

ETHICAL CONCERNS IN THE INTERPLAY OF IN-HOUSE AND OUTSIDE COUNSEL IN MANAGING LITIGATION

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JOSH

- Shareholder / Litigator at Haynsworth Sinkler Boyd, P.A.
- Licensed in GA, NC, and SC
- Utility, Construction, and Commercial Litigation

WHY I LIKE WORKING FOR LAWYERS...

- I like lawyers.
- Team approach & dialogue
- Understand the process
- Bypass routine explanations

DEMITRA

- Litigation Counsel at Duke Energy
- Licensed in NC
- Previously practiced with a firm in NC
- Various kinds of litigation across the enterprise
 - personal injury, property damage, commercial, construction

WHY I LIKE BEING IN-HOUSE...

- Develop and maintain relationship with clients
- Apply what you have learned from previous experiences and lawsuits to improve company policies and practices
- Diverse practice
- Good balance of directly handling lawsuits and managing outside counsel

GOAL

- To provide a general overview of certain ethical areas that may arise for in-house counsel during the course of litigation

DISCLAIMERS

- The information provided herein is general, but there are resources available for specific situations:
 - Rule 407, S.C. App. Ct. R., Rules of Professional Conduct
 - In-House / In-Firm Guidance
 - SC Bar Ethics Hotline (803) 799-6653, Ext. 178
 - SC Bar Ethics Advisory Opinions
 - You can submit a request for one yourself.
- Neither of us are here to speak for Haynsworth Sinkler Boyd, P.A. or Duke Energy.
- No legal or ethical advice is given herein.

WHO IS THE CLIENT?

- Rule 1.13: Organization as Client
- "(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."
- Applies to both outside and in-house counsel
 - Client contact as "client"
 - Internal "clients" who think of you as "their lawyer"

WHO IS THE CLIENT?

- "(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."

WHO IS THE CLIENT?

- "(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7 (Conflict of Interest: Current Clients), the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders."

WHO IS THE CLIENT?

- Beware of "between you and me" conversations.
- Advise of need for separate counsel, as appropriate, as difficult as that conversation might be.

STICKY JOINT REPRESENTATION

- Consider conflict waiver from both parties before undertaking the representation that states:
 - Counsel has fully disclosed risks and advantages of joint representation;
 - The parties have indicated they understand the risks and advantages;
 - The parties agree to the joint representation and to waive any conflict that presently exists;
 - In the event any conflict arises, the employee understands that the attorney will represent the entity and not the employee;
 - Identify any screening mechanisms that will be used to protect interests of the other;
 - Advise that the attorney will not exploit confidences to detriment of either; and
 - Client may request attorney's withdrawal.
- Outside counsel should consider separate engagement letters for both.

CONFLICT OF INTEREST

- Discover that the manager has engaged in conduct outside the scope and course of employment and/or that the corporation may have a claim against the manager?
 - Warn that you represent the employer and that whatever information the employee provides may not be kept confidential and may be used against the employee ("Upjohn" warning).
 - Obtain written acknowledgement to this effect from employee.
- Discover that the employee may have a claim against the corporation?
- Disagree on how to proceed in litigation?
 - One party wants to deny the conduct and the other does not.
 - Settlement

UP-THE-LADDER REPORTING

- Rule 1.13: Organization as Client
- "(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law."

UP-THE-LADDER REPORTING

- (c) Except as provided in paragraph (d), if,
 - (1) despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
 - (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.
- (d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.
- (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

UP-THE-LADDER REPORTING

- Aside from the ethics issues...
- Sarbanes-Oxley §307
 - Up-the-ladder reporting requirements
- Dodd-Frank and SEC "Whistleblower" rules

PRESERVATION OF EVIDENCE

- Rule 3.4: Fairness to Opposing Party and Counsel
- "A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act[.]"

PRESERVATION OF EVIDENCE: PHYSICAL EVIDENCE

- As in-house counsel, you may be the first lawyer to learn of an incident, and you need to take action to ensure preservation of evidence—both physical and electronic—under Rule 3.4 and applicable civil rules.
- This is not just an ethical issue for the lawyer, as failure to preserve evidence can ultimately lead to potential spoliation instructions to a jury that can affect the substantive outcome of the case.
- What to do in a given situation can be a tough call and you may be faulted by the other side no matter the advice you give. Be ready to explain the difficult calls made so that they are reasonable to a judge or jury.

