Top Twelve Ethics Risks for In-house Lawyers

Presented on October 12, 2010

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The Top Twelve Ethics Risks for In-house Lawyers

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1. Recent Changes to New York and California Ethics Rules

- ABA Model Rules adopted in 1983, revised several times.
  - NY and CA among the last states holding out against uniformity.
  - ME adopted changes in 2009.
- NY adopted its version of Model Rules in April 2009.
- CA Bar Commission considering revisions since 2001.
- In July 2010, CA State Bar Board of Governors approved adoption of 60 of 68 proposed Model Rules.
  - One proposal (Rule 8.3 on reporting misconduct) was rejected.
  - Also, Bar still seeking additional comment on 7 proposed rules.

1. Recent Changes to New York and California Ethics Rules (Continued)

- But, even when the CA changes are adopted, CA and NY may differ in small or even significant ways.
  - Examples include, client fraud, communicating with adverse party, and UPL.
  - But many similarities, and increasing uniformity.
- Other rules show subtle differences.
  - CA proposes to forbid all "sexual relations" with a client unless they pre-existed the representation.
  - NY states that lawyers cannot "as a condition of entering into or continuing any professional representation by the lawyer or the lawyer's firm, require or demand sexual relations with any person" or"employ coercion, intimidation or undue influence in entering into sexual relations incident to any professional representation by the lawyer or the lawyer's firm."
  - Note NY Rule 1.18(d)(2) screening prospective clients; CA Bar still opposes this reform.
- In both states, note the use of the term "firm" – which in NY is defined to include "the legal department of a corporation or other organization" while CA has not yet proposed the specific definition of "firm" (but existing CA law is consistent with NY's definition).

2. Business Duties and Legal Duties/Compliance Obligations and Legal Obligations

- In-house lawyers may have both business and legal duties.
  - Responding to in-house lawyer request for guidance, Philadelphia Bar Association Advisory Op. 2008-8 discussed implications of ABA Model Rule 5.7.
    - Opinion states it was "prudent" for lawyer to discuss applicability of rules, and inapplicability of privilege.
  - NY RPC 5.7(a)(4) will presume that any "person who receives nonlegal services [from a lawyer] believes the services to be the subject of a client-lawyer relationship. . ."

2. Business Duties and Legal Duties/Compliance Obligations and Legal Obligations (Continued)

- . . . Unless the lawyer or firm advises "in writing" that these "are not legal services" and that "the protection of a client-lawyer relationship does not exist with respect to the nonlegal services."
  - No comparable proposed CA rule at this time.
- Problems with applying this analysis in in-house lawyers.
- Magnified by corporate compliance duties and obligations, which often fall on the in-house lawyer.
- FCPA encourages disclosure, not confidentiality.
  - Also, consider added implications of Section 922 of Dodd-Frank Act.

2. Business Duties and Legal Duties/Compliance Obligations and Legal Obligations (Continued)

- Courts applying privilege claims will consider similar factors.
- Here are some recent examples, all from 2007:
  - *Santa Fe* case (175 P.3d 309).
  - *Baruch College* case (2007 U.S. Dist. LEXIS 92921).
  - *Wal-Mart* case (2007 U.S. Dist. LEXIS 95696).

3. Recent Multijurisdictional Practice Developments

- Background: the Birbrower Imbroglio.
  - California Supreme Court decision triggers nationwide reforms.
- ABA Model Rule 5.5 was the result of this process.
- Adopted with few variations in virtually all US jurisdictions.
  - For in-house lawyers, the key language is the Model Rule 5.5(d)(1) safe harbor, exempting from UPL any "legal services" that "are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission."
  - Some states have adopted 5.5(d)(1) or similar language: AK, AZ, AR, DC, GA, MD, MA, NE, NH, NM, NC, OK, SD, TN, VT, WA, WI, and WY.
  - Others offer or require registration for in-house lawyers regularly employed within their jurisdictions: CT, DE, ID, IN, IA, LA, MO, NV, NJ, ND, OH, OR, PA, RI, SC, and UT.

3. Recent Multijurisdictional Practice Developments (Continued)

- Some states have not adopted Rule 5.5(d)(1) or equivalent language and have adopted special in-house licensing procedures.
  - These states include: CA, CO, FL IL, KS, KT, MI, MN, TX, and VA.
- Some states, however, have not adopted Rule 5.5(d)(1) or its equivalent and have not adopted any special in-house licensing procedures.
  - These currently include HI, MS, MT, NY, and WV.
  - New York risks for unlicensed in-house practitioners include NY Jud. Law §478.

