

Employment Law Overview Part I

by Judith A. Colbert

I. Introduction



Employment discrimination laws seek to prevent discrimination by employers based on race, sex, religion, national origin, physical disability, and age.

Employees who fall within one or more of these classes are said to be members of a “protected group.” Discriminatory practices include bias in hiring, promotion, job assignment, termination, compensation, and various types of harassment. Federal and state statutes comprise the main body of employment discrimination laws.

This two-part article will discuss some of the more important federal employment law statutes and provides tips to avoid discrimination claims. Title VII of the Civil Rights Act of 1964, harassment, retaliation and the Age Discrimination in Employment Act will be discussed in this issue of the *Bulletin*. Other significant employment law statutes will be discussed in the next issue.

II. Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e, et seq.

Title VII prohibits discrimination in many aspects of the employment relationship. It applies to most employers engaged in interstate

commerce with more than 15 employees. The Act prohibits discrimination based on race, color, religion, sex or national origin.

A. Race/Color Discrimination

Equal employment opportunity cannot be denied any person because of his or her racial group or perceived racial group, his or her race-linked characteristics, or because of his or her marriage to or association with someone of a particular race or color. Title VII also prohibits employers from basing employment decisions on stereotypes and assumptions about the abilities, traits, or the performance of individuals who are members of certain racial groups. Title VII's prohibitions apply regardless of the race, color, or ethnicity of the employee alleging discrimination.

Title VII prohibits not only intentional discrimination, but also neutral job policies that disproportionately affect persons of a certain race or color and that are not related to the job and the needs of the business. Thus, job requirements must be uniformly and consistently applied to persons of all races and colors. Even if a job requirement is applied consistently, if it is not important for job performance or business needs, the requirement may be found unlawful to the extent that it excludes persons of a certain racial group or color significantly more than others.

Pre-employment questions about race may suggest that race will be used as a basis for making selection decisions. Such questions should be avoided. Offensive conduct, such as racial or ethnic slurs, racial “jokes,” derogatory comments, or other verbal or physical activity based on an individual's race/color is also prohibited. Employees should be encouraged to report harassment at an early stage to prevent its escalation. Employers must take appropriate steps to prevent and correct unlawful harassment.

Title VII also prohibits discrimination in compensation and other terms, conditions, and privileges of employment. Race or color discrimination may not be the basis for differences in pay or benefits, work assignments, performance evaluations, training, discipline or discharge, or any other facet of employment. Thus, employees who belong to a protected group should not be segregated physically or isolated from other employees or from customer contact.

Tips:

- Train supervisors and employees on basic employment laws.
- Ensure your hiring process does not seek or consider an applicant's race.
- Employee pay and promotions should be merit-based and not related to race.

Title VII's prohibitions apply regardless of the race, color, or ethnicity of the employee alleging discrimination.



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- Audit your job postings to ensure they do not disproportionately affect persons of a certain race.
- Do not tolerate any offensive conduct, harassment, racial jokes or slurs in the workplace.
- Promptly investigate all complaints of harassment or discrimination and take appropriate action.
- Contact the NLADA Insurance Program for a hiring checklist and a sample Acknowledgment of Employment Policies form.

B. National Origin Discrimination

National origin discrimination occurs when an employee is treated less favorably because of his or her ethnicity, accent, or based on the perception that he or she has a particular ethnic background. National origin discrimination also occurs when an employee is treated less favorably because of marriage or other association with someone of a particular nationality.

Title VII prohibits any employment decision, including recruitment, hiring, firing, or layoffs, based on national origin. Offensive conduct (e.g., an ethnic slur) that creates a hostile work environment based on national origin is also prohibited.

Language is a major issue in the area of national origin discrimination. An employer may not base a decision on an employee's foreign accent unless the accent materially interferes with job performance. An English fluency requirement is only permissible if required for the effective performance of the position for which it is imposed. English-only rules must be adopted for nondiscriminatory reasons and may be used if needed to promote the safe or efficient operation of the employer's business.

Tips:

- The tips noted above for race discrimination also apply to national origin discrimination.
- Do not base performance appraisals or other employment decisions on an employee's national origin or foreign accent.
- Do not tolerate ethnic slurs in the workplace.
- Contact the NLADA Insurance Program for a "Performance Appraisal Dos and Don'ts" list.

