In-House Ethics: Important Questions

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Overall Responsibility

• “A law firm . . . shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.” Rule 5.1(a), NY R. Prof. Conduct.

• “Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. This includes … lawyers having comparable managerial authority in a law department of an enterprise or government agency.” ABA Model Rule Comment.
Model Rule 5.5 – Unauthorized Practice of Law

- ABA Model Rule creates safe harbors for certain types of practice by lawyers not licensed in that state:
  - Services undertaken in association with an admitted lawyer who actively participates in the matter
  - Provides legal services in or reasonably related to ADR proceedings that do not require pro hac vice admission if services are reasonably related to lawyer’s practice in jurisdiction where licensed
  - Legal services arise out of or are reasonably related to lawyer’s practice where licensed
  - Permits services provided solely to the lawyer’s employer or its affiliates by a non-admitted lawyer licensed in another state, provided the services are not services for which the jurisdiction requires pro hac vice admission or permission (a.k.a. In-House Counsel exception).
Rule 5.5: Unauthorized Practice of Law; as adopted in New York.

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.
- (b) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.
- Note: New York chose not to adopt any of the ABA Model Rule 5.5 safe harbor provisions for temporary practice by non-admitted lawyers, nor did it adopt the In-House Counsel exception.
In-House Counsel and UPL Consequences

• Using the title “General Counsel” without local licensure, and without qualification, is the unauthorized practice of law. See *In re Application of Stage*, 692 N.E.2d 993 (Ohio 1998).

• Possible consequences of unlicensed In-House counsel:
  – Unauthorized Practice of Law – criminal sanction.
  – Complaint of Unauthorized Practice of Law to jurisdiction in which In-House Counsel is licensed.
  – Lose Ability to Claim Attorney-Client Privilege. See *Fin. Tech. Int’l, Inc. v. Smith*, 49 Fed. R. Serv. 3d 961 (S.D.N.Y. 2000) declined to find that communications with unlicensed house counsel were privileged because although house counsel had passed NY bar exam, he had not completed bar application paperwork and was not licensed in any other state.
Is a Lawyer Lawyering?
Why it Matters.
Why Lawyering Matters

• “When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.” Rule 4.3 NY R. Prof. Conduct.

• NY City Bar Assn Op 2009-02 – duty to clarify role applies even if there will be no material prejudice to unrepresented person.

• Is company employee L, who has a law license, and is conducting an internal investigation, bound by Rule 4.3?

• What if L is employed within the HR department, but notes “lawyer” or “J.D.” on his or her business card?
Why Lawyering Can Matter: Application of Professional Ethics Rules

• “If a rule requires as a condition precedent that there be an attorney acting in a representative capacity and there was no representation, then it would not be appropriate to recommend a violation of that rule.” Dismissed Complaint by Minnesota Office of Lawyers Professional Responsibility, 2007.

• Certain Rules of Professional Conduct begin with the preface “In representing a client . . . .” (e.g., Rules 4.2 and 4.3).
Is it Lawyering?

- I’m not a Lawyer: An interviewee alleges that L violated Rule 4.3(b). 
  *How will L show she was not acting as a lawyer?*

- I am a Lawyer: Plaintiff seeks to discover L’s report of the investigation.  *How will L show she was acting as a lawyer, so as to protect the attorney-privilege?*

- *Can’t have it both ways.*

- *Illustrates need to clarify lawyer’s role in organization.*
Lawyering: Certain presumptions

• “There is a presumption that a lawyer in the legal department or working for the general counsel is most often giving legal advice, while the opposite presumption applies to a lawyer . . . who works for the Financial Group or some other seemingly management or business side of the house.” *Boca Investerings Partnership v. United States*, 31 F. Supp. 2d 9, 11-12 (D.D.C. 1998).

• *What does L’s job description say? What is L’s title? To whom does L report?*
In-House Counsel

What about Non-Compete Agreements?
Lawyering & Non-Compete Agreements

• “A lawyer shall not participate in offering or making: (a) a partnership, shareholder, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement. . . .” NY R. Prof. Conduct 5.6.

• May General Counsel include a non-compete in In-House Counsel employment agreements?
Are Non-Competes Enforceable, Ethical?

- Employment agreements for in-house lawyers are subject to Rule 5.6 and may not include restrictive employment provisions or non-compete covenants. See New Jersey S. Court Advisory Comm. on Prof’l Ethics, Op. 708, 2006.

- WA and CT Ethics Opinions opine that in-house counsel may be required to sign a non-compete agreement but the non-compete is only enforceable if lawyer obtains a non-lawyer position with a competitor. Lawyer is free to provide legal service to a competitor per Rule 5.6. See Washington Bar Op. 2100 (2005); Connecticut Bar Association Op. 02-05.
Who, Within the Corporation, Is Protected from Communication by Plaintiff’s Counsel?
Communication with a Person Represented by Counsel

• “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.” Rule 4.2, New York Rules of Professional Conduct.
Employees of Organizations and Rule 4.2, ABA Comment 7

- In the case of a represented organization, this rule prohibits communications with a constituent of the organization:
  - who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or
  - who has authority to obligate the organization with respect to the matter or
  - whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.
Comment 7 to ABA Model Rule 4.2:

- Consent of the organization’s lawyer is not required for communication with a former constituent.
- If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule.
Does Rule 4.2 Protect In-House Counsel from Direct Contact by Adverse Counsel?

• Probably Not -- “Model Rule of Professional Conduct 4.2 generally does not prohibit a lawyer who represents a client in a matter involving an organization from communicating with the organization’s inside counsel about the subject of the representation without obtaining the prior consent of the entity’s outside counsel.” See ABA Formal Op. 06-443, entitled “Contact With Inside Counsel of an Organization Regarding a Matter When the Organization is Represented by Outside Counsel.”
What if In-House Counsel was a Participant?

