Ethics Issues for In-House Counsel in 2020

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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 to include the legal department of a corporation, government, legal services organization, or other organization
- The Rules apply whether you are acting in a legal capacity or business capacity

California Rules of Professional Conduct, Rule 1.0.1 (c)

Registered In-House Counsel

- California generally requires lawyers who "practice law" to be admitted to the Bar
  Rule 5.5(b)
- "Practicing law" includes a "systematic and continuous presence" in the state
- But California Rules of Court, Rule 9.46, provides for a restricted license if a lawyer, *inter alia*, is admitted in another state, and works for a single "qualifying institution"

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
- "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)

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*., 2018 WL 3055774 (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)

Who in Your Organization Is the "Client"?

- An in-house lawyer employed by an organization represents the organization, acting through its duly authorized "constituents"
- "Constituents" include "the equivalents" of officers, directors, employees, shareholders
- A lawyer ordinarily must accept the decision of an organization's constituents, even if the lawyer questions the utility or prudence of the decision, and even if the decision puts the organization at serious risk
- BUT, the lawyer has a duty to inform the client of significant developments related to the representation, that the lawyer believes are in the best interest of the organization

Rule 1.13 and Comment 1; Bus. & Prof. Code § 6068

Joint Representations of the Organization and an Employee

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

Rule1.13 & Comms. 2, 7

Privilege and Work Product Parameters

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

Corporate "Affiliates"

- Normally in-house counsel ethically may provide services to a wholly-owned subsidiary; but watch out for Rule 1.7 conflicts, e.g.,
  - Inter-company transactions
  - Insolvency
  - Subsidiary is only partially owned by your company
- Privilege is protected if an in-house lawyer provides legal advice to a subsidiary, even if the subsidiary is located in another state and the lawyer's advice would be an unauthorized practice of law in that state

  E.g., *Le Bleu Corp. v. Fed. Mfg. LLC*, 2018 US Dist. LEXIS 56291 (E.D. Wis. 4/2/18)

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)

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"

Rules 5.1(c), 5.3(c)

Rule 1.7 “Conflict of Interests”

- 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”

  Rule1.7(a)-(b)

Rule 1.9, 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

- Matters are “substantially related” if they involve the same transaction or dispute; or if there is a substantial risk that confidential information that normally would have been provided in the prior representation would materially advance the new client’s position

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
  - Former client's consent to screening is not required, but written notice must be provided and new firm must respond to any client objection

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. . . ."

- ABA Model Rule 1.1, Comment 8:

  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 Op. 2015-193, on e-discovery competence: lawyer must (1) have or acquire technological competence; (2) associate someone who is competent; or (3) decline the representation

Technological Competence and Confidentiality

- Rule 1.6, "Confidential Information of a Client," recognizes the "fundamental principle" that a lawyer "must not" reveal information protected by Bus. & Prof. Code 6068

  Rule 1.6, Comm. 1

- 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 (2017), *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?
- Relevant social media postings are fair game for discovery

Whistleblowers and "Reporting Up"

- Rule 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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