DENTONS

Risk Tips for In-House Counsel: Lessons in Ethics, Professionalism and Risk Management

November 14, 2024

Presented to ACC Southern California
at the Magic Castle

Agenda

- Practicing Law as an In-House Counsel
- Privilege Pitfalls
- Cross-Border Issues
- Duties of Confidentiality, Diligence and Competence

Practicing Law as an In-House Counsel

"Practicing Law" as an In-House Counsel

- The Rules of Professional Conduct apply to all State Bar members.
- This includes out-of-state licensed registered in-house counsel under California Rules of Court, Rule 9.46.
- The definition of "law firm" under the Rules includes the legal department of a corporation.
- The CRPC apply whether you are acting in a legal capacity or in a business capacity.

CRPC Rule 5.5: Unauthorized Practice of Law

- "Unauthorized" practice of law is defined by each state's version of Model Rule 5.5.
- Under CRPC Rule 5.5(b)(1), a lawyer not admitted to practice law in California may not establish a presence in California for the practice of law or hold out that the lawyer is admitted to practice in California.

  Comment to Rule 5.5(b)(1) provides an exception if the attorney is qualifying in-house counsel under California Rules of Court Rule 9.46.

CRPC Rule 5.5 and CRC Rule 9.46 (cont'd)

- To fall under the CRC Rule 9.46 exception to CRPC Rule 5.5, in-house counsel must satisfy additional measures to "practice law" in the state without being admitted to the California Bar, e.g.:
  - Be an active licensee in good standing of the bar of a U.S. state
  - Meet requirements for admission to the California Bar except for taking the California bar exam
  - Comply with State Bar Registered In-House Counsel Program rules
  - Reside in California
  - Satisfy MCLE requirements
  - Register as an in-house counsel

The Mis-Match Between Rule 5.5 and Today's Remote-Working World

- 2024 NYT article reported that of people with graduate degrees,19% work fully remote and 22% are in-office only part of the week.

  https://www.nytimes.com/interactive/2024/03/08/business/economy/remot-work-home.html
- State Bar of California, Formal Opinion Interim No. 20-0004 declined to opine on unauthorized practice of law issues for lawyers working remotely and referred said lawyers to the opinions issued by the ABA and CRPC 5.5 on multijurisdictional practice
- ABA Formal Opinion 495 (not binding) authorized lawyers to practice remotely from jurisdiction in which they are not admitted, if permitted by and if they do not provide legal services in that jurisdiction.

Privilege Pitfalls

Attorney-Client Privilege

- Essential elements of attorney client privilege:

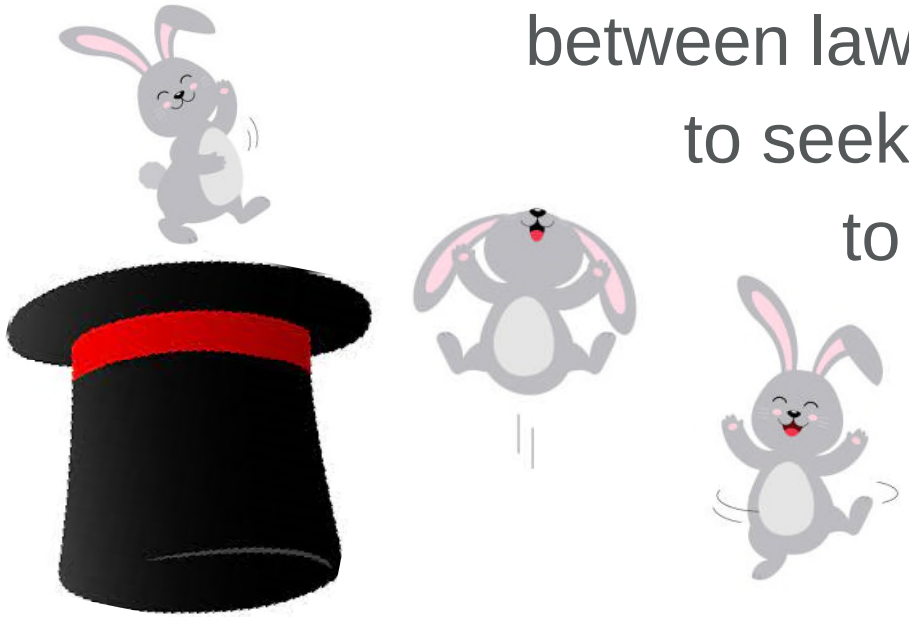
  A communication,

  made in confidence,

  between lawyer and client,

  to seek or provide legal advice

  to the client.