- What if the contacted in-house counsel is “a part of a constituent group of the organization” as described in Rule 4.2 Comment [7] as, for example, when the lawyer participated in giving business advice or in making decisions which gave rise to the issues which are in dispute?

- Other Rules may also limit opposing counsel’s ability to inquire, especially as to communications that might be privileged. Rule 4.4(a) prohibiting means of obtaining evidence that violates the rights of a third party.
New Rule 3.3

Confidentiality
And
Candor to the Tribunal
Rule 1.6 (a) Client Confidentiality

• “Confidential information” consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested to be kept confidential.

• “Confidential information” does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.
Candor to the Tribunal
Rule 3.3

- Known, Know or Knows – denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

- Requires lawyer to disclose information to the tribunal even if protected by Rule 1.6 (confidentiality rule that includes attorney-client privilege information) when:
  - The lawyer knows a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding;
  - The lawyer knows false testimony or evidence is being offered in a court proceeding;
  - Necessary to correct material false testimony or evidence that was offered by the lawyer and the lawyer later comes to know of its falsity.
Candor to the Tribunal
Rule 3.3: Other new Issues.

- Permits, but does not require, lawyers to refuse to offer evidence **believed to be false**, except where the evidence is the testimony of a criminal defendant.

- New Rule 3.3(d) imposes obligation upon lawyer in an ex parte proceeding to disclose all material facts known if necessary to enable court to make informed decision, even if facts are adverse to client.
What New Developments Are There in the Law Regarding Unauthorized Retention and Inadvertent Production of Confidential Documents?
Intentionally Obtaining or Retaining Privileged Documents Violates Rule 4.4.

- Rule 4.4(a): Respect for Rights of Third Persons:

  “In representing a client, a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of such a [third] person.”
Intentionally Obtaining or Retaining Privileged Documents Also Subjects an Attorney to Sanctions.


- Plaintiff class action counsel approaches a former high level Cargill HR employee to obtain investigative information. Former employee tells counsel he has Cargill documents relating to prior discrimination claims.

- Plaintiffs’ counsel does not caution former employee about attorney-client privilege, takes possession of documents, is tardy in notifying defense counsel, and then retains copies after documents are returned.

- Plaintiffs’ firm disqualified as class action counsel and denied fees. Ethics complaint against firm’s senior partner results in discipline.
Ethical Duties and Inadvertent Disclosure

• Rule 4.4(b): “A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.”

• ABA Formal Opinion 05-437, based on new Rule 4.4(b), supersedes ABA Formal Op. 92-368, which stated:
  “A lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them.”
Court Rules and Inadvertent Disclosure

  Provides there is no waiver of privilege or work product, if production of privileged documents was inadvertent, and “reasonable steps to prevent disclosure” were taken, and “reasonable steps to rectify” the disclosure are taken.

  Provides that a party who in discovery produces privileged or work product materials may notify the recipient. The recipient must “promptly return, sequester, or destroy” the materials; must not use or disclose; and must attempt retrieval. The recipient may promptly present the material to the court for determination.
Conflicts of Interest: New Terminology
Changes to Conflict Rules Terminology

- Informed Consent – agreement obtained after the lawyer has explained the material risks and reasonably available alternatives (Rule 1.0(j)).

- Confirmed in Writing – requires either signature of person giving informed consent, or confirmation in “writing” promptly transmitted by the lawyer to the person confirming an oral consent. (Rule 1.0(e)).

- Writing - “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording, and e-mail. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.
When May Former Counsel Be Disqualified For Knowing Too Much?

“Playbook Conflicts”
The Issue

• Attorney F formerly represented Company C in many matters, whether as in-house or as outside counsel. F is now representing Plaintiff P in a lawsuit against C. Can C obtain a disqualification order against F?
Rule 1.9: Duties to Former Clients

• (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

• NY Law – Substantially Related: *T.C. Theatre Corp. v Warner Bros Pictures*, 113 F. Supp. 265 (S.D.N.Y.1953): “[t]he former client need show no more than that the matter embraced within the pending suit wherein his former attorney appears . . . are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client.”
Playbook Disqualification Denied


- “No evidence that the legal issue at the heart of the present action is essentially the same as any of the various legal issues” to which the lawyers had provided counsel to Travelers in the past.

- Reason: Focus of new dispute involved a policy change eliminating underinsured coverage that occurred after counsel ceasing to represent Travelers on uninsured and underinsured matters.
Playbook Denied: Former In-House Counsel


- In-House counsel’s prior representation was not substantially related to the post-separation litigation against AIU.

- Reason: Former in-house counsel’s position involved representation limited to Canadian lawyers’ professional liability coverage. In-House responsibilities did not involve litigation or coverage disputes such as those involved in current representation adverse to AIU.
Playbook Conflict Found - Disqualified


- Former in-house counsel leaves Hearst and then becomes primary outside counsel on employment matters. After dispute with Hearst over hourly charges, counsel begins representing former Hearst employees.

- Counsel disqualified in all three cases because the allegations did not allege isolated acts unconnected to continuing management policies, but instead that actions were motivated by management’s discriminatory animus, a subject which counsel had likely consulted with management about in the recent past.
“Playbook Conflicts”
ABA View on Former In-House Counsel

- “General knowledge of the strategies, policies, or personnel of the former employer is not sufficient by itself to establish a substantial relationship . . . .”

- “If the legal department were divided into specialized areas of practice such as tax, patent, and securities law, there would be no presumption that the general counsel has knowledge of any specific matter dealt with by any practice area.”

- See ABA Formal Ethics Opinion 99-415, “Representation Adverse to Organization by Former In-House Lawyer.”
Questions