



the in-house bar association<sup>SM</sup>

**Material Type: Program Materials**  
**Title: Common Ethical Issues Facing In-House Counsel**  
**Source: ACCA**

## **COMMON ETHICAL ISSUES FACING IN-HOUSE COUNSEL**

**Frederick J. Krebs**  
**President**

**American Corporate Counsel Association**  
**Washington, DC**  
**www.acca.com**

Today's discussion will focus on ethical questions and issues frequently faced by in-house attorneys. We will address four major areas, all of which are interrelated: (A) who is the client?; (B) attorney/client privilege; (C) suing the client; and (D) unauthorized practice of law. The selected bibliography is for future reference; it provides some examples and but is not an exhaustive treatment of the subjects. We will use the hypotheticals to frame the discussion. I encourage members of the audience to share their experiences and opinions.

### **A. Who is the client?**

1. The entity--not its officers, directors or shareholders.
2. Need to clarify role in circumstances where corporate constituents might be confused as to who counsel represents.
3. Relationship with officers and employees.
4. Conducting an internal investigation.
5. Relationship with affiliates (parents, subsidiaries and joint ventures).

### **B. Attorney--client privilege**

1. When does the privilege apply in corporate setting? (*Upjohn* rules)
  - a. communication between counsel and employee;
  - b. at the direction of the employee's superior so corporation could obtain legal advice;
  - c. employee aware that communication for purpose of seeking legal advice;
  - d. communication concerned matters within scope of employee's duties;
  - e. information sought not available from the upper echelon management and needed to supply legal advice;
  - f. communication was confidential when made and kept confidential thereafter.
2. Conducting an internal investigation.
3. Loss or waiver of privilege.
  - a. dual role or acting in a business capacity.
  - b. disclosure to persons outside privilege.
  - c. disclosure to government (even if compelled).
  - d. crime/fraud exception.
  - e. who "owns" the privilege?

e. who "owns" the privilege?

4. Inadvertent creation of attorney-client relationship.

C. Suing the client.

1. Client right to select own counsel (and right to terminate).

2. Professional obligations of in-house counsel.

3. In-house attorneys' rights as an employee.

4. Wrongful discharge, contract or EEO actions.

5. Application of attorney-client privilege.

D. Unauthorized Practice of Law

1. States vary as to definition of unauthorized practice of law.

ABA Model Rule 5.5:

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

2. Special corporate or limited admissions for in-house counsel (selected examples):

(a) Maryland, Bus. Occ. & Prof. Code Ann. 10-206(d), admission without examination; must associate local counsel to appear in court.

(b) Oklahoma, Okla Stat. Ann. app. Tit. V, 6, special temporary permit as long as in-house counsel works full time for sponsoring business.

(c) Minnesota, Minn. Ct. Admission to Bar. R. VI, provides a one-year license for out-of-state corporate counsel.

(d) Missouri, Mo. Ct. R. 8.105, provides special license for in-house counsel relocating to state.

(e) Ohio Gov. Bar R. VI, § 4, Allows corporate status registration

3. New Jersey, Committee on Unauthorized Practice of Law, Opinion no. 14 (in-house attorney not engaged in UPL when working solely for employer)

4. California: attorneys must take bar exam to practice law.

5. What constitutes UPL?

### **Hypotheticals**

#### *Situation Number 1*

A Car Company has a lawsuit brought against it for a design defect in one of its most popular models. At the request of its general counsel tests were conducted on the car to be used in the company's defense. The general counsel presented the results and his legal opinion to the Policy and Strategy Committee of the Board of Directors. At the meeting the Committee discussed the business ramifications of the information the general counsel presented to them and ultimately adopted his recommendations which were memorialized in the minutes of the meeting. Plaintiffs request production of the minutes of the meeting.

Is the company's request for production of the minutes of the meeting different than the request for production of the minutes of the meeting?

In a subsequent suit regarding the defective car line, different plaintiffs request results of studies conducted by Car Company on the defective car, claiming studies were not conducted in anticipation of Plaintiff's lawsuit.

#### *Situation Number 2*

Company decides to purchase a tire company. Concerned with potential environmental liabilities on the tire companies land, Company has its in-house counsel, who specializes in environmental matters, negotiate the environmental issues in the purchase agreement. During negotiations attorney advises Company's management of his concerns and based upon his recommendations the Committee decides not to pursue the purchase of the tire company. Tire company sues Company for breach of contract and request depositions of Company's attorney regarding his advice to Company's management.