C. Religious Discrimination

Title VII prohibits employers from discriminating against individuals because of their religion in hiring, firing, and other terms and conditions of employment. Employers may not treat employees or applicants more or less favorably because of their religious beliefs or practices—except to the extent a religious accommodation is warranted. An employer may not refuse to hire individuals of a certain religion, may not impose stricter promotion requirements for persons of a certain religion, and may not impose more or different work requirements on an employee because of that employee's religious beliefs or practices.

Employers must reasonably accommodate employees' sincerely held religious practices unless doing so would impose an undue hardship on the employer. A reasonable religious accommodation is any adjustment to the work environment that will allow the employee to practice his or her religion. Examples include: flexible scheduling, job reassignments and lateral transfers, modification of grooming requirements and other workplace practices, policies, or procedures.

An employer may demonstrate undue hardship by presenting evidence that accommodating an employee's religious practices: (a) requires more than ordinary administrative costs; (b) diminishes

efficiency in other jobs; (c) infringes on other employees' job rights or benefits; (d) impairs workplace safety; (e) causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work; (f) conflicts with another law or regulation.

Generally, an employer may not place more restrictions on religious expression than on other forms of expression that have a comparable effect on workplace efficiency. Employers must take steps to prevent religious harassment of their employees by implementing an anti-harassment policy and having an effective procedure for reporting, investigating, and correcting harassing conduct.

Tips:

- The tips noted above for race discrimination also apply to religious discrimination.
- If it does not cause an undue hardship, reasonably accommodate an employee's sincerely held religious beliefs.
- Promptly investigate complaints of religious harassment or discrimination and take appropriate action.

D. Sex-Based Discrimination

It is unlawful to discriminate against any employee or applicant for employment because of his or her sex in regard to hiring, termination, promotion, compensation, job training, or any other term, condition, or privilege of employment. Title VII also prohibits employment decisions based on stereotypes and assumptions about abilities, traits, or the performance of individuals on the basis of sex. Intentional discrimination and neutral job policies that disproportionately exclude individuals on the basis of sex and that are not job related are prohibited.

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Tips:

- The tips noted above for race discrimination also apply to sex discrimination.
- Gender should not be a factor in hiring, job assignments, promotions, compensation or any other condition of employment.
- Contact the NLADA Insurance Program for a list of interview tips.

E. Sexual Harassment

Sexual harassment is a form of sex discrimination that violates Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when the conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

Sexual harassment may occur in a variety of circumstances. Key points to remember include:

- The victim, as well as the harasser, may be a woman or a man. The victim does not have to be of the opposite sex.
- The harasser may be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.
- The victim need not be the person harassed, but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
- The harasser's conduct must be unwelcome.

Tips:

- Prevention is the best tool to eliminate sexual harassment in the workplace. Employers should communicate to employees that sexual harassment will not be tolerated.
- Employers should also have a comprehensive, written harassment policy, provide sexual harassment training to their employees, establish an effective complaint or grievance process, and take immediate and appropriate action when an employee complains.
- Training should also include race, color, national origin, sex, age, religion, and disability harassment.
- Contact the NLADA Insurance Program for sample harassment policies.

F. Retaliation

An employer may not fire, demote, harass, or otherwise "retaliate" against an individual for filing a charge of discrimination, participating in a discrimination proceeding, or otherwise opposing discrimination. The same laws that prohibit discrimination based on race, color, sex, religion, national origin, age, and disability, as well as wage differences between men and women performing substantially equal work, also prohibit retaliation against individuals who oppose unlawful discrimination or participate in an employment discrimination proceeding.

Retaliation occurs when an employer takes an adverse action against an individual because he or she engaged in a protected activity. An adverse action is an action taken to try to prevent someone from opposing a discriminatory practice, or from participating in an

employment discrimination proceeding (e.g., filing a charge of employment discrimination, cooperating with an internal investigation of alleged discriminatory practices, or serving as a witness in an Equal Employment Opportunity Commission investigation or litigation). Some examples of adverse actions include: (a) termination; (b) refusal to hire; (c) denial of promotion; (d) threats; (e) unjustified negative evaluations and references; (f) increased surveillance; and (g) any other action such as an assault or unfounded civil or criminal charges likely to deter reasonable people from pursuing their rights.