3. Recent Multijurisdictional Practice Developments (Continued)

- But, despite these UPL concerns, the risks of privilege waiver are low. Judge Irving Kaufman stated what has now become the general rule in *Georgia-Pacific Plywood Co. v. United States Plywood Corp.*, 18 F.R.D. 463, 466 (S.D.N.Y. 1956): "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,' that person is a lawyer within the privilege."
  - The court added: "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."

4. International Practice Risks, Including Outsourcing

- Increasingly, lawyers for multinational corporations must confront international legal issues.
  - Even domestic companies are considering the risks and benefits of outsourcing (or more precisely, offshoring) various types of legal tasks.
- One risk is loss of privilege: ECJ's *Akzo* decision (Sept. 14, 2010).
  - EU investigation, dispute over two emails, and court reaffirms that privilege belongs only to "independent" counsel – i.e., "lawyers who are not bound to the client by a relationship of employment."
- Outsourcing or offshoring was addressed recently in ABA Formal Opinion 08-451 (Aug. 5, 2008).
  - ABA generally blessed such efforts, assuming that the lawyer engaging the overseas firm remains ultimately responsible for rendering competent legal services under Model Rule 1.1, including supervisory duties under Rules 5.1 and 5.3. Similar result by Association of the Bar of the City of NY Op. 2006-03.
  - ABA Commission on Ethics 20/20 is currently analyzing outsourcing ethics issues.

4. International Practice Risks, Including Outsourcing (Continued)

- Another, and related, issue is the increasing recognition that corporate law departments can and should hire foreign lawyers.
  - For example, Wash. APR 8(f) states:

> (f) Exception for Foreign House Counsel. A lawyer admitted to the practice of law in a jurisdiction other than a United States jurisdiction may apply to the Board of Governors for a limited license to practice law as in-house counsel in this state when the lawyer is employed in Washington as a lawyer exclusively for a profit or not for profit corporation, including its subsidiaries and affiliates, association, or other business entity, that is not a government entity, and whose lawful business consists of activities other than the practice of law or the provision of legal services. The lawyer shall apply by (i) filing an application in the form and manner that may be prescribed by the Board of Governors, (ii) presenting satisfactory roof of (I) admission by examination to the practice of law and current good standing in a jurisdiction other than United States jurisdiction and (II) good moral character, (iii) filing an affidavit from an officer, director, or general counsel of the applicant's employer in this state attesting to the fact the applicant is employed as a lawyer for the employer, including its subsidiaries and affiliates, and the nature of the employment conforms to the requirements of this rule, (iv) paying the application fees required of foreign lawyer applicants for admission under APR 3, and (v) furnishing whatever additional information or proof that may be required in the course of investigating the applicant.

5. Constituent Conflicts, and Who Is The Client

- Who is the client, and how does the lawyer advise an entity where employees may have differing views and interests?
  - This issue also arises where the corporation comprises multi-entities.
  - It generally arises when “constituents” (to use the terminology of NY Rule 1.13) include other employees.
- NY Rule 1.13 provides significant guidance for the in-house lawyer.
- Also, a 9th Circuit case from July 2010, *United States v. Graf*, offers additional helpful assistance.
  - The court adopted the 3rd Circuit’s five-part Bevill test to analyze a personal privilege claim by a corporate employee for communications with the company’s inside counsel.
  - The company had waived its privilege claim; the court allowed the statements to be admitted.

5. Constituent Conflicts, and Who Is The Client (Continued)

- and, if there is to be a dual representation, follow the consent procedures of NY Rule 1.7(b).
- Also, in the meantime, consider the requirements of NY Rule 4.3, which governs communications with an unrepresented person.

6. Electronic Dangers, Including E-discovery and Security Issues

- New York has been a pioneer in addressing ethics risks from modern electronic technology.
  - The policy of preserving confidentiality and protecting the attorney-client relationship precludes a lawyer from using "technology to surreptitiously obtain information" (NY State Bar Association Committee on Professional Ethics, Opinion 749 – 12/14/01), and situations where counsel inadvertently transmits confidential information via hidden data to adverse counsel can be guided by cases addressing inadvertent disclosure.
  - NY State Bar Opinion 782 (Dec. 2004) restates this opinion as "an obligation not to exploit an inadvertent or unauthorized transmission of client confidences or secrets." It concludes that, when sending documents by email, a lawyer "must exercise reasonable care to ensure that he or she does not inadvertently disclose his or her client's confidential information."
- But, if you are handling a secret billion-dollar deal for your client Eli Lilly, do you want to send the final draft to your co-counsel Bradford Berenson or to New York Times reporter Alex Berenson. If you are not careful, Microsoft's Outlook will make the decision for you.
- Other issues: e-discovery
  - *Harkabi v. Sandisk Corp.* (S.D.N.Y. Aug. 2010): in-house counsel sends "do-not-destroy" letter but despite producing 1.4 million electronic documents in discovery, allows two laptops to be re-used; Judge Pauley orders that jury can draw negative inference and imposes fees and expenses.

