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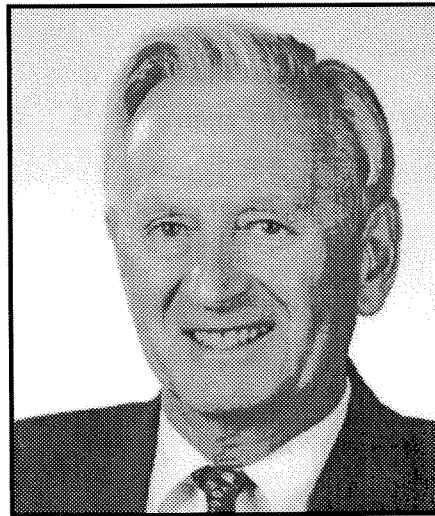
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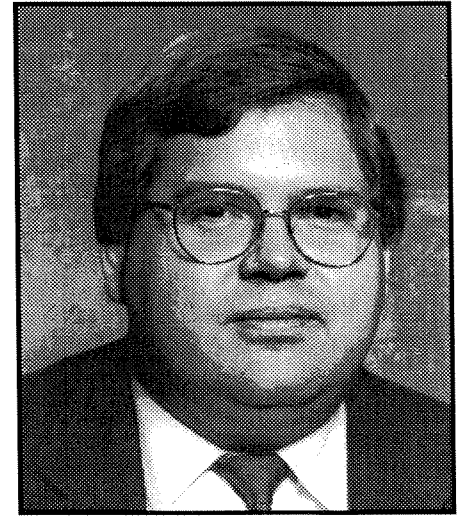
Focus On New Jersey

Updating Rules Of Professional Conduct To Reflect Today's In-House Practice

The Honorable Stewart G. Pollock, Chair, New Jersey Supreme Court Commission on the Rules of Professional Conduct (RPC), and Bruce J. Hector, President, New Jersey Corporate Counsel Association (NJCCA), discuss the status of proposed updates to the RPC that impact corporate counsel. Following two decades of distinguished service as a member of the state's highest court, Justice Pollock currently is Of Counsel with Riker, Danzig, Scherer, Hyland & Perretti LLP. Mr. Hector is Associate General Counsel with Becton Dickinson and Company. Questions can be addressed to spollock@riker.com or bruce_j_hector@bd.com. Jairo G. Cano, an intern and second year student at Seton Hall School of Law provided research for this dialogue.



The Hon. Stewart G. Pollock



Bruce J. Hector

Pollock: Widely reported corporate scandals raise significant implications for corporate counsel. As well as heightened scrutiny of corporate responsibility, counsel face challenges driven by economic, technological and cultural changes. In these changing times, corporate counsel are well advised to look seriously at the professional rules that govern their practice.

Our Commission has been meeting for two years to study and draft changes to the RPC and the accompanying explanatory comments. Critical in the process has been the participation of members of the bar, both from law firms and in-house practice, in submitting comments and testifying at public hearings.

Hector: In-house practice often crosses state borders. Internet and other electronic tools enable corporate counsel to research laws of any jurisdiction and to convey their advice throughout their company's interstate and international locations. In-house attorneys who survive downsizing

in today's tough economy must do more with less, which often calls for increased specialization. An attorney working on antitrust, corporate securities, intellectual property, import/export controls and other specialized areas is more likely to address questions of federal law than issues governed by one local jurisdiction.

To reflect contemporary legal practice, NJCCA for a number of years has been working with the American Corporate Counsel Association (ACCA), the American Bar Association (ABA) and the New Jersey State Bar Association (NJSBA) in advocating adoption of Model Rule 5.5 to permit lawyers licensed in one state to practice in another with a limited license.

Pollock: New Jersey's consideration of the controversial issues surrounding multijurisdictional practice intensified last August after the ABA adopted Model Rule 5.5. The rule permits a lawyer admitted in one state to provide legal services in another state under certain circumstances.

The circumstance of most interest to corporate counsel is the "catchall" for transactions. It permits cross-boundary legal services that are provided under a limited license to the lawyer's employer or its organizational affiliates.

Hector: For New Jersey corporate counsel, multijurisdictional practice is a matter of particular concern. Whether working for companies large or small, they often are confronted in their day-to-day practice with legal issues that cross state and international boundaries. Among the benefits of adopting ABA's Model Rule 5.5 is uniformity with other states. For information about the status of efforts in other states in adopting Rule 5.5, visit www.acca.com.

Pollock: At the New Jersey Supreme Court's hearing in April on the RPC, the New Jersey State Bar Association expressed concern that allowing out-of-state attorneys to practice in New Jersey without passing the state's bar exam

would adversely affect the practice of law in New Jersey.

Hector: This belief implies that the other states care less for their public than New Jersey. Furthermore, many out-of-state lawyers went to the same law schools as New Jersey lawyers. It is important to realize that our clients should have the ability to choose the lawyer who will best represent them on corporate issues that cross boundaries, regardless of what state issued their license.