Protected activity includes opposition to a practice believed to be unlawful discrimination. Opposition occurs when an employee informs an employer that he or she believes that the employer is engaging in prohibited discrimination. Opposition is protected from retaliation as long as it is based on a reasonable, good faith belief that the complained-of practice violates anti-discrimination law and the manner of the opposition is reasonable. A protected activity may also include requesting a reasonable accommodation based on religion or disability.

Employees are not excused from continuing to perform their jobs or follow their company's legitimate workplace rules just because they have filed a complaint with the EEOC or opposed discrimination.

Tips:

- Train managers regarding the laws prohibiting retaliation in the workplace.
- Harassment policies should include a no-retaliation provision.

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Employees are not excused from continuing to perform their jobs or follow their company's legitimate workplace rules just because they have filed a complaint with the EEOC or opposed discrimination

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- Complaints regarding retaliation should be promptly investigated and appropriate action taken.

III. Section 1981 of the Civil Rights Act of 1866 (42 U.S.C. § 1981)

Section 1981 is a civil rights statute that, like Title VII, guarantees persons of different races equal rights. Certain features make Section 1981 appealing to claimants: (a) the statute of limitations for actions under Section 1981 is four years; (b) Section 1981 has no caps on compensatory and punitive damages as Title VII does; and (c) Section 1981 claims are enforced solely through court action. Employees do not have to file a charge of discrimination with the EEOC or other agency before bringing suit under the statute.

IV. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621, et seq.

The ADEA protects individuals who are 40 years of age or older from employment discrimination based on age. The ADEA applies to employers with 20 or more employees. The ADEA's protections apply to both employees and job applicants. Under the ADEA, it is unlawful to discriminate against a person because of his or her age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training.

The ADEA generally makes it unlawful to include age preferences, limitations, or specifications in job notices or advertisements. It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on age, or for filing an age discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADEA.

Tips:

- Avoid requests for an applicant's age in the hiring process.
- Promotion, pay increases and other job benefits should not be based on age.
- Ensure your policies do not negatively impact employees 40 years of age or older.
- Contact the NLADA Insurance Program for a sample employment application and position description worksheet.

V. The Older Workers Benefit Protection Act of 1990 (OWBPA), 29 U.S.C. § 623, et seq.

The OWBPA specifically prohibits employers from denying benefits to older employees. It explicitly amends the ADEA to clarify the circumstances under which employees may voluntarily forgo certain benefits. An employer may ask employees to waive their rights or claims under the ADEA, either in the settlement of an ADEA administrative or court claim, or in connection with an exit incentive program. However, the ADEA, as amended by OWBPA, sets out specific minimum standards that must be met in order for a waiver to be considered knowing, voluntary, and valid. An ADEA waiver must:

1. Be in writing and be understandable;
2. Specifically refer to ADEA rights or claims;
3. Not waive rights or claims that may arise in the future;
4. Be in exchange for valuable consideration (consideration is something bargained for and given in exchange—money, for example);
5. Advise the individual in writing to consult an attorney before signing the waiver; and
6. Provide the individual at least 21 days to consider the agreement and at least seven days to revoke the agreement after signing it.

If an employer requests an ADEA waiver in connection with an exit incentive program or other employment termination program, the minimum requirements for a valid waiver are more extensive.

VI. Conclusion

Complaints alleging violations of Title VII and the ADEA are initially filed with the Equal Opportunity Employment Commission, which investigates claims prior to court intervention.

State statutes and local ordinances also provide extensive protection from employment discrimination. Some laws extend similar protection as provided by the federal acts to employers who are not covered by those statutes (e.g., smaller employers). Other laws provide protection to groups not covered by the federal acts (e.g., prohibitions of discrimination based on sexual orientation). Thus, in addition to being familiar with federal law, it is important to be aware of the state and local laws of the jurisdiction(s) in which business is done.