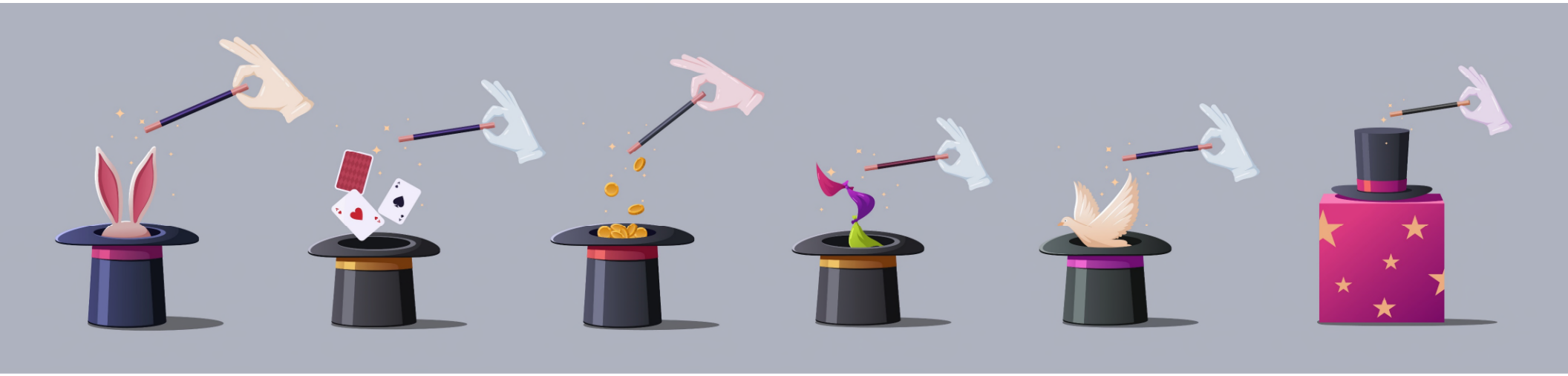


Attorney-Client Privilege (cont'd)

- California Evidence Code § 952: Attorney-client privilege applies to communications with third-parties if the "disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted."
- Communications with an expert are privileged only if the expert is retained solely as a consulting expert. *Roush v. Seagate Technology, LLC*, 150 Cal. App. 4th 210, 225 (2007).
  - If the expert is a testifying expert, then "neither the attorney-client privilege nor the work product protection will prevent disclosure of statements to, or reports from, a testifying expert." *DeLuca v. State Fish Co., Inc.*, 217 Cal. App. 4th 671, 689 (2013).

Who in Your Organization Is the “Client”?

- An in-house lawyer employed by an organization represents the organization, acting through its “constituents” who are “authorized to conduct its affairs.”
  - Constituents themselves are not automatically “clients” of in-house lawyer, although the lawyer may represent a constituent and the company, subject to CRPC 1.7, 1.8.2, 1.8.6, and 1.8.7.



Dual Representation of the Organization and Its Constituents

- Privilege attaches to a communication with an employee of the organization if said employee "is the natural person to be speaking for the corporation." *D. I. Chadbourne, Inc. v. Superior Court of San Francisco*, 60 Cal. 2d 723, 736-37 (1964).
- "Upjohn warning:" Required of lawyer interviewing constituent where there is "significant risk" that representation of one could "materially limit" responsibilities to the other. *Upjohn Co. v. U.S*, 449 U.S. 383 (1981).
  - Important to memorialize that *Upjohn* warning was given, with specifics.

Dual Representation (cont'd)

- Suggested Upjohn warning:
  - The lawyer represents the company and not the constituent
  - The privilege belongs to the company, not to the constituent, but to protect the privilege, the constituent should not disclose the conversation to anyone inside or outside the company
  - The conversation will be reported to the company
  - The conversation may be reported by the Government to a third party or the Government
  - The person may wish to obtain independent counsel.

- Answer to the question, "Should I get my own lawyer?" "I cannot advise you on that, because I do not represent you."

