THE ADVICE OF COUNSEL DEFENSE IN PROFESSIONAL DISCIPLINARY PROCEEDINGS - - DOES IT EXIST?

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Attorneys facing complex ethical questions, such as whether potential clients may cause impermissible conflicts of interest with current or past clients, or whether their firm can enter into attractive business relationships with clients, often seek independent advice. Law firm risk management partners, outside counsel with expertise in professional conduct issues or the Bar's Ethics Committee provide most of these consults. Given the volume of professional responsibility questions that arise in practice and the relatively small number of disciplinary actions, it appears that the advice and discussions often produce satisfactory results. However, if a complaint is filed with the Attorney Discipline Office regarding the action taken, a key issue in the case is likely to be the impact the consult should have on the disciplinary action.

An attorney's decision to seek an ethics consult could produce a number of different outcomes in the case. These range from a complete defense to a complaint, to the consult being of no value in the case. While New Hampshire law is not settled, cases from other states support the position that consults will be significant mitigating factors during the sanctions phase. However, current law provides little support for an advice of counsel defense to an ethical violation.

For obvious reasons, attorneys charged with disciplinary violations would like to be able to defend by showing that they acted in reliance on advice of counsel. Their argument is that when lawyers get advice of competent counsel on complex ethical problems, they have done all they possibly can to comply with the professional rules. Thus, a finding of violation should be precluded.

This "advice of counsel" defense has been used successfully in other areas of the law, such as cases dealing with malicious prosecution, *see e.g., Hogan v. Irwin Motors,* 433 A.2d 1322 (N.H. 1981); insurance cases where the insurer has been accused of acting in bad faith, *Alford v National Emblem Ins. Co.*, 469 S.W.2d 375 (Tenn. 1971); and claims alleging willfulness in patent infringement actions, *Bott v. Four Star Corp.*, 807 F.2d 1567 (C.A.Fed. 1986).

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Further, in criminal prosecutions, a defendant acting under a mistaken belief that the conduct complies with the law is relieved of criminal liability if there was reliance on statements of the law found in a statute, or an administrative order, or a written interpretation of the law from an appropriate public official. RSA 626:3, II. (This provision does appear to extend this defense to reliance on advice of private counsel.)

Given the increased complexity of professional responsibility law (the Restatement of the Law Governing Lawyers now fills two volumes), a strong argument exists for recognizing a defense in professional disciplinary proceedings for lawyers who seek advice from bar authorities or independent counsel before acting - - particularly in circumstances in which the ethics issue is complex, the lawyer seeks advice from another attorney who is both independent and qualified, and the lawyer provides all information necessary for a well informed opinion.

Despite these considerations, however, the argument has not been successful in lawyer disciplinary cases. In *Kentucky Bar v. Guidugli*, 967 S.W.2d 587 (Ky. 1998), for example, the court disciplined a lawyer for failing to reveal on his bar application that he had entered a guilty plea in a criminal case. He claimed that he relied on legal advice given by his criminal lawyer and by his brother, a district court judge. Both advised him that, because the case was sealed, it need not be reported. The Court rejected his claim that the legal advice barred a finding of professional misconduct. *See also In re Ainsworth*, 614 P.2d 1127 (Or. 1980) ("We do not mean to encourage consultation with the general counsel of the Oregon State Bar by suggesting that his or her advice can provide a defense to disciplinary violations. It cannot." *Id*. at 1133).

The theory behind rejection of the advice of counsel defense is that all lawyers must know and understand the rules of professional conduct, and that the attorney's actual knowledge of those rules is irrelevant. In *People v. Katz*, 58 P.3d 1176, 1187 (Colo. 2002), for example, the Presiding Disciplinary Judge stated that the hearing panel will presume that an attorney

> understands and will adhere to the Rules of Professional Conduct. It is the individual attorney's duty and obligation to comply with the Rules of Professional Conduct. The attorney may not delegate that duty or responsibility to another under the umbrella of advice of counsel and thereby create a defense to a violation of those Rules.

Id. at 1187 (citations omitted).

Though not addressing the advice of counsel defense specifically, the New Hampshire Supreme Court has clearly established a duty on New Hampshire lawyers to know the Rules. In *Whelan's Case,* 619 A.2d 571 (N.H. 1992), the Court confirmed that ignorance of the professional responsibility rules is not a defense:

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> The respondent's defense is basically one of ignorance of the Rules of Professional Conduct, which is no defense. We hold that lawyers, upon admission to the bar, are deemed to know the Rules of Professional Conduct. "Attorneys in this State have the obligation to act at all times in conformity with the standards imposed on members of the bar as conditions for the right to practice law." *Id.* at 573. (*citations omitted*)

While this seems to be the general rule around the country, the logic of extending this position to situations in which the attorney seeks out advice from qualified, independent counsel is not as clear. Issues of professional responsibility have become more complex and are frequently referred to lawyers who concentrate in the area. The ethical judgments involved in modern law practice are nuanced and rely on many sources of law beyond the actual rules. The existence of an active national organization for lawyers handling professional responsibility matters, The Association of Professional Responsibility Lawyers (APRL), and the issuance by the American Law Institute of the two-volume Restatement of the Law Governing Lawyers, demonstrate the scope and complexity of the field. Denying lawyers a defense for actions in this complex area that are taken in reliance on the advice of experts seems not to recognize this reality. Interestingly, several Massachusetts and Maryland attorneys active in APRL have indicated on the organization's listserv that they are now trying cases seeking to use advice of counsel as a bar to a disciplinary finding.

