CLE Seminar for In-House Counsel
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Ethics Issues for In-House Counsel in 2020

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Agenda

- "Practicing Law" in the Era of Remote Working
- Privilege Parameters in Your Organization
- New Attorney Hires and Conflicts Risks
- Challenges to Ethical Duties of Competence and Confidentiality During the Pandemic
- Reporting Misconduct

“Practicing Law” in the Era of Remote Working

The Parameters of “Practicing Law” as an In-House Counsel

- The Rules of Professional Conduct apply to all State Bar members, whether active or inactive.
- A “law firm” is defined as the legal department of a corporation or other organization, or a legal services organization.
- The Rules apply whether you are acting in a legal capacity or in a business capacity.

ABA Model Rules (“Rule”), Rule 1.0(c)

Registered In-House Counsel

- Under ABA Model Rules, a lawyer may not "practice law" unless admitted to the Bar of the state in which the lawyer has established a "systematic and continuous presence," for the practice of law (Rule 5.5, Comm. 4).
- But "practice of law" is established by state laws which vary among jurisdictions.
- Most states have a rule of court permitting in-house counsel to practice law in a state in which they are not admitted under a restricted license.

E.g., California Rule of Court 9.46; Ill. Supreme Court Rule 716

Privilege Between Unadmitted Lawyer and Client

- Attorney-client privilege applies if the lawyer 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."
- Privilege protects clients and lawyers otherwise admitted in a jurisdiction and does not undermine privilege by "unauthorized" practice.
- "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. 463, 465-66 (S.D.N.Y. 1956); see *Powell v. W. Illinois Elec. Co-op.,* 180 Ill. App. 3d 581, 589, 536 N.E.2d 231, 236 (1989)

Ethical Supervisory Responsibilities for Your Law Department

- 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

Rules 5.1(a), 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."

Supervising Remotely: Equipment

- Does subordinate have sufficient, and sufficiently secure, equipment?
  - Reliable and secure internet connection
  - Wi-Fi with enabled encryption
  - Company-owned or approved personal computer with appropriate security software
  - Access to IT and cybersecurity support
  - Enabled screen lock
  - Printer connection
  - Private working space or headphones, blocked sightlines to computer
  - “Clean desk” with lockable place for hard-copy documents/shredder

Supervising Remotely: Complex Passwords, Made Simple

- “Through 20 years of effort, we’ve trained everyone to successfully use passwords that are hard for humans to remember, but easy for computers to guess.” (Quote from xkcd.)
  - xkcd cartoon: https://xkcd.com/936/
    - TrØub4dor%3: @1000 guesses/second, 3 days.
    - Correct horse battery staple -- correcthorsebatterystaple: @1000 guesses/second, 550 years.
  - 8 characters --- dictionary word and number: “Donuts11”: 2 days.
  - 12 characters --- word, number, special character: JellyDonut#1: 30,000 years.

Supervising Remotely: Other Issues

- Training on remote working, and regular reminders.
- Periodic training on phishing attempts.
- Productivity issues: results vs. activity.
- Social Media:
  - *In the Matter of Frank Arthur Smith*, 35 Mass. Att'y Disc., 2019-16 (11/5/19)
- Regular "meetings" with subordinate/non-lawyer.
- Where is subordinate lawyer "practicing law?"

Privilege Parameters in Your Organization

Attorney-Client Privilege

- General test:
  - A communication,
  - made in confidence,
  - between attorney and "client",
  - for the purpose of seeking, obtaining or providing legal assistance to the client.

Attorney Work Product Doctrine

- Two categories of AWP, with different levels of protection:

(1) Documents (and other tangible things) prepared in anticipation of litigation: discoverable upon adverse party's showing of substantial need and inability to obtain equivalent without undue hardship.

- Document prepared or obtained "because of" anticipated or actual litigation.
- Anticipated litigation was "primary motivating factor" in preparation of document.
- Document created only "for use in" litigation.

(2) Writing that reflects attorney's impressions, conclusions, opinions, legal research or theories: not discoverable.

Privilege, Extended

- ACP extends to third parties like experts and consultants, if:
  - Third party is acting under the direction of counsel;
  - Third party is performing an "interpretive function" by rendering expert advice to assist attorney in delivering legal advice to client;
  - Dominant purpose is facilitation of legal advice, not business advice.

United States v. Kovel, 296 F.2d 918 (1961)

The Joint Defense and Common Interest Doctrines

- "Joint defense" and "common interest" doctrines are "rules of non-waiver"
  - Privileged communications made to further goals of joint defense or common interest;
  - Parties' interest is truly aligned;
  - Interest is legal, not commercial; and
  - Privilege is not otherwise waived;
- Best practice is to document the parties' common interest[s], scope, duration, potential conflicts of interest, and circumstances for termination.

Privilege and Litigation Funders

- Not much case law on discovery from litigation funders.
- Information protected by the attorney work product doctrine generally extends to cover a party's communications with litigation funders, prior to execution of funding agreement.
- The attorney-client privilege and the common interest doctrine likely do not extend to litigation funders.

Miller UK Ltd. v. Caterpillar, Inc., 17 F.Supp.3d 711 (N.D. Ill. 2014); *see also Wells Fargo Bank v. Superior Court*, 22 Cal. 4th 201 (2000)

Who in Your Organization Is the "Client"?

