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CLE SEMINAR 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 . . ."

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

No. 2: “Practicing Law” Under Ethical Rules

- Kansas and Missouri generally require lawyers who “practice law” in their states to be admitted to the Bar.

Ks. Rule 5.5; Mo. Rule 4-5.5

- But Kansas S. Ct. Rule 712 and Mo. Bd. Law Examiners Rule 8.105 provide for a restricted license if lawyer, *inter alia*, is admitted in another state, and works for a single employer or affiliates
- “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”

Ks. Rule 5.5 & Comm. 14; Mo. Rule 4-5.5 & Comm. 15

No. 3: Privilege Between Licensed Lawyer and Client is not Destroyed by Lawyer's "Unauthorized" Practice in a Particular State

- 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 often will 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. United States Plywood Corp.,*18 F.R.D. 463, 466 (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"

- Lawyer must take "reasonable measures to assure" that the person knows the services are not legal services and that "the protections of the client-lawyer relationship do not exist"

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

Ks. Rule 5.7; Mo. Rule 4-5.7; *Neuder v. Battell Pacific Northwest Natl. Laboratory,* 194 F.R.D.289 (D.C. 2000): RCHFU, LLC v. Marriott Vacations Worldwide Corp. (5/23/18 D. Colo)

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

- Rules of Professional Conduct apply to all State Bar members
  - “Law firm” includes “legal department of a corporation or other organization,” or "legal services organization"

Ks. Rule 1.0(d); Mo. Rule 4-1.0(c)

- 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 with the Rules by lawyers and non-lawyers who are "employed or retained or associated" with the lawyer

Ks. Rules 5.1(a), 5.3(a); 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 the 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”

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

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

- Lawyer employed by an organization represents the organization, acting through its duly authorized constituents

Ks. Rule 1.13; Mo. Rule 4-1.13

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

Ks. Rule 1.13 & Comm. 2; Mo. Rule 4-1.13 & Comm. 1

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

- In-house counsel may provide advice to individuals in the execution of their job functions; but only on company-related issues

- If interests of company and employee 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* warning)

- If employee agrees to continue to talk to lawyer, lawyer must advise employee that information may not be privileged as to the employee

Ks. Rule 1.13 & Comm. 8; 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

Ks. Rule 1.8(k) & Comms. 18-19; Mo. Rule 4-1.8(j) & Comms. 17-19

- Concerns are "blurred line" between professional and personal relationships; may affect independence of legal judgment and 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."

Ks. Rule 1.0(d) & Comm. 3; 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 legal advice requested by or offered to a lawyer's client constituent
  - *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)

- Some jurisdictions do not recognize any ACP between in-house counsel and client
  - In EU, lawyer-client privilege requires lawyer to be "independent" from client, and communication must be related to the client's right of defense. *AM&S Europe Ltd. v. Commission of the European Communities,* 1982 E.C.R. 1575, Case No. 155/79
  - Akzo Nobel Chemicals v. Commission, C-550/07 P (2010)(in-house lawyers are not "independent from" their clients, and so attorney-client privilege does not apply)

No. 11: Extension of ACP or Work Product Protection Beyond Your Corporate Employees

- Attorney-Client Privilege vs. Attorney Work Product
- 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 party

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

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

No. 13: Conflicts of Interest with Former Clients

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

OR

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

Ks. Rules 1.9, 5.3(a); 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 new law firm
  - But Rule 1.10 permits firm to cure conflict by implementing ethical screening, as to lateral attorneys who did not "substantially participate in" a matter at former firm/company
  - Lateral must acknowledge firm's conclusion of non-substantial participation (Comment 5)
  - Former client's consent to screening not required, but "firm" must respond to any objections

Ks. Rule 1.10; Mo. Rule 4-1.10; *Dynamic 3D Geosolutions v. Schlumberger*, 2015 US Dist. LEXIS 67353 (W.D. Tx. 3/31/15)

No. 15: “Competence” Includes Competence in Technology

- Ks. Rule 1.1 & Comm. 8; 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"

Ks. Rule 1.6 & Comm. 26; Mo. Rule 4-1.6 & Comm. 15

- Attorney's "reasonable efforts" to prevent unauthorized disclosure of confidential information transmitted over the internet 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

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 necessary for e-discovery

No. 17: The Perils of Social Media

- Does your company permit BYODs for business purposes? Personal laptops, cellphones, tablets, blackberries . . . All pose a 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

Rhone v. Schneider Nat'l Carriers, Inc., No. 4:15-cv-01096-NCC, 2016 WL 1594453 (E.D. Mo. 4/21/16)

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

No. 18: Misconduct Not Involving Legal Services

- "Professional misconduct" under Rule 8.4 includes, *inter alia*, "conduct involving dishonesty, fraud, deceit or misrepresentation"

- Kansas Disciplinary Rule 203(c) (1) requires that lawyer charged with a felony or other crime for which offender registration is required under law must inform the Disciplinary Administration in writing within 14 days

- In both Kansas and Missouri conduct outside the representation of clients can lead to suspension or debarment
  - *In re Frahm*, 291 Kan. 520 (2010) (attorney suspended 3 years for leaving scene of accident while intoxicated)
  - *In re Stewart,* 342 S.W.3d 307 (Mo. 2011) (license suspended indefinitely after 4th DUI)

No. 19: “Reporting Up”

- Rule 1.13(b) requires in-house counsel to disclose violations of law that negatively affect the company

- Lawyer must:
  - Determine whether violation of law by employee in fact hurt company’s interests
  - If so, “report up” to company official[s] who can take steps to remedy violation; look to organization’s policies
  - 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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