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ETHICS OPINION 1045

New York State Bar Association
Committee on Professional Ethics

Opinion 1045 (1/8/15)

Topic: Lawyer as witness

Digest: In-house counsel for a corporation may submit to an interview with an administrative agency that is investigating alleged wrongdoing by the client, where the facts to be disclosed by the lawyer will not constitute confidential information. However, if the agency's investigation results in a proceeding before a tribunal, and if the lawyer is likely to be a witness on a significant issue of fact, the lawyer may not also act as an advocate before the tribunal in such proceeding, absent an exception to the advocate-witness rule.

Rules: 1.0(w), 1.1(c), 1.6(a), 3.7(a)

FACTS

1. In-house counsel for a corporation has been asked to submit voluntarily to an interview with an administrative agency that is investigating a charge by a third party of wrongdoing by the client. The interview will involve what occurred at a meeting between the corporation and the third party, at which the lawyer was a participant. The lawyer's interview may help to avert a formal complaint against the client, and therefore may be beneficial to the client. The corporation has no objection to its lawyer appearing for such interview. The facts the lawyer would discuss during the interview are not subject to the attorney-client privilege and do not otherwise constitute confidential information of the client (e.g. will not be embarrassing or detrimental to the client and will not reveal information the client has requested be kept confidential). If, after its investigation, the agency believes the charge against the client has merit, it could file charges, in which case a hearing would be held before a tribunal.

QUESTION

2. May in-house counsel for a corporation voluntarily submit to an interview with an administrative agency that is investigating a charge by a third party of wrongdoing by the client, where the facts disclosed by the lawyer will not constitute confidential information?

OPINION

3. Rule 1.6 of the New York Rules of Professional Conduct (the "Rules") prohibits a lawyer from knowingly revealing confidential information (as defined in that Rule) unless the client gives informed consent, as defined in Rule 1.0(j). Confidential information includes information gained during the representation that (a) is protected by the attorney-client privilege, (b) is likely to be embarrassing or detrimental to the client if disclosed, or (c) the client has requested be kept confidential. We have been told, and we assume for purposes of this opinion, that the information the lawyer would relate to the agency concerns the conduct of the client at a meeting at which the adversary was present (and thus would not be protected by the attorney-client privilege), and that the information related by the lawyer will not be embarrassing or detrimental to the client, and that the client has not requested that it be kept confidential. Consequently, we see no issue under Rule 1.6. If the information might be embarrassing or detrimental to the client, or if the client had requested that the lawyer not disclose it, the lawyer could not voluntarily disclose it without the informed consent of the client.

4. Rule 3.7(a) prohibits a lawyer from acting as an advocate before a "tribunal" in a matter in which the lawyer is likely to be a witness on a significant issue of fact. The term "tribunal" is defined in the Rules to include not only a court or arbitrator but also an administrative agency "acting in an adjudicative capacity," meaning that a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter. Rule 1.0(w).

5. Although the interview here is with an administrative agency, the agency at this stage is exercising its investigative functions, rather than acting in an "adjudicative capacity." Consequently, Rule 3.7(a) is not currently implicated.

6. If the agency determines to bring a formal complaint against the client following the interview, then the agency will be acting in its "adjudicative capacity." At that point, if the lawyer is "likely" to be a witness on a significant issue of fact, Rule 3.7(c) will come into play, and the lawyer will not be able to act "as advocate before" the tribunal unless one of the exceptions in Rule 3.7(a) applies. See N.Y. State 642 (1993) (lawyer may not serve as both lawyer for a union and as a witness in an arbitration concerning a collective bargaining agreement the lawyer negotiated).[1]

7. If the agency determines to bring charges against the client, the lawyer will need to determine if he is likely to be a witness on a significant issue of fact. This requires evaluating other available testimony. As the court stated in MacArthur v. Bank of New York, 524 F. Supp.

1205, 1208 (S.D.N.Y. 1981), "An additional corroborative witness would almost always be of some use to a party, but might nevertheless be essentially cumulative. At some point, the utility of additional corroboration is de minimus [sic] and does not require the attorney's disqualification." In that case, the court found that an independent lawyer would likely call the lawyer, both to supply his own account of the events in question (even if corroborative) and to prevent the jury from speculating about his absence. It therefore found the lawyer's testimony would be far from cumulative, because his role was pivotal, and his conduct had been brought into question by the adversary. Determining whether the lawyer is likely to be a witness on a significant issue of fact is a factual question beyond the jurisdiction of this Committee.

8. If the lawyer is likely to be a witness on a significant issue of fact, Rule 3.7(a) does not authorize the lawyer to choose whether to be a lawyer or a witness. The lawyer must not act as an advocate before the tribunal. The rule applies whether the lawyer would be called as a witness by the lawyer's client or the client's adversary, and whether or not the lawyer's testimony would be favorable to the client. Under the former Code of Professional Responsibility, EC 5-10 elaborated on the predecessor to Rule 3.7 as follows: "Where the question [of whether to be a witness or an advocate] arises, doubts should be resolved in favor of the lawyer testifying and against the lawyer's becoming or continuing as an advocate." See MacArthur v. Bank of New York, supra ("[T]he stricture is mandatory: the party cannot choose between the attorney's testimony and his representation. The rule embodies a conclusive preference for testimony . . . . A party can be represented by other attorneys, but cannot obtain substitute testimony for a counsel's relevant, personal knowledge.") This obligation is not eliminated by client consent. Id. at 1209. Although the language of EC 5-10 was not carried over into the comments to Rule 3.7, we believe it is implicit in the language of the rule itself.

9. Similarly, Rule 1.1(c) prohibits a lawyer from intentionally prejudicing or damaging the client during the course of the representation, except as permitted or required by the Rules. Such prejudice might arise if the lawyer withheld material testimony on a significant issue of fact, either in the investigatory stage of the matter or at a later hearing before a tribunal.

CONCLUSION

10. In-house counsel for a corporation may submit to an interview with an administrative agency that is investigating alleged wrongdoing by the client, where the facts to be disclosed by the lawyer will not constitute confidential information. However, if the agency's investigation results in a proceeding before a tribunal, and if the lawyer is likely to be a witness on a significant issue of fact, the lawyer could not also act as an advocate before the tribunal in such proceeding, absent an exception to the advocate-witness rule.

(44-14)

[1] While the lawyer could not appear before the tribunal as counsel in the matter, he or she could participate in the case outside the courtroom, for example, by directing outside counsel. Rule 3.7(a) (lawyer shall not act as advocate before a tribunal); see ABA Inf. 89-1529 (1989). But that is not the issue at this stage.

One Elk Street, Albany , NY 12207
Phone: 518-463-3200 **Secure Fax:** 518.463.5993