6. Electronic Dangers, Including E-discovery and Security Issues (Continued)

- Another electronic ethics issue is social media.
  - Philadelphia Bar Association Professional Guidance Committee Opinion 2009-02 concerns pretexting by lawyers to access an individual's social networking website, such as whether a lawyer may ask a third party to "friend" one of the parties involved in the case in order to access their information. The Opinion concludes that such conduct would violate Rule 8.4, because the planned communication is deceptive. "It omits a highly material fact, namely, that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for sure in a lawsuit to impeach the testimony of the witness."
  - ABA Commission on Ethics 20/20 has recently published an "issues paper" concerning ethics risks arising from social media use by lawyers.

6. Electronic Dangers, Including E-discovery and Security Issues (Continued)

- Finally, cloud computing is rapidly becoming a major issue.
  - And the ABA Commission on Ethics 20/20 has recently published an “issues paper” concerning the security and other risks arising from lawyers’ use of cloud computing. The Commission has recognized that the confidentiality and other riskissues presented are similar to those presented by outsourcing.

7. Protecting Consulting Experts Through Privilege

- In-house lawyers frequently rely upon experts to assist them in providing advice to their corporate clients.
  - Historically, it has been questionable whether contributions from these additional experts are protected by privilege.
- Two recent cases suggest that courts are now recognizing that such expertise is a component of an in-house lawyer's advice and therefore privileged.
  - *Commissioner of Revenue v. Comcast Corp.*, 901 N.E.2d 1185 (Mass. 2009).
  - *United States v. Graf, 610 F.3d 1148 (9th Cir. 2010).*

7. Protecting Consulting Experts Through Privilege (Continued)

- Finally, note the changes to the Federal Rules of Civil Procedure regarding expert discovery, which is effective Dec. 1, 2010.
  - Changes to Rule 26(a)(2)(B) will ensure that expert work-product (including drafts of expert reports, as well as some communications from attorneys to experts) will become shielded from discovery.
  - Effective December 1, 2010, only the "facts or data considered by the witness" in forming the expert opinions must be disclosed, replacing the current requirement that an expert disclose all "data or other information" relied on when developing expert opinions, preparing reports, or preparing for testimony.
  - Finally, communications between an attorney and testifying expert that will remain open to discovery will be limited to: (1) compensation for the expert's study or testimony; (2) facts or data provided by the lawyer that the expert considered in forming opinions; and (3) assumptions provided to the expert that the expert relied upon in forming an opinion.

8. Rule 502's Risks and Benefits

- Fed. R. Evid. 502 became effective in Sept. 2008.
  - Some states are adopting comparable rules (e.g., Wash. ER 502).
- Addresses inadvertent disclosure, and prevents broad subject matter waiver.
  - "A disclosure of a communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver in a state or federal proceeding if the disclosure is inadvertent and is made in connection with federal litigation or federal administrative proceedings — and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error . . ."
- Also allows selective waiver to government authorities.
  - "In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection — when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority — does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law. . . ."

8. Rule 502's Risks and Benefits (Continued)

- Excellent tool for minimizing expenses in electronic discovery.
  - Include claw-back provisions in discovery and protective orders.
  - Rule 502(d) means federal court order extends to “all” state actions.
- Also provides assistance to corporate compliance efforts, and negotiations with DOJ and other federal authorities.
- Available in federally-mandated arbitration proceedings.
- Downside? In-house lawyers will become more frequent witnesses.

9. Loss of Privilege Through In-House Inattention

- Effect of unlicensed in-house attorney on privilege protections.
  - Helpful case law for clients and outside counsel, allows reasonable reliance of client to control privilege issues.
- *Gucci America, Inc. v. Guess?, Inc. et al.,* 09 Civ. 4373, 2010 WL 2720079 (S.D.N.Y. June 29, 2010), a June 29, 2010 decision by S.D.N.Y. Magistrate Judge James L. Cott, adopted a different standard for in-house lawyers.
  - Gucci in-house lawyer Jonathan Moss was an "inactive" member of the CA Bar, license expired in 1996.
  - Court holds that corporations must exercise hiring due diligence to protect privilege claims.
    - Despite repeated promotions, the court found "the record devoid of evidence that, during Moss's eight years of employment with the company, Gucci had made any effort to ascertain his qualifications as an attorney."