- In-house lawyer employed by an organization represents the organization, acting through its duly authorized "constituents"
  - "Constituents" include "the equivalents" of officers, directors, employees, and shareholders.

Rule 1.13 & Comms. 1-2

Legal Advice, Business Advice, and What Falls In Between

- In-house counsel often are called upon to participate in meetings involving significant business decisions -- those may or may not be privileged communications, depending on several factors.

- "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*., No. 16-CV-1301-PAB-GPG, 2018 WL 3055774, at *3 (D. Colo. May 23, 2018); *Bankdirect Capital Finance, LLC v. Capital Premium Finance, Inc.,* 326 F.R.D. 176 (N.D. Ill. 8/3/18)

Joint Representations of the Organization and an Employee

- In-house counsel may provide advice to constituents; but only on company-related issues.

- For joint representations of company and employee:
  - If interests of a company and constituent could possibly 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.

Corporate "Affiliates"

- Normally in-house counsel may ethically provide services to a wholly-owned subsidiary; but watch out for Rule 1.7 conflicts, e.g.,
  - Inter-company transactions
  - Insolvency
  - Subsidiary only partially owned by your company
- Choice of law for affiliates' privilege protection varies, depending on state in which litigation is pending, or state with the most significant relationship to the communication.

In re Teleglobe Comm. Corp., 493 F.3d 345 (3d Cir. 2007); *Trzaska v. L'Oreal USA, Inc.*, No. 2:15cv-02713 (D.N.J. Jan. 6, 2020)

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)

New Attorney Hires and Conflicts Risks

Conflict of Interest: Current Clients

- Conflict of interest with current client occurs when:
  - "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, third person or lawyer's personal interest.
- Conflicts can be cured by informed written consent, unless lawyer would represent claims between clients in "litigation or other proceeding before a tribunal."

Rule1.7(a)-(b)

Rule 1.9, Former Client Conflicts

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

- Matter is "substantially related" if it involves the same transaction or dispute; or if there is a substantial risk that confidential information which normally would have been provided in the prior representation would materially advance new client's position.

Imputed Conflicts

- Rule 1.10 prohibits lawyers in a "law firm" from representing a client when any of the lawyers practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless
  - Prohibition is based on a lawyer's personal interest and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or
  - Prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and
    - Disqualified lawyer is timely screened
    - Former client's consent to screening is not required, but written notice must be provided and new firm must respond to any client objection.

Challenges to Ethical Duties of Competence and Confidentiality During the Pandemic

Increased Attacks on Information Security Have Increased Our Ethical Obligations

"Compliance requires attorneys to understand limitations in their knowledge and obtain sufficient information to protect client information, to get qualified assistance if necessary, or both. These obligations are minimum standards—failure to comply with them may constitute unethical or unlawful conduct. Attorneys should aim for security that goes beyond these minimums as a matter of sound professional practice and client service."

ABA TechReport, Cybersecurity (Jan, 28, 2019)

Competence in Technology

- Rule 1.1:

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

- Comment 8 to Rule 1.1:

  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 . . . ."

- See also California Formal Ethics Op. 2015-193

Technological Competence and Confidentiality

- Rule 1.6, "Confidential Information of a Client," recognizes the "fundamental principle" that a lawyer "must not" reveal information and/or confidential information.
- A lawyer'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, 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.

Social Media Risks

- 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?
- Social media postings and device content are fair game for discovery, subject to relevancy and other traditional discovery restrictions.

  In re Cook Medical, Inc., 2017 U.S. Dist. LEXIS 149915 (S.D. Ind. 9/15/17); *Zamora v. Stellar Mgmt. Group,* 2017 WL 1362688 (W.D. Mo. 4/11/17); *Ye v. Cliff Viessman Inc.,* 2016 U.S. Dist. LEXIS 28882 (N.D. Ill.3/7/16);

Reporting Misconduct

Reporting Lawyer "Misconduct" Under Rule 8.4

- "Professional misconduct" by a lawyer under Rule 8.4 includes, *inter alia*, "conduct involving dishonesty, fraud, deceit or misrepresentation."
  - Misconduct not involving the representation of clients can lead to suspension or debarment.
  - Different threshold for r*eporting* lawyer misconduct: Rule 8.3 requires a lawyer to report "knowledge" of "material" misconduct by another lawyer.

Reporting Material Violations of Law Under Rule 1.13

- Decision of organization's authorized constituent ordinarily must be accepted by the lawyer even if decision's utility or prudence is doubtful.
- If decision is clear violation of legal obligation or law, and lawyer reasonably believes decision is reasonably certain to result in substantial injury to organization, Rule 1.13(b)-(c) requires "reporting up" to higher levels of organization.
- Depending on seriousness, reporting up may require disclosure to CEO or Board of Directors.
  - Rule does not apply when lawyer is investigating defending allegation against organization.

“Reporting Up” Under SOX

- Under Sarbanes-Oxley Act Section 307, attorney who “appears” or “practices” before SEC and who becomes aware of “material violation” by issuer, or director, officer, employee or agent of issuer, must report up to CEO or chief legal officer of organization
- If response is inadequate, attorney must report to Audit Committee or Board

Thank you

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