PRESERVATION OF EVIDENCE: E-DISCOVERY

- Rule 3.4 Concerns
- 2006 Amendments to Fed. R. Civ. P. and 2015 Revisions
- Litigation Holds / Standardized

LAWYER VS. BUSINESS PARTNER

- Dependent upon the size of your organization and your role, you may be looked to as both an attorney and a business partner.
- Acting as a business partner runs the risk of hurting claims to attorney-client privilege, which applies only when you act as a lawyer providing legal advice.
- Since being part of business decisions is a reason many of us went in-house in the first place, you must ensure that you participate properly in either role.
- This is made more complicated when the business wants you to act as a business partner on occasion, but communicates with you as though everything is “legally privileged.”

LAWYER VS. BUSINESS PARTNER

- Some courts are hostile to claims of attorney-client privilege involving only in-house lawyers and their business clients, often presuming (unfairly) that your communications are more business than legal and therefore not deserving of protection.
- It is critical to always take steps to (a) properly mark privileged communications, (b) set out the legal purpose of your communication at the beginning of the email or in the body of the document/attachment, (c) separate business advice from legal advice, ideally through separate documents but if not possible at least by separate and clearly marked sections of the document, and (d) train the business on the difference between legal and business advice and when the privilege properly applies and how to request legal services vs. business advice (and be sure all of the lawyers in your department understand the process as well).

Source: "Ten Things You Need To Know As In-House Counsel: Lawyer v. Business Partner"

ATTORNEY-CLIENT PRIVILEGE / *UPJOHN*

- The U.S. Supreme Court adopted a case-by-case approach and emphasized the following five factors in reaching its decision:
 1. The communications were made by employees at the direction of corporate superiors to enable the corporation to obtain legal advice.
 2. The communications concerned matters within the scope of the employees' duties.
 3. The information was not available from upper-level directors.
 4. The employees were aware that the purpose of the communication was to enable the corporation to obtain legal advice.
 5. The communications were intended to be kept confidential and were not disseminated outside the corporation.

Upjohn Co. v. U.S., 449 U.S. 383 (1981).

ATTORNEY-CLIENT PRIVILEGE / *UPJOHN*

- When communications meet the *Upjohn* factors, the privilege is absolute. Further, unlike the work-product discovery rule, there is no exception to the privilege when the information sought cannot be discovered from an unprivileged source. *Admiral Ins. Co v. U.S. Dist. Court for Dist. of Ariz.*, 881 F.2d 1486 (9th Cir. 1989).
- **Key focus: Was attorney acting as a businessperson or as an attorney?**

COMMUNICATING WITH CORPORATE EMPLOYEES

- When communicating with corporate employees, counsel should:
 - (1) inform the employee that counsel represents only the corporation and not its employees;
 - (2) inform the employee that communications will only be privileged on behalf of the corporation and at the corporation's discretion;
 - (3) advise the employee to consult his own attorney if the employee has concerns about personal liability; and
 - (4) document that the warnings in (1)-(3) were given.

COMPETENCE

- "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."
- A particular concern for in-house generalists.
- CLE can certainly assist here.
- Consider utilizing outside counsel with the requisite experience, when appropriate.

COMMUNICATIONS OUTSIDE THE COMPANY

- Rule 4.3: Dealing with Unrepresented Person
- "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. 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. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."

COMMUNICATIONS OUTSIDE THE COMPANY

- Make sure anyone outside the company with whom you are communicating knows you are a lawyer and that you are not disinterested.

COMMUNICATIONS OUTSIDE THE COMPANY

- Rule 4.2: Communications with 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."

COMMUNICATIONS OUTSIDE THE COMPANY

- Bottom Line: If you know a person outside the company is represented, do not speak to them.

COMMUNICATIONS OUTSIDE THE COMPANY

- What if the in-house attorney is contacted by opposing counsel in active litigation, though the company is represented by outside counsel?
- The opposing counsel contacting the in-house attorney has likely committed an ethics violation under Rule 4.2. Even though the in-house attorney is an attorney, the contact is still improper.
 - NC Superior Court Example / *Pro Hac Vice*

SUPERVISORS / OUTSOURCING

- Rule 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers
- "(b) A lawyer having direct supervisory authority over another lawyer, including a suspended lawyer employed pursuant to Rule 34, RLDE, Rule 413, SCACR, shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."
- Similar rule covering non-lawyer assistants is at Rule 5.3(b).
- As in-house counsel, you are responsible for those you supervise (including outside vendors) and for taking reasonable steps to ensure they comply with their ethical obligations.

CROSS-JURISDICTIONAL PRACTICE

- Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law
- (d) A lawyer admitted in another United States jurisdiction, and not debarred, disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
 - (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or
 - (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

CROSS-JURISDICTIONAL PRACTICE

- If it feels "iffy" check the local unauthorized practice rules in the relevant jurisdiction.
- Associate outside counsel, if needed.

QUESTIONS?