9. Loss of Privilege Through In-House Inattention (Continued)

- Two other loss of privilege risks.
  - First, do not assume US privilege law is uniform. *Sterling Finance Management, L.P. v. UBS PaineWebber, Inc.,* 782 N.E.2d 895 (Ill. App. 2002) (communication between client located in New York and lawyer located in New York, which would have been privileged under New York law, held not to be privileged under Illinois' "modified control group" test).
  - Second, amateurs using modern technology can undermine their clients' privilege protections (*Jasmine Networks, Inc. v. Marvell Semiconductor, Inc.,* 117 Cal.App.4th 794, 12 Cal.Rptr.3d 123, (Cal.App. 6 Dist., Apr 08, 2004)

10. The Ethics of In-House Investigations

- Internal corporate investigations are becoming a significant lawyer risk.
  - Ethics and conflicts, criminal liability risks for corporate officers.
  - Federal-state interplay
- Investigations from stock options backdating scandals.
- Broadcom's investigation, utilizing Irell & Manella law firm.
- Two court decisions, and eventually a final dismissal.
  - *United States v. Nicholas*, *C.D. United States v. Nicholas, 606 F. Supp. 2d 1109 (C.D. Cal. 2009),* Judge Carney suppresses disclosure of CFO's statements to Irell because of its "ethical misconduct" in joint representation.
  - *United States v. Ruehle*, *United States v. Ruehle, 583 F. 3d 600 (9th Cir. 2009),* overturns Judge Carney's decision, noting that federal privilege law is different than state's rules and CFO had no expectation of confidentiality.
  - Government also went after Broadcom GC David Dull (charges dismissed in Dec. 2009 because of prosecutorial misconduct).

10. The Ethics of In-House Investigations (Continued)

- Another recent example of investigations gone awry: *Allen v. International Truck And Engine*, 02-cv-902, 2006 U.S. Dist. LEXIS 63720 (S.D. Ind. Sept. 6, 2006), GC hires outside law firm (Littler) and private investigator to investigate racial discrimination at company.
  - Investigators thereafter run amok, using false identities to meet and interview named plaintiffs and secretly tape their conversations.
  - Plaintiffs learn of investigation, unsuccessfully seek discovery, then file sanctions motion.
  - Littler submits affidavits denying involvement. At hearing on sanctions motion, Littler partner (Parsons) tells court that firm had nothing to do with the illegal investigation.
  - Later, a Littler associate mistakenly files firm time records as part of summary judgment motion.
  - Judge notes that "[t]hese inadvertently filed time records reflect a scenario quite different than the one Parsons represented to the court" and holds that GC and Littler violated ethics rules. He issues public reprimand on GC and Littler lawyers, and orders Littler to pay monetary sanctions caused by their misconduct.
  - Also sanctions plaintiffs' lawyers for not alerting defendants to the mistakenly-filed Littler time records, a tactic that resulted in "needless gamesmanship."

11. Employment Law and the In-House Lawyer: Square Pegs and Round Holes

- Lawyers have duties of confidentiality, with strict ethics rules that govern any conflicts or other factors limiting their undivided loyalty, restrictions on practice are forbidden, and clients have broad freedom to terminate representation at any time for any reason.
  - That's the world of outside counsel. But how do those principles translate to in-house lawyers? Standard employment law principles do not apply.
- May a court (or arbitrator) force a company to rehire a lawyer (*Sands v. Menard, Inc*., 787 N.W. 2d 384 (Wis. 2010))?
- May a former in-house lawyer seek whistleblower status and sue for wrongful discharge (*Balla v. Gambro, Inc.*; *Kidwell v. Sybaritic Inc.*; *General Dynamics Corp. v. Superior Court*; and *Van Asdale v. International Game Technology*)?
- May an in-house lawyer agree to a non-competition clause (NJ Op. 708 7-10-06)?

11. Employment Law and the In-House Lawyer: Square Pegs and Round Holes (Continued)

- Finally, Rule 1.9 governs former in-house lawyers' right to handle matters against their former employer. Depending on the role of the inside counsel at the company, these ethics restrictions may be sufficiently broad to support a "playbook" disqualification.

12. Toyota's Crime-Fraud Conflagration

- Crime-fraud dangers.
  - Privilege protections are gone, if opposing party offers prima facie fraud evidence.
- Recent example: *In re Toyota Motor Sales U.S.A., Inc.* and *Dimitrios P. Biller* (JAMS Ref. No. 1220040045), decided on Sept. 9, 2010.
- This Toyota ruling is interesting not because it is pathbreaking, but because it is increasingly routine.
  - and in-house lawyers will be in the evidentiary cross-hairs.

12. Toyota's Crime-Fraud Conflagration (Continued)

- One more Toyota case, decided by a California Court of Appeal on Sept. 20, 2010, offers a different warning.
- The headline says it all:
  - "Toyota Lawyer Drives Into Attorney, Loses $625K Case, Must Pay Her $125K Legal Bill + $5K for Appeal"

“Hey, let’s be careful out there.”

-Sgt. Phil Esterhaus

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