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Ethics Issues for In-House Counsel in 2021

September 2021

CLE SEMINAR FOR IN-HOUSE COUNSEL
2021

Agenda

- Who is In-House Counsel's "Client"?
- Where Do (and Can) In-House Lawyers "Practice Law"?
- Confidentiality Issues for In-House Counsel
- In-House Counsel's Ethical Obligation to Supervise "Subordinates"
- In-House Counsel's Duty of Technological Competence

Who is In-House Counsel's Client?

Rule 1.0(c)—Application of Rules to In-House Counsel

- The Rules of Professional Responsibility/Conduct apply to In-House Counsel
- Model Rule 1.0(c): "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; **or lawyers employed in a legal services organization or the legal department of a corporation or other organization**.

Rule 2.1—In-House Counsel as "Advisor" to Client

- Model Rule 2.1 provides:

"In representing a **client**, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

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

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

Rule 1.6 Confidentiality and Attorney-Client Privilege

- Not all client communications protected by Rule 1.6 (confidentiality) are also protected by the attorney-client (evidentiary) privilege. Rule 1.6 obligations are **broader**.
- Model Rule 1.6(a): "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b) [providing various exceptions]."
- *See* In re *Anonymous*, 932 N.E.2d 671 (Ind. 2010) (attorney disciplined for violating Rule 1.6 by discussing client's dissolution allegations with friend of the client).

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-client privilege 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)

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)

Dual Representation of the Organization and Officers, Directors, or Employees

- Model Rule 1.7(a)(2): Lawyer may not represent two clients concurrently where there is "significant risk" that representation of one could "materially limit" responsibilities to the other.
  - If interests of a company and constituent could 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 potential 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)

Where Do (and Can) In-House Lawyers "Practice Law"

"Practicing Law" as In-House Counsel

- The Rules of Professional Conduct apply to all State Bar members, whether active or inactive. Rule 1.0(c).
- Definition of "law firm" in the Rules includes 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.

Where Can In-House Lawyers "Practice Law?"

- 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).
- The "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 under a restricted license, if counsel lives in but is are not admitted in the state.

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

"But Texas is so Beautiful This Time of Year . . . ."

You are the GC of Trinket Co., which is headquartered in Denver and has a large factory in Phoenix. You receive a call next week from Jane, the Associate GC for Labor & Employment. To your surprise, she tells you that she moved from Denver to Houston in March 2020 and has no plans to return. Jane is admitted to the Colorado Bar only.

Should you be concerned?

Where Can You "Practice Law?" (cont'd)

- ABA Formal Opinion 495 (12/16/20) on Model Rule 5.5:

  "Lawyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the . . . unauthorized practice of law and if they . . . do not provide or offer to provide legal services in the local jurisdiction."

- Opinion is non-binding guidance; not all State Bars are on board . . . .

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, not lawyers.
- "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)

Confidentiality Issues for In-House Counsel

The Duty of Confidentiality

- A lawyer's duty of confidentiality is broader in scope than attorney-client privilege:
  - A lawyer shall not reveal confidential information relating to the representation of the client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by an exception. Rule 1.6(a)
- Rule applies not only to matters relayed by client in confidence, but to all information, regardless of source, relating to the representation. Rule 1.6 Comm. 3.
- Lawyers may not disclose information that could reasonably lead to the discovery of client -confidential information by a third party. Rule 1.6 Comm. 4.

ABA Formal Opinion 498—Virtual Practice

- ABA Formal Opinion 498 (3/10/21) addresses a lawyer's duty of confidentiality, describing the lawyer's obligation to "make reasonable efforts to prevent inadvertent or unauthorized disclosures of information relating to the representation and take reasonable precautions when transmitting such information."

Confidentiality Exceptions Under the Rules

- Exceptions to the rule of client confidentiality are very limited, e.g.,
  - Lawyer may disclose confidential communications to prevent client from committing a crime or fraud,
    - Where client uses lawyer's services in furtherance of the crime/fraud and
    - Client's crime/fraud "reasonably certain to result in substantial injury" to third party's financial interest. Rule 1.6(b)(2)
  - Crime-fraud exception applies only prospectively:

    "It is the purpose of the crime-fraud exception . . . to assure that the 'seal of secrecy' between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime." *U.S. v. Zolin*, 491 U.S. 554, 562-63 (1989).

Confidentiality Exception to Prevent "Substantial Injury to the Organization"

- Rule 1.13(b) permits disclosure of client-confidential information if lawyer "knows" that a constituent intends/refuses to act in violation of law or obligation to organization, if
  - Act reasonably might be imputed to the organization, and
  - Act is likely to result in substantial injury to the organization.

"Substantial Injury" Exception Under Rule 1.13(b)(2) *(cont'd)*

- Rule 1.13(b) and Comments provide a number of factors lawyer must consider in determining whether and how to proceed, e.g.,
  - Seriousness of the violation and its consequences
  - Decisions concerning policy and operations, even risky ones, are "not as such in the lawyer's province." Rule 1.13 Comm. 3.
  - How to minimize disruption of the organization.
- Rule requires escalation within the organization
- Under Rule 13(c), if action, or a refusal to act, is clearly a violation of law and is likely to result in substantial injury to the organization, "the lawyer may resign," albeit consistency with ethical requirements of Rule 1.16.

In-House Counsel's Potential Obligations Under SOX § 307

- Sarbanes-Oxley Act creates affirmative duty for attorneys "practicing before" the SEC to "report up" evidence of client's material violation of a securities law, breach of fiduciary duty, or a similar violation
  - "Up the ladder" reporting is required:
    - Report reasonable belief of violation to the CLO or CEO
    - If no response, report to BOD audit committee, other BOD independent committee directors not employed by company, or entire Board.

In-House Counsel's Ethical Obligations to Supervise "Subordinates" in Organization's Legal Department

Ethical Supervisory Responsibilities

- 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 Responsibilities *(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."

Remote Supervision

- ABA Formal Opinion 498 (3/10/21) also addresses a lawyer's "duty of supervision" in the context of virtual practice:
  - "[T]he duty of supervision requires that lawyers make reasonable efforts to ensure compliance by subordinate lawyers and nonlawyer assistants with the Rules of Professional Conduct, specifically regarding virtual practice policies."

Challenges in Supervising Remotely: Equipment

- Does subordinate have sufficient, and sufficiently secure, equipment?
  - Reliable and secure internet connection
  - Wi-Fi with enabled encryption
  - Complex and secure password
  - 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: Other Issues

- Training on remote working, and regular reminders
- Periodic training on phishing attempts
- Productivity issues: results vs. activity
- Regular "meetings" with subordinate/non-lawyer
- "Zoom fatigue"

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In-House Counsel's Duty of Technological Competence

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

What Constitutes "Technological Competence"?

"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. . . ."

ABA TechReport, Cybersecurity (Jan, 28, 2019)

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.

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*

In-House Counsel's Cyber-Security/Data Privacy Obligations

- ABA Formal Opinion 483 (10/17/18) discusses lawyer's obligation to report data breaches, citing Rule 1.4 duty to keep clients "reasonably informed" and explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation."
- Op. 483 "picks up where Opinion 477R left off." When a data breach occurs and has substantial likelihood of involving material client information, lawyers have a duty to notify clients of the breach and to take other reasonable steps consistent with their obligations the Rules.