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CLE FOR IN-HOUSE COUNSEL
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Ethics Issues for In-House Counsel: Nineteen Tips for 2019

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No. 1: You Are a Member of Your Organization's "Law Firm"

- Rules of Professional Conduct apply to all State Bar members

- "Firm" or "Law Firm" under the Rules:
  - "Law firm" includes the legal department of a corporation or other organization, or a legal services organization
  - "With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm . . . ."

Mo. Rule 4-1.0(c) & Comm. 3

No. 2: “Practicing Law” Under Ethical Rules

- Missouri generally requires lawyers who “practice law” to be admitted to the Bar

  Mo. Rule 4-5.5

- But Mo. Bd. Law Examiners Rule 8.105 provides for a restricted license if lawyer, *inter alia*, is admitted in another state, and works for a single employer
- “Practicing law” includes a “systematic and continuous presence” in the state
- A lengthy stay in a state for a single legal task -- negotiation or litigation -- is not necessarily a “presence” in the state for determining whether lawyer is “practicing law”

  Comm. 15 to Mo. Rule 4-5.5

No. 3: Privilege Between Unadmitted Lawyer and Client

- If a person is authorized to practice law "in any state or nation, the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer," attorney-client privilege applies
- Privilege protects clients, and lawyer otherwise admitted in a jurisdiction does not undermine privilege by "unauthorized" practice

  Hensel v. American Air Network, Inc., 189 S.W.3d 582 (2006)

- "Since corporate counsel will often be required to spend a great deal of time in different localities, the client may be deprived of the security of the attorney-client privilege unless counsel devotes himself almost entirely to studying for bar examinations. . . ."

  *Georgia-Pacific Plywood Co. v. U.S. Plywood Corp.,*18 F.R.D. 465-66 (S.D.N.Y. 1956)

No. 4: Dual Legal and Business Obligations

- Rule 5.7 applies ethical duties under the Rules to lawyer "even when the lawyer does not provide any legal services" to a "person for whom law-related services are performed"
- Applies to services "performed through a law firm or a separate entity

Mo. Rule 4-5.7

- "Predominant purpose test": Legal advice must not be "incidental" to business advice

In re Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014); *RCHFU, LLC v. Marriott Vacations Worldwide Corp*. (D. Colo. 5/23/18); *Bankdirect Capital Finance, LLC v. Capital Premium Finance, Inc.,* 326 F.R.D. 176 (N.D. Ill. 8/3/18)

No. 5: Supervisory Responsibility for Ethical Conduct of Your “Subordinates”

- A lawyer "who individually or together with other lawyers" has managerial authority
  - "comparable" to a law firm partner,
  - “shall make reasonable efforts to ensure”
  - the “firm” has "measures in effect giving reasonable assurance" of compliance
  - by lawyers and non-lawyers who are "employed or retained or associated" with the lawyer

Mo. Rules 4-5.1(a), 4-5.3(a)

Supervisory Responsibility *(cont'd)*

- Even a "non-partner" in-house lawyer has responsibility for ethical conduct of subordinate lawyers or non-lawyers who are under his or her direct supervision
  - Instructions on ethical responsibilities, appropriate for the circumstances
  - Supervisor has responsibility for misconduct of subordinate lawyers and non-lawyers if supervisor has “knowledge” of non-compliant conduct at a time when consequences can be avoided or mitigated, and fails to take “reasonable remedial action”

Mo. Rules 4-5.1(c), 4-5.3(c)

No. 6: Who in Your Organization Is the "Client"?

- In-house lawyer employed by an organization represents the organization, acting through its duly authorized "constituents"

Mo. Rule 4-1.13

- "Constituents" are officers, directors, employees, shareholders and "equivalents"

Comm. 1 to Mo. Rule 4-1.13

No. 7: Joint Representations of the Organization and an Employee

- In-house counsel may provide advice to constituents; but only on company-related issues
- If interests of company and constituent may diverge, lawyer should advise constituent of the conflict or potential conflict of interest; that lawyer cannot represent constituent; and that person may wish to obtain independent representation. *Upjohn Co. v. U.S*, 449 U.S. 383 (1981)
- If constituent agrees to continue to talk to lawyer, lawyer must advise constituent that information may not be privileged as to the constituent

Mo. Rule 4-1.13 & Comms. 2, 7

No. 8: Sexual Relations with a Client

- A lawyer shall not have sexual relations with a client "unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced"

- "When the client is an organization," the Rule prohibits outside or inside counsel from having a sexual relationship with a "constituent of the organization" who "supervises, directs or regularly consults" with that lawyer about the organization's legal affairs

Mo. Rule 4-1.8(j) & Comms. 17-19

- Concerns underlying the Rule: "blurred line" between professional and personal relationships, which may affect independence of legal judgment or impair privilege protection

No. 9: Are Corporate "Affiliates" Your Client? Maybe . . .

" It may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation as well as the corporation by which the members of the [law] department are directly employed."