Additionally, you should consult your counsel if you have questions regarding employment laws and prior to discharging an employee.

You can also contact the NLADA Insurance Program at 202-452-9870 or contact Kevin Horsted at 202-452-9870 ext. 240 or by email at k.horsted@nlada.org for a termination checklist and a sample exit interview form. You may also contact Kevin Horsted with any questions you may have about the NLADA Insurance Program.

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TICKLER AND CALENDARING SYSTEMS: Reducing Risk and Stress in Legal Practice

By Neil G. McBride



If this article were being written as the front page of a tabloid, or to attract attention at a vendor's booth at the NLADA Annual Conference, it would start with something like this:

Amazing Risk Management Technique! It protects your firm. It protects your clients. It reduces stress on your case handlers. AND IT'S SO EASY TO DO!!!

The message of this article is almost that simple: Improving a legal aid firm's policy for calendaring and tickling, and consistently following that policy, is almost certainly the risk management technique that offers the most benefits to a firm for the least cost and trouble.

"Failure to calendar properly" and "failure to react to calendar" constituted more than half of the claims based on alleged administrative errors in the American Bar Association's (ABA) 1990-95 malpractice claims survey. A good system should not only give reliable notice, but include a reliable system to ensure that the advocates "react" to notices they get.

A consistent, reliable firm-wide tickler system is not just a good idea. According to the ABA model ethics rules, the duties imposed on supervisory lawyers to ensure ethical compliance in a firm include adopting policies and procedures to "identify dates by which actions must be taken in pending matters." ABA Model Rule of Professional Conduct 5.1(a) & cmt.[2]. In short, putting in place an effective calendaring system is an ethical requirement for firm managers.

A reliable tickler system will not only improve the quality of the firm's ability to handle their caseloads but will allow them to handle their caseload with less personal stress. A reliable tickler system does not usually require new staff, complex new software, or any significant new resource beyond the attention of leadership and some training and orientation for staff.

Three Observations

Before describing the characteristics of an effective calendaring system, three observations might help a firm understand the issues at work. First, there is no official standard from the American Bar Association, insurers, associations or anyone else, describing the minimum standard a firm must meet in its tickler/calendaring system. What is appropriate for different firms will vary widely given different factors, including the volume and nature of practice, the size of staff, the forums in which the firm works, and the way advocates work together.

Second, although the profession has no official policy on what a tickler system must look like, there is agreement that the system of tickling and calendaring events should not be left to the personal invention of each individual advocate. A system that depends solely on a calendar on the wall or self-made entries in a computer is not one that should be relied on to protect the interests of clients or the firm. A firm's tickler/calendaring system is too central to its overall standard of practice and management risk to be homemade by each individual advocate.

Finally, it is important to recognize that a good calendaring system is not only helpful to avoid missed deadlines or neglect. A well-supervised tickler system can be the foundation of a commitment to encourage a higher and more consistent quality of representation. For example, by promoting a standard that discourages filing pleadings on the last day, a good tickler system can promote effective review by colleagues and promote a culture of advocacy that anticipates that the resources throughout the firm can, when necessary, be available for the benefit of any single client and that advocates will have time to use such resources as they work their cases.

The Basic Characteristics of an Effective Tickler/Calendaring System

What do the cases and literature involving legal ethics and malpractice in recent years suggest about what an effective a tickler system should look like? For most legal aid firms, three characteristics are essential.

I. A second party should be involved in managing the system. This person should be involved on a day-to-day basis and know how an advocate is using the system in the event that he or she is suddenly unavailable.

Section 301-1001 of the ABA/BNA Lawyers Manual on Professional Conduct says:

Indeed, most professional liability insurance policies now require that the insured lawyer or firm have in place some form of dual calendar management system. Edginton, *Managing Lawyers' Risk at the Millennium*, 73 Tul. L. Rev. 1987, 2005 (1999). *The salient element of such a system is that more than one individual in the practice is responsible for seeing that the calendaring tasks are performed.* [Emphasis added.]

Among legal aid programs that have protocols for tickler systems (and unfortunately, most do not), the most common and serious deficiency is that they do not include participation by a second party.

