ETHICS ISSUES FOR CORPORATE COUNSEL

By

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7 Ethics Hotspots for Corporate Counsel

- Organization as Client
- Gatekeeper
- Internal Investigations
- Communications with Third Parties
- Attorney-Client Privilege
- Certifications
- Supervision



Organization as "Client"

RPC 1.13(a) - A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.



Organization as "Client" cont'd

- Pre-existing relationship/conflict of interest.
- Disclosure required under RPC 1.13(f):
 - the actual or potential conflict
 - cannot represent individual(s) involved
 - may wish to obtain independent representation
 - discussions not privileged
- Confidentiality under RPC 1.6.
- Explain relationship to non-lawyers up front.
 - Prevent privilege issues, establish confidentiality boundaries before issues arise and subtly alert colleagues to gatekeeper role.

Gatekeeper

- Reporting up RPC 1.13(b).
 - "... proceed as is reasonably necessary in the best interest of the organization."
 - Sometimes requires a concise, carefully worded memo to the CEO.
- Preventatively stand your ground as counsel, and if applicable, as an officer.
 - Punt to outside counsel as appropriate.
- Any ethical obligation to prevent arguable legal but likely damaging conduct?

Internal Investigations

- What role for in-house counsel?
 - Quandary balancing costs, efficiencies and sensitivities of having in-house counsel coordinate versus outside counsel.
- Potential issues:
 - Disqualification as a necessary witness.
 - Issues under RPCs 1.7 and 1.13 conflicts of interest, confusion as to attorney-client relationship, confidentiality and privilege.
 - Risks likely increase with level of target.
 - •Benefits of delegating to outside counsel?

Communications with Third Parties

- As a practical matter, third parties are more likely to sue you or file an ethics grievance.
 - Truthfulness in statements to others RPC 4.1.
 - Persons known to be represented RPC 4.2.
 - Dealing with un-represented persons RPC 4.3.
 - Correct misunderstandings and do not give legal advice.

"Attorney-Client Privilege" Follows Control of the Company

- Protect attorney-client privilege through role clarity, controlling distribution and education.
- But do not assume you will always control assertion of privilege for your communications.
 - Right to assert privilege follows control changes occur in mergers, acquisitions, bankruptcy and board/management turnover.
 - Many instances involving bankruptcy trustees most recently, MF Global.

Certifications

- In-house lawyers are increasingly being asked to sign certifications.
 - Subpoenas, forms from regulators, auditor certifications, etc.
 - It is unethical and unwise to certify anything outside the scope of your knowledge or expertise.
 - There is often no basis for requiring counsel to sign such certifications.

Supervision

- In-house law department is a "Firm" under RPC 5.1.
 - Senior lawyers must take reasonable precautions to ensure that the conduct of subordinates is "compatible with the professional obligations of the lawyer."
 - Senior lawyers can be held accountable for violations of subordinates — both lawyers and non-lawyers - including independent contractors.
 - Examples diligence, communication, confidentiality, truthfulness in statements to third parties, conflicts...

Additional Topics for Discussion

- Conflicts of Interest RPC 1.7
 - Direct conflicts
 - Material limitation conflicts
 - Non-consentable conflicts
- Discovery and Spoliation Issues
- Competence, Diligence, Communication
- Personal Relations RPC 1.8(j)