Pollock: New Jersey has been ahead of the curve in adapting the RPC to the changing needs of the bar, including corporate counsel. Opinion 14 of the Unauthorized Practice of Law Committee reflects this attitude. The opinion permits in-house counsel not admitted in New Jersey to provide legal advice to their corporate employer. The opinion, however, does not permit in-house counsel to provide legal advice to co-employees on personal matters. Proposed Rule 5.5(d)(1) incorporates that policy in the RPC. RPC 5.5, moreover, generally broadens the scope of multijurisdictional practice.

Hector: The defenders of the current Rule 1:21-1[a], requiring a bona fide office be maintained in New Jersey, claim that the rule is necessary to ensure a competent bar. The fluidity of borders argues against their position. The ease of public transportation between New Jersey and New York City and Philadelphia enables people to live in one state and work in another. In light of the regional nature of contemporary practice, it often makes more sense and is more practical for a company located in Camden to work with a lawyer in Philadelphia than one in Jersey City.

Pollock: Our Commission recommended changing the bona fide office requirement. Given the ease of electronic communications and modern transportation, if a New Jersey client, including a corporation, wants to be represented by a lawyer admitted in New Jersey, but with an office in another state, the Commission thought that the client should be able to retain that attorney.

Hector: Your Commission has done an excellent job of helping the public, as well as the legal profession, to maintain their focus on the ethical behavior that is

expected from each lawyer practicing in New Jersey. These expectations continue under the proposed changes permitting multijurisdictional practice. Should any attorney violate New Jersey's Rules of Professional Conduct, they would be subject to discipline under our rules, in addition to those of their home states. Reciprocity provisions are included so that if the lawyer commits acts that justify disbarment in New Jersey, then the reciprocity provisions would apply in disbaring the lawyer in his or her home state as well.

Pollock: To determine which jurisdiction of disciplinary authority applies, the first question is whether the violation occurred before a tribunal. If so, the rules of the jurisdiction in which the tribunal sits would apply. For other conduct, the proposed rule would apply the rules of the jurisdiction in which the lawyer's conduct occurred or if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction would apply. The proposed rule concludes that the lawyer would not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes that the predominant effect of the lawyer's conduct will occur. Looking to a lawyer's reasonable belief, rather than to the facts demonstrating the presence or absence of such a predominant effect, puts the focus on subjective assessments, which promise to raise interesting jurisdictional questions.

Hector: Admonishments about counseling a client engaged or proposing to engage in criminal or fraudulent activity are not new. What is new is the heightened public scrutiny, which is a function of the fact that a lot of investors suffered financial losses as a result of questionable corporate practices. Public officials are reacting to that. The current SEC rules implementing the Sarbanes-Oxley Act take a step back from an early proposal of noisy withdrawal by an attorney practicing before the SEC if he or she becomes aware of material violations by the corporation. They now require the lawyer to report material violations up the ladder within their organization.

Pollock: New Jersey's Rule 1.6 (b) requires a lawyer to disclose information to the proper authorities to prevent the

client from committing a criminal, illegal or fraudulent act that he reasonably believes will result in death, substantial bodily harm or substantial injury to the financial interest or property of another. Our Commission recommended to the court that it maintain the mandatory provision and not make it permissive. We recommended furthermore that the court expand Rule 1.6 (b) to require a lawyer to reveal information to the proper authorities to prevent a client or third party from committing fraudulent acts. We also recommended a provision that would permit the lawyer to reveal that information to the person threatened as well as the proper authorities if he believes that disclosure is necessary to prevent the harm set forth.

Hector: This is a wonderful opportunity for corporate counsel to show their value to their corporations. Reporting potentially criminal, illegal or fraudulent activities up the ladder to the company's general counsel, CEO, audit committee or the board is good business practice. It helps the company's highest management to halt inappropriate activities before they become the fodder for hostile headlines.

Pollock: The in-house corporate lawyer has been strengthened. Often executives have goals to achieve, and the lawyer has the responsibility of saying that they might not do it in the way they first propose. Occasionally in the past, some executives have viewed in-house counsel as roadblocks to be circumvented. Now everyone is aware that looking only at the immediate financial returns may not be the most efficient way of doing something. Ethical considerations can have significant impact on a company's long-term economic health.

I urge counsel to consider the RPC and their impact on the day-to-day practice in an in-house setting. The whole panoply of the rules applies to you from the moment you raise your right hand and are admitted to the bar. The prudent lawyer will find out what those rules are and follow them.

Hector: Thank you, Justice Pollock, for sharing your insights. I look forward to continuing our dialogue about the proposed changes to the RPC at NJCCA's annual meeting on September 23. In-house counsel who would like to attend the meeting may contact Barbara Walder at njcca41@aol.com.