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Participation by a second party is an essential check required by the fact that most of us are human. We make mistakes. We ignore our own notices. We get tired of giving reminders to ourselves and just stop using what system the office offers. Having a responsible second party involved reduces that likelihood of error and makes the first party pay more attention because he or she knows that someone else is looking.

Traditionally, this second party participation involves the shuttling back and forth of tickler cards or the files themselves. The advocate can write dates of when the file should be returned, or the action begun, either on the file or a tickler card. For example, for a case that requires a simple answer to be filed on October 15, the advocate would fill out a tickler card that states today's date, a return date (perhaps October 9), a statement of the reason for the return, and a way to indicate, by initial or otherwise, that the file was tickled on a certain date and returned on another date. This initialing of date-tickled and date-returned can serve as both a good supervisory tool and important proof that the advocate acted responsibly in the event of a missed deadline.

With a computer-based system, a firm may avoid the manual exchange of a tickler card (which may or may not be a good thing) by giving one or more second parties a mirror of the advocate's calendar and simultaneous notice of tickler notices. In any event, the advocate's supervisor should have, as a primary duty, responsibility for making sure that the advocate consistently follows the firm's tickler and calendaring protocol, whether it is manual or computer-based.

2. An effective tickler/calendaring protocol should apply to all open cases. Except for cases closed almost immediately after the first encounter with a client, advocates should enter a tickler date for action or review of every open case. Among legal aid and private firms, some of the most serious harm to client interests has come from delay on those "small" matters in which the substance and timing of the "next step" is vague. If a file is important enough to be open in the name of a client, it should have a tickle date. If it doesn't need a tickle date, it should be closed.

3. Effective tickler/calendar systems should have supervisors responsible for making sure that advocates use them consistently. Protecting clients and staff by insisting on an effective tickler system should be one of the most important duties of program managers. Whether the lead person includes a litigation director, a unit supervisor, a managing attorney or executive director, someone in a position of authority should have that responsibility clearly defined in his or her job description.

Stress

All case handlers, in legal aid or private firms, experience stress from their caseloads. We can feel stress at the volume or complexity of our cases, from feeling that we have too many cases, and from the anxiety of knowing that we can always do

more on any one of them. No conscientious case handler can always rest easily with the knowledge of how important the success or failure of our representation can be to the success or failure of our clients and their families. An effective, consistently used tickler system can significantly reduce these kinds of stress in two ways.

First, consistent, deliberate use of a tickler system serves as a daily reminder of being part of a law firm. This feeling should give some comforting confidence to advocates that they are not alone in bearing the burden of representing their clients. The firm and those in it share the burden in active, specific ways. A tickler system can tell them when they need to step in – for whatever reason – and what needs to be done when they do.

Second, those who study and write about stress and time management consistently emphasize the potential benefits of a tickler system. All advocates sometimes have the vague but stressful feeling that they are missing something, perhaps combined with the conviction that they do not have time to do everything that needs to be done.

Experts tell us that a good tickler system can be an effective way to reduce this kind of stress if it includes two important characteristics.

First, the advocate must **identify the next specific step** required in any case or responsibility and when it should be done. This step can be as simple as "check for reply to demand letter" or something as complex as "file brief on appeal." Psychologically, no matter how demanding the next step might be, by identifying the next specific step we can often change the feeling we have about the action from something diffuse and vague to something we can handle.

Second, after we specifically identify the next step, and when it needs to be taken, **get the file out of sight**. This second action is essential for the advocate to gain the stress-reducing benefit of a good tickler system. Ideally, getting the file out of sight would involve placing it in a central file, administered by competent support staff members, who can be relied upon to return it to the advocate on the tickle date indicated. Since virtually no legal aid firms use central files for open cases, and since this article is trying to emphasize the ease with which a firm can start using a tickler system, it will not emphasize the benefits of central filing. In the absence of a central file, advocates can get files out of their sight by using filing cabinets or other storage in or near their own offices.

This physical separation is critical. People who study time and stress management for a living have convincing evidence that the visible presence of the sources of our anxiety – stacks of case files for lawyers – is a constant distraction and source of stress. If we have a stack of cases on our desk or on the floor surrounding our desk, our eyes constantly flick over the stuff, taking time, creating anxiety and distracting us from other tasks and taking up time as we think about what might be in the pile.

