Lawyers Consulting Lawyers On Ethics and Malpractice Problems

"Can We Talk?"

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Part II

Consulting with a non-affiliated lawyer about an ethics or malpractice problem raises client confidentiality issues that lawyers often overlook. Part I of this article examined the issue from the perspective of the consulting lawyer.[i] It covered the questions of whether it is permissible to tell the consulted lawyer confidential information without getting client consent; must you inform the client after a consultation; does the consultation create a conflict of interest for the consulting lawyer with his client; and by telling the consulted lawyer confidential information is the attorney-client privilege waived?

This part covers the issue from the viewpoint of the consulted lawyer:

- Is there an attorney-client relationship with the consulting lawyer or his client?
- If not, is the information disclosed by the consulting lawyer confidential?
- May the consulted lawyer use information learned from the consultation?
- Does the consultation create a conflict of interest with other clients of the consulted lawyer?

This article also considers confidentiality issues in reporting ethics and malpractice problems to lawyer liability insurance companies. The primary sources for the information and opinions expressed are ABA Formal Opinion 98-411, Ethical Issues in Lawyer-to-Lawyer Consultation (August 30, 1998) and a series of articles appearing in *The Professional Lawyer* published by the ABA Center For Professional Responsibility.[ii] There is little Kentucky authority to definitively answer lawyer-to-lawyer consulting ethics, but these secondary sources offer a thoughtful treatment of the issues and provide useful guidance. Unfortunately, they do not cover the question of lawyers consulting with professional liability insurance carriers. I attempt to fill this gap here.

Lawyer-to-Lawyer Consultation From The Consulted Lawyer's Viewpoint

The dilemma for the consulted lawyer is that the more information received the greater the risk for a disqualifying conflict of interest with a current or prospective client. Conversely, if the information is so terse or sanitized for confidentiality reasons that there is too little to go on, the advice given may be incompetent. The key points to consider in working with this tension are:

1. Are either the consulting lawyer or his client the consulted lawyer's client?

The commentators are in agreement that the consulting lawyer's client does not automatically become the consulted lawyer's client. There is no "springing" attorney-client relationship based on the fact that a lawyer consults with another lawyer about a client matter.[iii] If the consulting lawyer, however, is seeking advice primarily for his own purposes (e.g., a malpractice or ethics issue), a confidential attorneyclient relationship with the consulted lawyer usually arises.

2. Does the consulted lawyer have a confidentiality duty to the consulting lawyer's client? Is there a limitation on use of information by the consulted lawyer?

Generally the consulting lawyer has no duty of confidentiality to the consulting lawyer's client. Accordingly, if the consulted lawyer later reveals or uses information from the consultation no ethics violation is committed. Notwithstanding this general rule, the consulted lawyer may in certain circumstances have confidentiality and limited use duties. The consulting lawyer may obtain the consulted lawyer's agreement to keep information confidential, confidentiality may be inferred from the circumstances, or the nature of the information may be so sensitive "that a reasonable lawyer would know that confidentiality is assumed and expected."[iv]

3. Does the consultation create a conflict of interest with clients of the consulted lawyer?

If the consulted lawyer owes no duty of confidentiality to the consulting lawyer's client, he also has no disqualifying conflict of interest should he represent a new client adverse to the consulting lawyer's client.[v] A more difficult conflict issue is when the consulting lawyer based on a hypothetical situation inadvertently gives advice adverse to a current client's interest. This failure to perform an adequate conflict check may require the consulting lawyer to withdraw from representing his own client, defend a disqualification motion at trial, or defend a malpractice claim. Good risk management requires that before consulting with another lawyer enough information be obtained to perform a reasonable conflict review.

It is worth noting that the Kentucky Supreme Court recognizes an appearance of impropriety conflict of interest test. While analysis of the rules supports a conclusion that the consulted lawyer owes no duties to the client of the consulting lawyer, application of the appearance test could result in a finding that a Kentucky lawyer owes the consulting lawyer's client duties even though never agreeing to keep information confidential.

Summing Up

ABA Op. 98-411 suggests these measures when being consulted by a non-affiliated lawyer:

- The consulted lawyer should ask at the outset if the consulting lawyer knows whether the consulted lawyer or her firm represents or has ever represented any person who might be involved in the matter. In some circumstances, the consulted

lawyer should ask the identity of the party adverse to the consulting lawyer's client.

- At the outset, the consulted lawyer should inquire whether any information should be considered confidential and, if so, should obtain sufficient information regarding the consulting lawyer's client and the matter to determine whether she has a conflict of interest.
- The consulted lawyer might ask for a waiver by the consulting lawyer's client of any duty of confidentiality or conflict of interest relating to the consultation, allowing for the full use of information gained in the consultation for the benefit of the consulted lawyer's client.
- The consulted lawyer might seek advance agreement with the consulting lawyer that, in case of a conflict of interest involving the matter in consultation or a related matter, the consulted lawyer's firm will not be disqualified if the consulted lawyer "screens" herself from any participation in the adverse matter.

Lawyer-to-Insurer Consultation Reporting Claims and Potential Claims of Malpractice

Most lawyer liability insurance companies use a claims made policy form and urge prompt reporting of claims and potential claims (usually referred to as "incidents"). Prompt reporting has advantages for both the lawyer and client. It triggers coverage of the claim or incident in the current policy year. This protects both client and lawyer from later denial of coverage for late reporting and permits identification of coverage issues. Any claim paid is against the limits of the annual policy enforce at the time the claim or incident was reported. This means that future year policy limits are not reduced by prior year problems. Prompt reporting in effect provides the most efficient coverage for the money.

