) of Rule 4.2 to determine if they should be read to proscribe contact with in-house counsel absent consent of outside counsel. Rule 4.2(a) provides:

> During the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Specific issues concerning organizations that are parties are addressed in subparagraphs (b) and (c). According to Rule 4.2(b), a lawyer may communicate with a "nonparty employee of the opposing party" on the subject of the representation without the consent of the opposing party's lawyer. When talking to a nonparty employee, the lawyer must disclose his or her identity and the fact that the lawyer represents a party in a matter against the nonparty employee's employer. Rule 4.2(c) defines *party* as any employee "who has the authority to bind a party organization as to the representation to which the communication relates."

Opinion 331 addresses the argument that in-house counsel representing a client in the matter may fall under the definition of *party* because in-house counsel can speak for and bind the organization, and therefore a lawyer must have the consent of outside counsel to communicate with in-house counsel. That argument is characterized as ignoring the "drafters' clear intentions because it . . . is inconsistent with and counterproductive to the Rule's purpose . . . and it would lead to peculiar and unworkable results."

The fact that in-house counsel may have the power to bind the party does not distinguish in-house from outside counsel. Any lawyer representing a party will have some power to bind the party within the scope of a representation. *See* Restatement (Third) of the Law Governing Lawyers §§ 26, 27. Absent that authority, it would be futile to communicate with a party's lawyer because whatever the lawyer said would be unreliable. It is precisely because a lawyer may speak for a party that Rule 4.2(a) requires speaking with the party's lawyer rather than the party itself.

If in-house counsel is considered to be the "party" and the organization had decided not to hire outside counsel, opposing counsel could not communicate with the organization at all. Such a conclusion could not be the intended result of the language of Rule 4.2(a), and it would be an unworkable result.

The argument that in-house counsel are likely to be given powers beyond strictly counsel functions is considered in Opinion 331 and determined to be unwarranted. Because an in-house lawyer may have additional functions does not alter the fact he or she is a lawyer representing the party, and outside counsel may also be given additional functions by a client.

The committee also took into account the claim that allowing opposing counsel to select the lawyer with whom to communicate would give the lawyer leeway that might be abused. Opinion 331 considers that Rule 4.2 is "aimed at the problems that may flow when a lawyer communicates directly with a party even though that party is represented by counsel. The problem of one lawyer trying to take advantage of the fact that an opponent may have multiple lawyers with varying degrees of knowledge or involvement is a different issue. . . ."

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