



ISBA Professional Conduct Advisory Opinion

Opinion No. 17-05
May 2017

Subject: Corporate and In-house Counsel

Digest: An in-house corporate lawyer may provide legal services to multiple subsidiaries of the same corporate parent, but nevertheless must be mindful of the application of the Rules of Professional Conduct, particularly those addressing conflict of interest and confidentiality.

References: Illinois Rules of Professional Conduct 1.0(c), 1.6, 1.7, and 1.13(a);

Illinois Corporation Practice of Law Prohibition Act, 705 ILCS 220/5;

Teleglobe Communications Corp. v. BCE, 493 F.3d 345 (3rd Cir. 2007);

Restatement (Third) of the Law Governing Lawyers Sec. 66 (2000);

New York City Bar Association Formal Opinion 2008-02;

Balla v. Gambro, 145 Ill.2d 492 (1991);

Virginia State Bar Legal Ethics Opinion 1838 (2007);

ISBA Profession Conduct Advisory Opinion 95-15 (May 1995);

ABA 95-390 (January, 1995).

FACTS

The inquiring Lawyer works in-house in the legal department of insurance company A. The legal department provides representation to insurance company A's insureds pursuant to company A's insurance policy obligations. The legal department also represents insurance company A when it is a named party in litigation. Insurance company A is a subsidiary of insurance company B which, in turn, is a subsidiary of Holding Company. Holding Company is itself a subsidiary of Parent Company. Parent Company has recently acquired company X, whose

business is unrelated to insurance. Lawyer has been asked by Parent Company management to provide legal services to company X. The contemplated legal services are wholly unrelated to Company A.

QUESTION

Can Lawyer provide legal services to Company X?

ANALYSIS

It goes without saying that corporations may employ lawyers as corporate employees to represent corporate interests. As distinct legal entities, corporations have legal rights, including the right to legal representation. The Illinois Rules of Professional Conduct impliedly acknowledge the propriety of corporations employing lawyers in-house. IRPC 1.0(c) (“Firm” or “law firm” denotes ... lawyers employed in a legal services organization or the legal department of a corporation or other organization.”); IRPC 1.0, [Comment [3] (“With respect to the law department of an organization, including government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct”]; IRPC 1.13(a) (“A lawyer *employed* or retained by an organization represents the organization acting through its duly authorized constituents.”)(emphasis added). In addition, the right of a corporation to employ in-house lawyers is addressed by a specific exception to Illinois’ statutory prohibition against a corporation practicing law. 705 ILCS 220/5 (“Nothing contained in this act shall prohibit a corporation from employing an attorney or attorneys in and about its own immediate affairs or in any litigation to which it is or may be a party...”).

Current authority and jurisprudence also recognizes and supports the principle that in-house corporate lawyers may represent a corporate parent as well as multiple corporate subsidiaries or affiliates of the same parent. Restatement Sec. 96 (h) (“a lawyer representing a client organization may also represent one or more constituents of the organization, such as...an organization affiliated with the client;” *Teleglobe Communications Corp. v. BCE*, 493 F.3d 345 (3rd Cir. 2007)(acknowledging the benefits of centralization of in-house legal services for intra-family corporate groups); New York City Bar Assoc. Formal Opinion 2008-02. Nothing in the IRPC prohibits it.

With respect to the professional responsibility of in-house lawyers, the IRPC applies. *Balla v. Gambro*, 145 Ill.2d 492, 584 N.E.2d 104 (1991) (“In-house counsel must abide by the Rules of Professional Conduct.”). However, rules specifically tailored to in-house lawyers and intra-family corporate representation are few. The IRPC’s very general treatment of in-house lawyers noted above belies the complexity of many issues confronted by in-house lawyers. The most problematic issues revolve around client identity, conflicts of interest, and preserving client confidences. NYCBA Formal Opinion 2008-02; Virginia State Bar Legal Ethics Opinion 1838 (2007).

Because a lawyer’s primary duties and obligations flow to a client, a foundational issue in the corporate context is determining who is the client? Two rules comment on the issue, but are not particularly helpful. In noting that a corporate law department is encompassed by the Rule’s definition of “Firm,” Comment [3] to IRPC 1.0 merely highlights potential complications in identifying the in-house lawyer’s client. IRPC 1.0, Comment [3] (“There can be uncertainty,

however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed.”). Although aimed at outside counsel, IRPC 1.7, Comment [34] also provides that “A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a).”