Contrast that daily experience to the deliberateness of identifying the next action for each case, getting the file out of sight, and being confident that, with the help of a second person, it will return when it needs to return.

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Teaching new advocates the value of this kind of system, and giving them the tools and encouragement to use it, is probably the single most important thing a firm or supervisor can do to help new staff handle the stress and technical demands of a caseload.

For these personal reasons, to reduce risk and to protect clients, having a reliable, second-party tickler/calendar system ought to be a priority for every firm.

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Experience is a great teacher - especially in insurance. Either you learn from it or you will continue to engage in risky behavior. Unlike other insurance companies, the NLADA Insurance Program wants you to know what we have learned. We want you to know not only why having insurance matters, but more importantly, where the true risks lie in your practice and management, and what you can do to reduce and possibly even eliminate those risks. What we have learned indicates that every office should adopt policies and practices that formalize your risk management function. To reduce your risks and improve the quality of your services and office management, there is something you can do and something we will do:

- *You should designate a "counsel" position that will act as your office's point person when claims or ethics issues arise, monitor claims, develop standards particular to your areas of practice, recommend changes, and contribute to building and maintaining a culture within your office of high quality, ethical work.*
- *We will form a community within our membership of risk managers and ethics counsel, sharing thoughts, experiences, resources, and training materials.*

If you are interested in learning more about this effort, please contact Kevin Horsted at K.Horsted@nlada.org. And you can look forward to more risk management programs at this year's NLADA Annual Conference, November 8-11, in Charlotte, NC.

The General Counsel Function in Legal Aid & Defender Organizations: Confidentiality of Internal Communications to Ensure Ethical Compliance and Minimize Liability Risk

By Arthur J. Lachman



To meet their ethical obligations to ensure ethical compliance by lawyers, paralegals, and support staff,¹ and in an effort to better manage liability risks and claims, legal organizations are increasingly creating a separate in-house position of "general counsel."² Formalizing the general counsel role has become

standard practice in large private law firms in recent years, and many legal aid and defender organizations are following suit. Tasks typically undertaken by lawyers in this position include:

- ethics compliance and training;
- day-to-day ethics and loss prevention advice;
- identification and resolution of conflict of interest issues;
- handling disciplinary matters, court sanctions, and reporting issues;

- responding to subpoenas and discovery requests;
- claims reporting and management;
- general supervision, mentoring, and training of lawyers and nonlawyers;
- monitoring internal policies and quality control; and
- participating in bar ethics rulemaking and ethics opinion development.

In addition to assistance in complying with ethical obligations, a key benefit of formalizing the general counsel function is better handling of claims and potential claims against the organization and its lawyers. Common sense and experience show that when legal professionals identify ethical and malpractice issues early on and deal with them proactively, the risk of liability and professional discipline is greatly reduced. By creating an organizational climate of ethical compliance and loss avoidance, by serving as an institutional voice for the ethical principles of competent and diligent client representation, and by being the conduit for

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communications about issues before they actually become a problem, the in-house general counsel raises the overall quality of client practice in a legal organization.

Given the obvious benefits of lawyers talking to each other up-front about these issues, most of us simply assume that our discussions with co-workers to assist us in meeting our ethical obligations and minimizing exposure to client claims would be considered privileged and confidential. Unfortunately, case law in several jurisdictions suggests that confidentiality and privilege protections for these internal communications are lost when client conflicts of interest arise, even when lawyers seek advice from someone designated as the in-house general counsel in the organization. This article summarizes recent developments in the law of privilege for communications within legal organizations, including discussion of a recent New York formal ethics opinion that finally gets the issue right, and suggests ways to minimize the risk that internal communications will be considered discoverable down the road.

Privilege & In-House Counsel: Case Law

Courts have recognized that internal communications with general counsel in a legal organization are subject to the lawyer-client privilege.³ Certainly up to the point where a client has a potential claim against the organization, courts are very likely to uphold application of the privilege.