Additionally, a complete rejection of the defense is undercut somewhat by the Rules themselves. Rule 5.2(b) provides that a "subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." NH Rules of Professional Conduct, R. 5.2(b). This rule appears to demonstrates that a reasonable mistake in reliance on one with superior knowledge is not a violation at least in the more complicated and difficult ethical dilemmas. Of course, this rule may also simply recognize the need for a chain of command within a law firm that places the onus of ethical compliance on the more experienced lawyer.

If, as in most states, a lawyer may not rely on an advice of counsel defense, the question becomes whether the ethics consult may have some lesser, but nevertheless significant, forensic value. Here, the decisions are more reassuring. Many courts have looked to the efforts of the lawyer to comply with the rules as a mitigating factor. For example in the *Guidugli* case, *supra,* the Kentucky Supreme Court noted the lawyer's actions in seeking legal counsel on the issue of disclosure as a key mitigating factor. *Guidugli,* 967 S.W.2d at 589. The Court stated: "Because of this narrow distinction and the dearth of case law on the issue, Respondent's actions in seeking legal counsel on the issue of disclosure render his decision within reasonable boundaries." *Id.* Based in part on the

attorney's decision to seek legal advice, the court ordered a 30-day suspension over the objection of three dissenting judges who would have imposed a one-year suspension.

Similarly, in the *Ainsworth* case, the Oregon court noted that "if there was any violation of DR 5-103(A) or DR 5-104 by the accused in this case, it was not of any great severity or magnitude, and that under the circumstances of this case, including the fact that the accused sought the advice of the general counsel of the Oregon State Bar, he should not be disciplined by this court for any such violations." *Ainsworth,* 614 P.2d at 1133.

At least one state, Oregon, has adopted a rule of professional conduct explicitly authorizing the Disciplinary Board and Supreme Court to consider compliance with advisory opinions of the state bar's Ethics Committee or the General Counsel's Office as "a showing of the lawyer's good faith effort to comply with these rules" and "a basis for mitigation of any sanction." Oregon Rules of Professional Conduct, Rule 8.6 (2005). This rule was enacted in response to widespread dissatisfaction with the failure of the Court to adequately consider the fact that a lawyer sought advice of Bar Counsel in a prior case. *See In re Conduct of Brandt*, 10 P.3d 906 (Or. 2000).

The American Bar Association has promulgated a model set of rules it hopes states will use to impose sanctions. While New Hampshire has not formally adopted the *ABA's Standards for Imposing Lawyer Sanctions (ABA Standards*), our Court regularly looks to these rules for guidance. *See e.g.*, *In re Richmond's Case*, 904 A.2d 684, 695 (N.H. 2006). *Coffey's Case*, 152 N.H. 503 (2005); *Wolterbeek's Case*, 152 N.H. 710 (2005). The ABA standards focus the disciplinary board or court on four factors: the ethical duty violated, the lawyer's mental state, the injury, and any aggravating or mitigating factors. *See ABA Standards* (Theoretical Framework). While there is no explicit mention of ethics consults as a mitigating factor, *see ABA Standards* § 9.3, the standards do look at the absence of a dishonest or selfish motive. This language and the cases around the country indicate that a lawyer who seeks advice from an expert and follows that advice is acting without such an improper motive and should be able to raise this in mitigation.

Similarly, the NH Supreme Court in *Whelan's Case*, *supra,* looked at the good faith of the respondent and refused to suspend an attorney for litigating his mistaken belief that knowledge of a rules violation is needed for discipline. The court stated that "[a]lthough he was mistaken as to the standard which applies when determining if disciplinary action against an attorney is necessary, the respondent had a reasonable, good faith belief that in order to violate the Rules of Professional Conduct, an attorney would have to be aware that his or her conduct was prohibited by the rules." Though the Court clearly was not suggesting that good faith belief that one's conduct is permissible is a defense, the language suggests that mere errors in analysis could be useful as mitigation. *Whelan's Case,* 619 A.2d at 574.

It is likely that most courts and disciplinary boards, including New Hampshire's, will recognize the value of ethics consults in the sanctions phase of a disciplinary action. In addition, consultation with experienced professional responsibility lawyers is a sound risk management practice in any law firm. Finally, and most importantly, responsible lawyers, working with a risk management partner, outside counsel or the Bar's Ethics Committee will typically find the right result, both from an ethical and client-centered standpoint. If the recommended action complies with the Rules of Professional Conduct and the inquiring lawyer follows that advice, no discipline can be imposed and thus mitigation is not an issue.

The Advisories on the Law of Lawyering in New Hampshire issued by the Attorney Conduct & Liability Practice Group are intended to provide general overviews of professional responsibility law in a variety of areas encountered by lawyers. Because the law in this field is constantly changing, and because the Advisories are generic, they should not be relied upon as guidance or advice on how to handle specific situations. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at AC&LPG@devinemillimet.com.