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CALIFORNIA ETHICS IN REVIEW 1995

Each year, the Standing Committee on Ethics and Professional Responsibility of the State Bar of California issues a series of formal opinions regarding current legal ethics topics. These opinions are advisory only and are not binding on the courts, the State Bar of California, its board of Governors, its members, or any person or tribunal charged with regulatory responsibility. Below is a summary of the formal opinions released during 1995.

1. *FORMAL OPINION 95-390*

The lawyer with a corporate client is not prohibited by the American Bar Association Model Rules of Professional Conduct from representing a party adverse to a corporate affiliate of the lawyer's corporate client. The lawyer is required to obtain the consent of the corporate client if: (1) the affiliate should also be considered a client of the lawyer; (2) the lawyer and the corporate client have an understanding that the lawyer will not represent parties adverse to the client's corporate affiliates; and (3) there are actual or potential conflicts of interests that compromise the lawyer's ability to represent either the corporate client or the new, adverse client. Even if the circumstances are not such that ethically require the lawyer to obtain the consent of the corporate client, it is recommended, as a matter of prudence and good practice, that the lawyer inform the client of his intentions and discuss the matter with the client when considering undertaking a representation adverse to a client's corporate affiliate. The lawyer should also consider the possibility and impact of a motion to disqualify.

The opinion discusses Rules 1.7 and 1.13 of the ABA Model Rules of Professional Conduct, Restatement (Third) of The Law Governing Lawyers § 26 (Tent. Draft No. 5, 1992) and Formal Opinions 91-361 and 92-365 in determining whether the corporate client's affiliate should also be considered a client of the lawyer, and if the existing client's consent is required. Formal Opinions 92-367 and 93-377 are also mentioned.

2. *FORMAL OPINION 95-391*

A former judge returning to the practice of law is prohibited from the continued use of any title that refers to his former judicial status. It is therefore improper for a former judge to refer to himself, or encourage others to refer to him, as "Judge" or "The Honorable." This opinion is based on the likelihood that continued use of an honorific title will create public misconceptions and unjustified expectations concerning the influences and legal services of former judges practicing law.

The Committee reviewed ABA Model Rules of Professional Conduct Rules 7.1, 7.5, and 8.4, and the ABA Model Code of Judicial Conduct Canon 2B (1990) to reach its conclusion. The opinion also distinguishes the propriety of a former judge continuing to use his honorific title if he is not returning to the practice of law from the appropriateness of a former judge practicing law to *inform* potential clients of his prior judicial experience as long as the description is accurate and does not convey an implication of special influence.

3. *FORMAL OPINION 95-392*

It is a violation of ABA Model Rules of Professional Conduct Rule 5.4(a) for corporate in-house lawyers to share with the nonlawyer corporate employer any portion of legal fees collected by the lawyer or awarded to the lawyer in excess of the amount that would reimburse the corporation for the corporation's cost of its in-house counsel's handling of the matter. Thus, where a corporate in-house lawyer provides services to third persons for a fee, or if an in-house lawyer represents her corporate employer in successful litigation in which counsel's fees are awarded to the lawyer, the lawyer may only turn over to the corporation a portion of the fee equal to (or less than) the corporation's costs of employing the in-house counsel. Corporations may not reap profits from the work of their in-house attorneys.

Formal Opinion 93-374's exception to the rule prohibiting fee sharing is strictly limited to nonprofit organizations that sponsor litigation and is not inconsistent with the opinion offered here.

4. *FORMAL OPINION 95-393*

It is permissible for a lawyer employed in a government elder care office to disclose to a nonlawyer supervisor information relating to the representation of the client if such disclosure aids in the representation of the client. Prior to making the disclosure, however, the lawyer must affirm that the supervisor comprehends the confidential nature of the information and the limited purposes for which it may be used.

If the information is not to be used to carry out the client's representation, the lawyer must first consult with the client and obtain the client's consent. If the lawyer fails to obtain the consent of the client, the lawyer may only disclose that information that does not compromise the confidentiality or identity of the client.

The relevant ABA Model Rules of Professional Conduct Rule is 1.6. Formal Opinions 334 and 324 (1974), ABA Model Code of Professional Responsibility, Disciplinary Rule 4-101(b)(1), and Ethical Considerations 4-2 and 4-3 are also discussed.

5. *FORMAL OPINION 95-394*

It is improper under ABA Model Rules of Professional Conduct Rule 5.6(b) for a lawyer to enter into a settlement agreement that is conditioned on the lawyer's agreeing not to represent any similarly situated parties against the same agency in the future. It is a violation of ABA Model Rules of Professional Conduct Rule 8.4(a) for the agency's lawyer to make such an offer. These prohibitions apply where the controversy is between private parties and where a party is a governmental entity. The Committee opined that the use of the phrase "private party" in Model Rule 5.6(b) did not exclude coverage of a governmental entity in this circumstance. In either situation, such an agreement constitutes an ethically impermissible restriction on a lawyer's right to practice.

6. *FORMAL OPINION 95-395*

A lawyer who has represented a single party in a joint defense consortium does not necessarily acquire an ethical obligation towards the other members of the consortium to turn down future representation of parties adverse to those other members. It is highly likely, however, that the lawyer will be barred from accepting the representation of the ad-

verse parties based upon the lawyer's obligation to his previous client or due to fiduciary obligations the lawyer may have inadvertently assumed towards the other members of the consortium through his involvement.

The ethical obligations that the lawyer has to his previous client are outlined in ABA Model Rules of Professional Conduct Rules 1.6 (Confidentiality of Information) and 1.9 (Conflicts of Interest: Former Client). The fiduciary obligations to the other members of the consortium may have arisen from the law of agency, as discussed in the Restatement (Third) of the Law Governing Lawyers § 213 comment g(ii) (Preliminary Draft No. 11, 1995).

Under these circumstances, the lawyer must also consider whether his prior employment would materially limit his ability to represent the new client (ABA Model Rules of Professional Conduct Rule 1.7(b)). At a minimum, the lawyer would be obliged to fully disclose to the prospective new client the potential limitations on his representation (ABA Model Rules of Professional Conduct Rule 1.4(b)). The Committee further directs the reader to Formal Opinion 90-358 (1990).

7. *FORMAL OPINION 95-396*

ABA Model Rules of Professional Conduct Rule 4.2 provides that a lawyer may not communicate about the subject matter of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law. The following clarifications have been made by the Committee: (1) this prohibition applies in both criminal and civil matters; (2) the Rule prohibits contact by investigative agents acting under the direction of a lawyer with persons known to be represented in the matter being investigated, both prior to and after arrest or the institution of formal charges; (3) the communicating lawyer must have had actual knowledge of the parties' representation in order to be found in violation of the Rule. This knowledge may be inferred from the circumstances; (4) communications not concerning the subject matter of the representation are not barred; (5) a lawyer representing a corporation can only insulate those employees with managerial responsibility or agency obligations from contacts with opposing lawyers; (6) it is irrelevant that the represented person initiates the com-

munication; the prohibition remains applicable; (7) if a represented party initiates communication with a lawyer and declares the absence of representation, the lawyer should obtain reasonable assurances concerning the party's lack of counsel; (8) a lawyer may not direct an agent to participate in a communication in which the lawyer himself would be prohibited from participating; and (9) communications authorized by law are not prohibited under the Rule. Those communications include ones constitutionally protected, or specifically authorized by statute, court rule, court order, statutorily authorized regulation, or judicial decisional precedent.

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