Reporting claims and incidents to an insurer, however, raises two confidentiality questions:

- Is the lawyer's report to the insurer protected by the attorney-client privilege?
- Does the report violate the duty of confidentiality owed the client under Kentucky Rule of Professional Conduct 1.6?

There is no insured-insurer privilege. Therefore, lawyer-to-insurer reports must be found to come under the attorney-client privilege if they are to be protected from discovery. Current law shows that Kentucky subscribes to the "Broad View" that the attorney-client privilege applies to reports made to an insurer's representative. The reasoning is that the insured is required by the policy to cooperate and typically the insurer provides defense counsel. In Asbury v. Beerbower the Kentucky Supreme Court held:

> "The insured is ordinarily not represented by counsel of his own choosing either at the time of making the communication or during the course of litigation. Under such circumstances we believe that the insured may properly assume that the communication is made to the insurer as an agent

> for the dominate purpose of transmitting it to an attorney for the protection of the interests of the insured."[vi]

While it is comforting to know that claim and incident reports are privileged, the professional responsibility question remains of how much, if any, confidential information may be revealed to the insurer. Most of the answer is provided by Rule 1.6 Confidentiality Of Information:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
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> …
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> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; ….

Paragraph (b)(2) is known as the lawyer defense exception to the client confidentiality rule. It permits disclosure of confidential information in most situations in which a lawyer reports a malpractice claim or incident to an insurer. The premise is that when a client or third party accuses a lawyer of misconduct or malpractice the lawyer has the right of self-defense. Confidentiality and the attorney-client privilege are waived, but only to the extent necessary for the lawyer to defend against the accusation. The rule has been interpreted to allow revealing confidential information even though no formal claim or accusation has been made. If there is a serious possibility of a claim, the lawyer may take action to defend against it to include reporting the problem to an insurer.[vii]

What may be revealed to the insurer when the possibility of a claim is not a serious possibility, but only a remote one? This question arises when the lawyer is dealing with an uncertain situation that may develop into a malpractice claim. Typically the client is unaware of the problem and because of the uncertainty involved the lawyer believes it premature to discuss it with the client. Is it OK to report this incident to the lawyer's insurer? It is hard to argue that the client has waived confidentiality when the client does not even know there may be a problem. Yet it is in the best interest of both the lawyer and the client for the lawyer to report this incident to assure insurance coverage if the worst occurs. Furthermore, since the report is protected by the attorney-client privilege, there should be no prejudice to the client.

I can find no authority directly on point for this situation. An extension of the guidance for reporting more definite malpractice situations, however, supports a conclusion that this indefinite situation is reportable in full without violating confidentiality duties. A lawyer must be able to take appropriate action to avoid malpractice and protect the client from an error. Judicial policy in Kentucky encourages lawyers to seek help with client problems. This policy is supported by the application of the attorney-client privilege to insurer reports, Rule 1.6's self-defense exception to confidentiality duties, and the establishment of a confidential Ethics Hotline for Kentucky lawyers. Of course, if the situation is not resolved without prejudice to the client, the client must be told. Informing the client is only a matter of timing, not discretion but the report to the insurer is not an ethics violation.

Conclusion

Keeping client information confidential is the very essence of the attorney-client relationship. Policies that degrade this duty are suspect. Lawyer-to-lawyer consultations and prompt reporting of malpractice to professional liability insurers, however, operate to provide the client protection from lawyer negligence and financial loss. By following the suggestions in ABA Op. 98-411 confidentiality is only minimally compromised. The benefits for both client and lawyer justify a policy that encourages getting help when you need it most. Yes we can talk.

Endnotes

[i] *Kentucky Bench & Bar*,, Vol. 63 No.2, page 34, Mar. 1999. Available on the internet at www.lmick.com.
[ii] *See* Drew L. Kershen, *The Ethics of Ethics Consultation*, THE PROFESSIONAL LAWYER, Vol. 6, No. 3 (May 1995); *The Ethics of Ethics Consultation*, 1997 SYMPOSIUM ISSUE OF THE PROFESSIONAL LAWYER. SELECTED PAPERS FROM THE 23RD NATIONAL CONFERENCE ON PROFESSIONAL RESPONSIBILITY at 7-60 (ABA Center for Professional Responsibility 1997); *Ethics of Ethics Consultation, Center Update*, THE PROFESSIONAL LAWYER, Vol. 8, No. 4 at 18-19 (August 1997).
[iii] *See*, ABA Formal Opinion 98-411, Ethical Issues in Lawyer-to-Lawyer Consultation (August 30, 1998); Chinaris, *The Ethics of Ethics Consultation: The Consulted Lawyer's Perspective*, , 1997 SYMPOSIUM ISSUE OF THE PROFESSIONAL LAWYER at 47 (ABA Center for Professional Responsibilty 1997).
[iv] *See*, ABA Formal Opinion 98-411, Ethical Issues in Lawyer-to-Lawyer Consultation (August 30, 1998).
[v] *See*, ABA Formal Opinion 98-411, Ethical Issues in Lawyer-to-Lawyer Consultation (August 30, 1998).
[vi] Ky,. 589 S.W.2d 216 at 217(1979). *See also* Commonwealth v. Melear, Ky. App., 638 S.W.2d 290(1982); and Insured-Insurer Privilege; 55 ALR4th 336.
[vii] *See* Comment 18, K.R.P.C. 1.6; page 81, Annotated Rules of Professional Conduct, ABA 3rd Ed.; ABA/BNA Lawyers' Manual On Professional Conduct, Sec. 55:701, Confidentiality-Disclosure: Attorney's Benefit.