Unfortunately, the few courts considering the issue have concluded that privilege and work product protections for internal communications are lost when they relate to claims by existing clients of the organization.⁴ These courts reason that such claims create conflicts of interest based on the lawyer's fiduciary duty as imputed to other lawyers in the organization, rendering the privilege inapplicable as a matter of law. Although commentators have roundly criticized these decisions as a matter of privilege law and ethics, as well as on policy grounds,⁵ to date not a single judicial decision has concluded that an internal privilege applies when client claims are implicated.

A 2005 Washington Court of Appeals decision, *VersusLaw, Inc. v. Stoel Rives, LLC*,⁶ is illustrative. In that case, after a corporate entity sued its law firm for legal malpractice in drafting an agreement and failing to advise the entity to assert a claim under the agreement in a timely fashion, the entity sought discovery of communications between the lawyer handling the case and the firm's "in-house loss prevention attorney." The court held that the communications might be discoverable after an in camera review by the trial court, concluding that where there is a conflict between the law firm's own interest and its fiduciary duty to its client, the privilege does not apply. Thus,

When a law firm seeks advice from its in-house lawyer concerning potential malpractice in its representation of a client, the firm's position can

be adverse to or limit the law firm's representation of its client and create a conflict of interest.⁷

The Washington appellate court appeared to decide that prior to written client consent to the conflict of interest or withdrawal by the lawyer from the representation, communications about a potential client claim would be protected only to the extent they were made with outside counsel. But the court utterly failed to explain why only external communications should be protected in this context. These issues are of special concern to lawyers and organizations serving indigent clients, where obtaining informed consent may be problematic, where withdrawing from the representation and sending the client elsewhere is impracticable and not in the client's interest, and where resources for retaining and consulting outside counsel for the organization are limited or nonexistent. The Washington opinion and the others reaching a similar conclusion simply ignore both the practical realities of these situations and the strong public policy in favor of encouraging internal discussions of these issues by practicing lawyers.

Privilege & In-House General Counsel: New York Formal Ethics Opinion 789

But is there even a conflict of interest in this situation? In a well reasoned ethics opinion issued in October 2005 (Ethics Opinion 789), the New York Committee on Professional Ethics said that the answer will usually be no, concluding that "a law firm may form an attorney-client relationship with one or more of its own lawyers to receive advice on matters of professional responsibility concerning ongoing client representation(s), including on matters implicating the client's interests, without thereby creating an impermissible conflict between the law firm and the affected client(s)."⁸

The New York committee determined that there is no conflict with either the lawyer's own interests affecting his or her professional judgment, or with the interests of the legal organization that in-house counsel "represents." The committee adopted a pragmatic approach to the issue presented, noting that the ethics code

endorses and in some cases requires mechanisms within a law firm to promote obedience to a firm's obligations. Those ethical obligations frequently raise issues potentially or actually implicating the interests of one or more clients. Either a law firm must address these issues with one of its own lawyers, or else look to others for this advice. To hold that a law firm must always seek guidance outside its halls in order to preserve an attorney-client relationship – that is, to hire outside counsel (whose fiduciary duties may extend only to the firm) in every instance in which such an adversity arises – is simply impractical in the day-to-day life of many law firms, when issues of professional

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responsibility frequently require prompt responses most usefully provided by lawyers knowledgeable about the firm, its client relationships and its culture.

The committee concluded that there is no conflict because a lawyer's interest in carrying out ethical obligations "is not an interest extraneous to the representation of the client"; rather, "it is inherent in that representation and a required part of that representation." Because lawyers must always consider the ethical implications of their actions on behalf of a client, doing so normally does not, as a practical matter, result in a conflict of interest requiring client disclosure and consent.

The committee was careful to point out that where a legal organization's failure to comply with its ethical obligations might reasonably be expected to affect the exercise of professional judgment, then the organization may need to disclose its conclusions regarding the ethical issues. But it doesn't follow that the substance of communications with in-house counsel must also be disclosed to the client, nor is the lawyer required to tell a client how the lawyer has reached a conclusion on a particular matter of professional ethics.

