



## Playing for the Name on the Front of the Jersey

# Challenges of In-house Ethics Counsel

By Jason J. Irvin

**B**y the time you are reading this, it will be about time to fill out your NCAA tournament bracket. While basketball talk is normally confined to the water cooler, college basketball might just provide some insight to the management of law firms. One basketball quote in particular, sadly unattributed, may address the challenges facing in-house ethics counsel as well as the 64 coaches preparing their teams for March Madness. The author said, “My responsibility is getting all my players playing for the name on the front of the jersey, not the one on the back.” Recently issued ABA Formal Opinion 08-453 attempts to answer the question, what name is on the front of in-house ethics counsel’s jersey?

As the practice of law becomes increasingly specialized, many large firms have designated an in-house ethics counsel as a measure of self-policing. The ABA Model Rules encourage this trend. Comment [3] to ABA Model Rule 5.1 states, “[s]ome firms... have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee.” But these consultations, while important, present a potential minefield of conflicts of interest. The ABA recently addressed the ethical issues facing in-house ethics counsel in its Formal Opinion 08-453, “In-House Consulting on Ethical Issues.” The opinion provides a roadmap for the modern in-house ethics counsel and discusses, among other topics, the myriad of conflicts inherent to the practice of an in-house ethics counsel.

### Potential Conflicts between the Firm and Its Client

An in-house ethics counsel’s consultation with another lawyer does not pose a per se conflict with the firm or its client. ABA Model Rule 1.7(a)(2) bars a lawyer from representing a client if there is significant risk that the representation will be materially limited by a conflicting interest of the lawyer. Prophylactic advice, seeking to avoid misconduct, will not generally create a conflict of interest. An attorney’s efforts to determine whether a course of action will violate the ethical rules of conduct does not affect the attorney’s professional judgment. Rather, a lawyer’s efforts to conform to the applicable

ethics standards are an inherent part of the professional judgment for which he or she was hired. ABA Formal Opinion 08-453, p. 3 (citing New York State Bar Ass’n Comm. on Prof’l Eth. Op. 789).

In contrast to advice about prospective conduct, however, there is a great risk of a conflict if the lawyer seeking advice has already committed a violation of the ethics rules. ABA Formal Opinion 08-453, p. 3. In this circumstance, advice may be sought to protect the lawyer or the firm, rather than the client. Even if the lawyers have the best intentions, it may be difficult, if not impossible, for the lawyers involved to give sufficiently detached advice to the client. The firm may be disqualified from representing the client, absent a waiver of the conflict. *Id.*

### Conflicts between the Firm and the Consulting Attorney

Potential conflicts of interest for an in-house ethics counsel are not limited to those between the firm and its clients. A conflict may arise between the firm and its consulting attorney as well. ABA Model Rule 1.13(a) suggests that a lawyer retained by a firm represents that firm, rather than its individual members. But, the “reasonable expectations of the consulting lawyer” determine the existence of a lawyer-client relationship. ABA Formal Opinion 08-453, p. 3. As a consequence, an in-house ethics counsel needs to inform a consulting attorney that he or she represents the firm, rather than its individual lawyers. *Id.* at 3-4; ABA Model Rule 4.3. In some cases, dual representation of the firm and consulting attorney may be appropriate, if interests do not diverge, for example, if an ethics counsel does not believe that a consulting attorney has engaged in misconduct. ABA Formal Opinion 08-453, p. 4. But if an attorney has violated the ethics standards, an ethics counsel’s responsibility to prevent imputation of the conduct to the firm may create a significant conflict.

### Disclosing Information under ABA Model Rule 1.13

Although the ABA Model Rules suggest that the ethics counsel may be an outlet for “confidential referrals” of ethical problems, the ethics counsel may be required to disclose information in certain circumstances. Under ABA Model Rule 1.13(b), an ethics counsel must disclose a consulting lawyer’s misconduct to firm management if he or she knows the consulting lawyer “engaged

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in action... that is a violation of law that might be imputed to the organization and is likely to result in substantial injury to the organization.” Unless an ethics counsel believes that it is not in the best interest of the firm, he or she must refer the matter to a higher authority within the firm. ABA Model Rule 1.13(b). However, the ABA Model Rules do not require disclosure in every instance. If an ethics counsel reasonably believes that a situation can be corrected by counseling the lawyer involved, and that advice will be followed, disclosure may not necessarily be in the best interest

of the firm. ABA Formal Opinion 08-453 p. 5-6. Disclosure in this situation is not mandatory. *Id.*

### **In-House Ethics Counsel as Guardian of the Practice**

You might be asking yourself, “What does all this have to do with basketball?” Well, the answer is simple. The front of the in-house ethics counsel’s jersey reads, “The Practice.” No, not the canceled legal drama, but the higher pursuit of practicing law and preservation of the profession’s integrity. The Preamble of the ABA Model Rules states, “Every lawyer is responsible for

observance of the Rules of Professional Conduct.” But a lawyer serving his or her firm in the role of in-house ethics counsel has extraordinary responsibilities, for he or she is trusted to serve as the ethical compass for that firm. While his or her responsibilities extend far beyond resolving conflicts of interest, few duties could be more important or challenging. ABA Formal Opinion 08-453 goes a long way to defining an ethics counsel’s role and clarifying his or her responsibilities to his or her firm, its clients, and most importantly, to the bar itself. 