For the in-house lawyer, there is no one size fits all test for identifying the client. It may change depending on the circumstances of the representation. Is it the single corporate parent (whose interests may be considered to preempt the interests of any subsidiary, or in any case, be able to provide informed consent to any conflict waiver or disclosure of confidential information)? Or is it the legally distinct individual subsidiaries? Recognizing subsidiaries as separate clients seems to be acknowledged in the IRPC noted above, particularly IRPC 1.13. For practical purposes, treating subsidiaries as distinct clients would seem the better practice if for no other purpose than to focus the in-house lawyer’s attention on identifying and addressing problematic legal and ethical issues.

With respect to conflicts of interests, when an in-house lawyer is called upon to provide legal services to a related corporate entity that is not the lawyer’s direct employer, the lawyer must be careful to recognize the potential for competing interests. (Conflicts of interest involving corporate families have been most often addressed when confronted by outside counsel. ISBA 95-15 (May 1996) *affirmed by the ISBA Board of Governors* in 2010; ABA Formal Opinion 95-390.) As with any representation, the in-house lawyer must consider and, if applicable, apply IRPC 1.7. Although impacted by client identification, the interests of intra-family corporate entities may or may not be considered aligned. If the interests are determined to conflict, an in-house lawyer can consider a number of actions to address and resolve the conflict. First and foremost is to obtain, if possible, the subsidiary’s and parent’s consent to the representation as permitted by IRPC 1.7(b). Counsel may also consider obtaining advance conflict waivers, limiting the scope of the representation to eliminate the potential conflict, or retaining outside counsel. NYCBA, 2008-02.

Perhaps even thornier issues than conflicts arise with respect to confidentiality under IRPC 1.6. Virginia State Bar Opinion 1838 provides that an in-house lawyer must maintain a subsidiary’s confidences unless the subsidiary consents to disclosure. In most corporate contexts, maintaining this confidentiality from the corporate parent, and perhaps other subsidiaries, is likely unworkable and doesn’t reflect the work of an in-house legal department. *Teleglobe*, 493 F.3d at 369 (In holding that in-house communications amongst intra-group subsidiaries does not waive the attorney-client privilege, the Court noted: “Recognizing that any other result would wreak havoc on corporate counsel offices, courts almost universally hold that intra-group information sharing does not implicate the disclosure rule.”) Attempting to maintain confidentiality between related corporate entities, but particularly between a subsidiary and a parent, tends to disregard corporate ownership and hierarchy. In any case, such a restrictive reading of confidentiality in a corporate family setting may not reflect a complete analysis of IRPC 1.6. IRPC 1.6 allows a number of exceptions to confidentiality, all of which *could* be applicable in an in-house corporate setting. A subsidiary could likely provide informed consent for disclosure of its confidential information to the corporate parent or other subsidiaries. It might also be that revelation of subsidiary “confidential” information is implied in the corporate parent - subsidiary relationship.

Lastly, in situations involving subsidiary wrongdoing, IRPC 1.6(b) would seem to allow an in-house lawyer to reveal the information to the corporate parent because it may legally or financially impact the corporate parent. It should be noted, however, that even under such a liberal reading of IRPC 1.6, there are situations in which maintaining a subsidiary's confidential information remains problematic, such as when subsidiary insolvency or divestiture from the corporate parent may be at issue. In these situations, as with conflicts of interest, a prudent course for the in-house lawyer may be to memorialize in writing how confidential information will be treated, obtain advance consent for disclosure, or retain outside counsel.

While the application of the IRPC must be considered when an in-house lawyer is representing multiple subsidiaries of a corporate parent, none of these issues are present in the inquiry before the Committee. Here, the facts indicate that the business of subsidiary X is wholly unrelated to the insurance business of subsidiary A. No conflict or adversity between the two subsidiaries is identified in the facts. For purposes of our inquiry, no confidential information is being shared. Therefore, in answering the specific question posed, the Committee concludes that Lawyer's representation of subsidiaries A and X in wholly unrelated matters would not be prohibited. The Committee declines to speculate about potential ethical concerns that are not present in the inquiry.

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