Privilege Between Corporate "Affiliates"

- Extent of ACP between organization and its subsidiaries/affiliates depends on state law, corporate structure, commonality of in-house legal department, and other factors.
- Normally in-house counsel may provide privileged advice to a wholly-owned subsidiary; but watch out for potential Rule 1.7 conflicts, e.g.,
  - Inter-company transactions
  - Insolvency
  - Subsidiary only partially owned by your company

Legal Advice, Business Advice, and What Falls in Between

- Legal advice may rely in part on non-"legal" factors:

  "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

  Rule 2.1 & Comm. 2.

Legal Advice vs. Business Advice (cont'd)

- Communications containing mixed legal and business advice receive special scrutiny from courts; and in in-house mixed communications are reviewed even more critically:

  "In light of the two hats often worn by in-house lawyers, communications . . . must be scrutinized carefully . . . ."

  Brown v. Barnes & Noble, Inc., 474 F.Supp. 637, 648 (S.D.N.Y. 2019).

Q: What does The Rocky Horror Picture Show have to do with the Work Product Doctrine?

A:

An-ti-ci-pation

- **Work Product:** Ordinarily, a party may not discover documents and tangible things that are prepared in **anticipation of litigation** or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer or agent.” Fed. R. Civ. P. 26(b)(3)(A).

An-ti-ci-pation

Different From:

- **A/C Privilege:** Communication between attorney and client in confidence for purpose of seeking or rendering legal advice.

- **Duty of Confidentiality:** “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).” ABA Rule 1.6.

An-ti-ci-pation

- Everything we do as lawyers constitutes "attorney work product" and therefore subject to confidentiality protection. **Wrong.**

- Key element: materials must be "prepared in anticipation of litigation."

- Ok to just slap a "Work Product" label on documents?

What else happens when litigation is reasonably foreseeable?

Obligation to preserve documents.

What happens when you fail to preserve documents?

- Monetary sanctions;
- Limitations on the amount of damages recoverable;
- Adverse inference instruction;
- Striking pleadings in whole or in part;
- Evidence preclusion;
- Claim or defense preclusion; or
- Dismissing the case or awarding default judgment against the spoliator.

Document Retention Planning

- Does your company have a Records Retention Program?
- Is it updated?
- Legal department may have ethical obligation to advise on implementation (CRPC 1.1; M.R. 1.1; Comm. 8)
  - Implement **before** your next audit, governmental investigation, litigation, etc.

Cross-border Issues

Cross-border Issues

- Protecting client confidences when dealing with someone in foreign country can be challenging.
- Varying legal cultures and different regulatory regimes lead to a hodgepodge of rules around the globe.
  - Most countries don't have broad discovery mechanisms like we do.
  - Many countries have different categories of "legal professionals."

Cross-border Issues

- We in the US take for granted that a communication between an attorney and client is protected; that same communication might not enjoy same protection in a foreign tribunal.
- By the same token, where communications take place in foreign country or involve foreign attorneys or proceedings, US courts won't necessarily recognize a privilege
    - May defer to the law of the country that has the "predominant" or "most direct and compelling interest." *Astra Aktiebolag v. Andrx Pharmaceuticals*, 208 F.R.D. 92, 98 (S.D.N.Y. 2002).

Cross-border Issues

- *Akzo Nobel Chemicals Ltd v. European Commission*, Case C-550/07-P (September 14, 2010), is required reading if advising client in the EU.
- EU Court of Justice determined that company is entitled to confidentiality protection only with respect to communications emanating from "independent lawyers."
- Court: In-house counsel did not qualify as "independent lawyers," so their communications with employees not subject to protection.

Cross-border Issues

- *Akzo* (and others) can have serious consequences for US lawyers.
  - Since A/C privilege is based on assumption that client has reasonable expectation of confidentiality, litigants may argue that US companies have no reasonable expectation of confidentiality in communications to and from in-house counsel shared with company personnel in Europe.
  - *Akzo* also left open the question of whether communications with non-EU regulated attorneys (*i.e.,* US admitted attorneys) would be protected in EU proceedings.

