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D.C. Bar Clarifies Boundaries for Disclosure of Client Confidences by Discharged In-House Counsel

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D.C. Bar Association Legal Ethics Committee, Ethics Opinion 363

Brief Summary

The District of Columbia Bar Association Legal Ethics Committee (Committee) opined that in-house lawyers who sue their employers for employment discrimination or retaliatory discharge may not reveal client/employer confidences offensively in that context, but may reveal confidences, as reasonably necessary, defensively (i.e., in response to the employer's affirmative defenses or counterclaims).

Complete Summary

The Committee was asked whether a discharged in-house lawyer may disclose employer/client confidences or secrets in his or her employment discrimination or retaliatory discharge case. The Committee generally opined that such lawyers may use client confidences defensively but not offensively.

Under D.C. R. Prof'l Conduct 1.6(e)(3) a lawyer may reveal client confidences "to the extent reasonably necessary to establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer." The Committee concluded that the rule prohibits use of employer/client secrets or confidences in support of an employment-related claim, but that a lawyer may reveal such information (to the extent reasonably necessary) in response to the employer's affirmative defenses or counterclaims.

The Committee further opined that such lawyers are not prohibited from bringing employment discrimination or retaliatory discharge suits merely because an employer/client might perceive the need to assert confidential information in defense of such a suit.

Finally, the Committee expressed no opinion as to whether Rule 1.6(e)(3) could be preempted by certain employment discrimination or retaliatory discharge laws in certain circumstances.

Significance of Opinion

This opinion highlights a key difference between D.C. R. Prof'l Conduct 1.6 and many other jurisdictions' confidentiality rules. For example, Model R. Prof'l Conduct 1.6(b)(5) generally allows both the offensive and defensive use of client confidences in disputes between lawyer and client.

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