Admittedly, the New York committee was applying the Model Code rather than the current version of the Model Rules, and the fact that New York is one of just two jurisdictions imposing ethical obligations and discipline on legal organizations made it easier for the committee to reach its conclusion. Nevertheless, it is hoped that other state ethics bodies will reach a similar conclusion as that reached by the New York committee, beginning a process of persuading courts to analyze the privilege issues in this context pragmatically and with a better understanding of the underlying policies implicated.

Conclusion

In the meantime, given the overall unfavorable legal climate for treating internal communications as privileged and confidential, should lawyers simply avoid getting help from designated in-house counsel and other colleagues when problems arise? Absolutely not. But lawyers need to understand the risks associated with such communications and understand when it is appropriate to limit internal communications and seek outside advice. This is another important role of in-house general counsel in legal organizations.

As with most risk management issues, completely eliminating risk in this context is probably not possible, short of withdrawing from the representation or seeking advice from outside counsel. Nevertheless, here are some risk management suggestions for maximizing the likelihood that internal communications relating to investigating and advising

about a matter where there is potential for a client conflict of interest will receive confidentiality and privilege protections:⁹

- formalize the general counsel role rather than treating it as an ad hoc function;
- when a potential client conflict situation arises, management should formally request general counsel to act to provide legal advice to the organization;
- general counsel conducting an investigation or giving the organization legal advice about a dispute should not have a relationship with the client involved;
- general counsel should treat all written and oral communications as confidential, and should communicate about the matter only with the organization's managing officer or management committee/board of directors;
- general counsel should consider throughout the investigation and advising process whether the organization should withdraw from the representation, obtain a written conflict of interest waiver from the client, and/or obtain outside counsel to take responsibility for advising and investigating.

While these steps will not necessarily overcome the legal obstacles erected in *VersusLaw* and other court decisions, they are most likely to put the organization in a favorable light before a tribunal in the event that a malpractice plaintiff tries to penetrate the substance of internal communications. We can only hope that courts will begin following the reasoning of the New York ethics committee and "get real" in making policy determinations in this context. Stifling lawyers' communications with each other when potential liability claims or ethics violations arise is surely the wrong policy.

¹ See Model Rules of Prof. Conduct 5.1 (a), 5.3 (a).

² Persons holding this position in firms and other legal organizations are also sometimes called "legal counsel," "ethics counsel," "loss prevention counsel," and "risk management counsel."

³ See, e.g., *U.S. v. Rowe*, 96 F.3d 1294, 1296-97 (9th Cir. 1996); *Nesse v. Pittman*, 206 F.R.D. 325, 328-32 (D.D.C. 2002); *Nesse v. Pittman*, 202 F.R.D. 344, 350 (D.D.C. 2001); *Nesse v. Pittman*, 206 F.R.D. 325, 328-32 (D.D.C. 2002); *Hertzog, Calamari & Gleason v. Prudential Ins. Co.*, 850 F. Supp. 255 (S.D.N.Y. 1994); *Lama Holding Co. v. Shearman & Sterling, et al.*, No. 89 CIV 3639 (KTD), 1991 U.S. Dist. LEXIS 7987, 1991 WL 115052 (S.D.N.Y. 1991); *In re Sunrise Sec. Litig.*, 130 F.R.D. 560, 595 (E.D. Pa. 1989); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §73, cmts. c, i (2000) (organizational privilege principles apply to in-house counsel functions at law firms).

⁴ See, e.g., *Koen Book Distribs. v. Powell, Trachman, Logan, Carle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, 286 (E.D. Pa. 2002); *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 220 F. Supp. 2d 283, 286-88 (S.D.N.Y. 2002); *Sunrise, supra*, 130 F.R.D. at 595-98.

⁵ See Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721 (2005); Douglas R. Richmond, *Law Firm Internal Investigations: Principles & Perils*, 54 SYRACUSE L. REV. 69 (2004).

⁶ 111 P.3d 866, 877-79 (Wash. App. 2005), *review denied*, 132 P.3d 147 (Wash. 2006).

⁷ *Id.* at 879.

⁸ New York Bar Ethics Opinion 789 (Oct. 26, 2005).

⁹ These suggestions are adapted from Douglas R. Richmond, *supra*, 54 SYRACUSE L. REV. at 104-06.

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