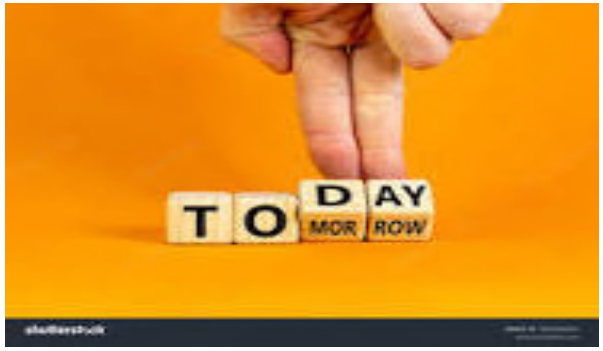
Ethical Duties of Confidentiality, Diligence, and Competence

The Duty of Confidentiality

- Lawyer's duty of confidentiality is broader in scope than attorney-client privilege:
  - "A lawyer shall not reveal information relating to the representation of a client" unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by an exception. Model Rule 1.6(a).
- Obligation applies not only to matters relayed by client in confidence, but to all information, regardless of source, relating to the representation. Comm. 3.

Lawyer's "Diligence" Obligation Under Model Rule 1.3

- The duty of diligence is separate from the duty of competence:
  - "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer . . . ." Rule 1.3, Comm. 1.
  - "A lawyer's workload must be controlled so that each matter can be handled competently." Comm. 2.
  - "Perhaps no professional shortcoming is more widely resented than procrastination. . . ." Comm. 3.



Technological Competence/AI

Duty of Competence – The "Technology" Amendments to the Model Rules of Professional Conduct

- ABA Rule 1.1 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."
  - Comment 8. **To maintain the 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**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.
- 40 states **including California** have adopted the Duty of Technology Competence

Duty of Competence – The "Technology" Amendments to the Model Rules of Professional Conduct *(Cont'd)*

- California Rule 1.1 Competence:

(a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.

(b) For purposes of this rule, "competence" in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary
for the performance of such service.

(c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent.

(d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably* necessary in the circumstances.

Examples of Lack of Technological Competence

- Inadvertently transmitting metadata.
- Failing to encrypt confidential information.
- Not understanding privacy settings on your social media.
- Using generative AI without considering confidentiality, reliability, accuracy

Artificial Intelligence – What Is It?

- **AI**. A machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. Software we use everyday as lawyers is AI (Westlaw, Lexis, Google, etc.)
- **Machine Learning**. A subset of AI that allows computers to learn and improve from experience without being expressly programmed.
- **Generative AI**. A class of AI models that can emulate the structure and characteristics of input data to generate synthetic data, including audio, video, pictures, and other digital content.
- **The Next Chapter**. Many AI companies are working on the next stage of AI – AGI and AI agents. This will complicate the ethical duties of lawyers.

The Legal Peril – AI Risks

- **Waiving Attorney-Client Privilege**. Third-party tools, including AI chat assistants, may risk waiting the attorney-client privilege.
- **Lack of Reliability**. Current models hallucinate, create false results, and may mislead the user. This can present significant risk depending on the application and use.
- **Lack of Transparency**. Most of the generative tools on the market are a black box. You may not know how your data is being processed, or how certain outputs have been generated.
- **Cybersecurity & Privacy Risk**. Data poisoning, privacy complications, and notice / consent become challenging.

Resources: ABA Formal Opinion 512; NYC Bar Formal Opinion 2024-5

Duty of Competence – E-Discovery

- California Formal Opinion No. 2015-193: "**The ethical duty of competence requires an attorney to assess at the outset of each case what electronic discovery issues might arise during the litigation, including the likelihood that e-discovery will or should be sought by either side. If e-discovery will probably be sought, the duty of competence requires an attorney to assess his or her own e-discovery skills and resources as part of the attorney's duty to provide the client with competent representation.** If an attorney lacks such skills and/or resources, the attorney must try to acquire sufficient learning and skill, or associate or consult with someone with expertise to assist."

Duty of Competence – Being a Luddite is No Excuse

Counsel: "I have to confess to this Court, I am not computer literate. I have not found presence in the cybernetic revolution. I need a secretary to help me turn on the computer. This was out of my bailiwick."

The Court: "Professed technological incompetence is not an excuse for discovery misconduct."

James v. Natl. Fin. LLC, No. 8931-VCL 2014 WL 6845560 (Del. Ch. Dec. 5, 2014)

What does it mean to be “Technology Competent”?

Individually

- You don’t have to be the expert, but know what you don’t know
- Ask your outside counsel their procedures and competencies
- Befriend your IT department

Organizationally

- Secure communication and data
- Remote working
- Vendor security
- Social media

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Thank you

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