Mo. Rule 4-1.0(c), Comm. 3

No. 10: Attorney-Client Privilege and Foreign Affiliates

- Under US Federal and state common law, ACP applies broadly to confidential communications between lawyer and client in order to obtain legal assistance

  Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981)

- But some non-US jurisdictions do not recognize any ACP between in-house counsel and client
  - In EU, Legal Professional Privilege requires lawyer to be "independent" from client, advice must be written, applies to client's "rights of defense"

    Akzo Nobel Chemicals v. Commission, C-550/07 P (2010)

No. 11: Extension of Privilege Protection Beyond Your Corporate Employees

- Attorney-Client Privilege vs. Attorney Work Product
- Joint Defense Privilege/Common Interest Doctrine
- Experts and consultants acting under the direction of counsel
- Litigation Funders?

No. 12: When Does Your Outside Counsel Have a Legal "Conflict of Interest?"

- Conflict of interest with current client:
  - "Direct adversity" between clients

    OR
  - "Substantial risk" that representation of one or more clients will be "materially limited" by lawyer's responsibilities to another client, former client or third part

- Conflicts can be cured by informed written consent, unless lawyer would represent claims between clients in "litigation or other proceeding before a tribunal"

Mo. Rule 4-1.7(a)-(b)

No. 13: Former Client Conflicts

- Conflict of interest would be created if new client would be represented by "firm" in "same or substantially related matter" in which new client's interest would be "materially adverse" to the firm's former client's interests

OR

- Lateral lawyer's former law firm represented potential new client in "same or substantially related matter" and lateral acquired client-confidential information that is material to the firm's current matter

Mo. Rule 4-1.9

No. 14: Lateral Lawyers and Imputed Conflicts

- For conflicts arising from Rules 1.7 and 1.9, Rule 1.10 imputes conflicts from lateral lawyer to all lawyers in new law firm
  - But Rule 1.10 permits firm to cure conflict by implementing ethical screening, where lateral lawyer did not "substantially participate in" matter at former firm
  - Lateral must acknowledge firm's conclusion of non-substantial participation (Comment 5)
  - Former client's consent to screening is not required, but new firm must respond to any client objection

Mo. Rule 4-1.10; *Dynamic 3D Geosolutions v. Schlumberger*, 837 F.3d 1280 (Fed. Cir. 2016)

No. 15: Legal “Competence” Includes Competence in Technology

- Mo. Rule 4-1.1 & Comm. 6:

  “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. . . .”

  To maintain requisite knowledge and skill, “a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . ."

No. 16: Lack of Technological Competence Could Adversely Affect Client Confidential Information

- Rule 1.6, "Confidentiality," requires lawyers to "act competently to safeguard information . . . against unauthorized access by third parties and against inadvertent or unauthorized disclosure"

Mo. Rule 4-1.6, Comm. 15

- Attorney's "reasonable efforts" to prevent unauthorized disclosure of confidential information transmitted over thei nternet requires a "case by case" process to systematically assess and address cybersecurity risks

ABA Formal Op. 477R, *Securing Communication of Protected Client Information*

What is Technological “Competence”?

- “Competence” includes sufficient knowledge of technologies relevant to the representation to meaningfully counsel and communicate with the client

- “[L]awyers necessarily need to understand basic features of technology”

  ABA Commission on Ethics 20/20 Report 105 A, quoting ABA Formal Op. 477R

Examples of Lack of Technological Competence

- Inadvertently transmitting metadata
- Failing to encrypt or otherwise protect confidential information
- Not understanding privacy settings on your social media and other apps
- Transferring client data/documents from your work computer to your personal home computer
- Failing to understand technology options for e-discovery
- Not understanding risks of “bcc” to client, or auto-correct feature
- Not recognizing features of a phishing attempt

No. 17: The Perils of Social Media

- Does your company permit BYODs for business purposes? Issue cellphones, laptops to employees?
  - Personal laptops, cellphones, tablets . . . . All pose temptation to comment on work matters outside the workplace
  - Is business done -- or discussed -- through text, IMs, social media, blogs?
  - Relevant social media postings are fair game for discovery

    Zamora v. Stellar Mgmt. Group, 2017 WL 1362688 (W.D. Mo. 4/11/17)

No. 18: Misconduct Not Involving Legal Services

- "Professional misconduct" under Mo. Rule 4-8.4 includes, *inter alia*, "conduct involving dishonesty, fraud, deceit or misrepresentation"
- Conduct outside the representation of clients can lead to suspension or debarment

  In re Stewart, 342 S.W.3d 307 (Mo. 2011)(law license suspended indefinitely after 4th DUI)
- Rule 4-8.3 requires lawyer to report "knowledge" of "material" misconduct by another lawyer

No. 19: “Reporting Up”

- Mo. Rule 4-1.13(b) requires in-house counsel to disclose material violations of law that negatively affect company
- Lawyer may urge constituent to correct misconduct
- Lawyer must:
  - “Report up” to company official[s] who can take steps to remedy violation
  - Depending on seriousness, reporting up may require disclosure to CEO or Board of Directors
- Rule does not apply when company is being investigated for criminal violations
- Statutes and regulations (e.g., SOX § 307) may have specific criteria and procedures

Thank you

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