#### *Situation Number 3*

Attorney works for Large Telephone Company which wholly owns its subsidiary, Baby Bell . Attorney has been involved in various legal matters of Baby Bell, participating in various lawsuits but is paid exclusively by Large Telephone Company. Large Telephone Company sells subsidiary to Northern Virginia Defense Contractor which does not retain Attorney for representation of subsidiary. Subsequent to the sale a dispute breaks out between Northern Virginia Defense Contractor and Large Telephone Company regarding certain liabilities of the subsidiary. Attorney represents Large Telephone Company in matter and Defense Contractor moves to have Attorney disqualified from the litigation.

#### *Situation Number 4*

Attorney, only licensed in New York, works as in-house counsel for a corporation located in New York. The corporation has an office located in California and asks attorney to advise it on California law regarding the hiring and firing of employees. Attorney writes memorandum on California law for management in New York. Attorney mails memorandum to management in California.

The Corporation relocates attorney to its office in New Jersey where attorney is not licensed.

#### *Situation Number 5*

Attorney was hired as general counsel for XYZ, Inc., a company she helped set up in Las Vegas, Nevada. Her employment is at-will. On several occasions members of the board of directors made remarks to her she felt were inappropriate concerning her gender and once she inadvertently received a copy of a memo that referred to her as a "New York Jew". Two weeks after stopping the sexual advances of a board members at a company Christmas party, Attorney is abruptly terminated without cause.

#### *Situation Number 6*

Senior, a partner at Big & Bigger, a law firm, learned about possible financial irregularities in handling client funds by his partner, Crook. He asked two associates to investigate. The associates did not bill the firm or record hours expended on the investigation; they acted under the direction of Senior; and they were not told they were working as the firm's attorneys. Crook left the firm. Prosecutor convenes a grand jury and subpoenas the associates. Senior and the law firm assert the attorney-client privilege. Prosecutor contends that Senior was not a client consulting an attorney. She also claims that fact-finding such as that done by the associates was not professional legal services. Finally, she argues that recognizing the privilege would reward the law firm; any other entity that uses its employees to conduct an investigation of internal wrongdoing would not get the benefit of the privilege.

### ***Selected Bibliography***

#### **Rules of Professional Conduct**

Model Rule 1.2. Scope of Representation.

Model Rule 1.2, Scope of Representation.

Model Rule 1.7, Conflict of Interest: General Rule.

Model Rule 1.13, Organization as a Client.

Model Rule 4.3, Dealing with Unrepresented Person.

Model Rule 5.5, Unauthorized Practice of Law.

### Articles

Brown, Ethical Professionalism and At-will Employment: Remedies for Corporate Counsel When Corporate Objectives and Counsel's Ethical Duties Collide, 10 Geo. J. Legal Ethics 1 (1996).

Brown, Article: The Dilemma of Corporate Counsel Faced with Client Misconduct: Disclosure of Client Confidences or Constructive Discharge, 44 Buffalo L. Rev. 777 (1996).

Cain, What Constitutes Wrongful Discharge of In-House Attorneys, 22 J. Legal Prof. 223 (1998).

Fitzpatrick, The Duty of Confidentiality: When May An Attorney Suing His/Her Former Employer Divulge Client Confidences Obtained During the Course of His/Her Employment? SB56 ALI-ABA 193, (May 1, 1997)

Giesel, The Legal Advice Requirement of the Attorney-Client Privilege: A special Problem for In-House Counsel and Outside Attorneys Representing Corporations, 48 Mercer L. Rev. 1169 (1997)

Kilbride, Identifying the Client in the Corporate Setting and the Attorney-Client Privilege, 6 Geo. J. Legal Ethics 1129 (1993).

Needham, Splitting Bar Admission Into Federal and State Components: National Admission For Advice on Federal Law, 45 Kan. L. Rev. 453 (1997)

◆ The Multijurisdictional Practice of Law and the Corporate Lawyer: New Rules for a New Generation of Legal Practices, 36 Tex. L. Rev. 1075 (1995).

O'Dell, Retaliatory Discharge: Corporate Counsel in a Catch-22, 44 Ala. L. Rev. 573 (1993).

Rotunda, Conflicts Problems When Representing Members of Corporate Families, 72 Notre Dame Law Review 7655-92 (1997).

◆ Sister Act: Conflicts of Interest With Sister Corporations, 1 J. Inst. Study Legal Ethics 215-48 (1996)

Van Deusen, Comment: The Attorney-Client Privilege For In-House Counsel When Negotiating Contracts: A Response To Georgia-Pacific Corp. V. Gaf Roofing Manufacturing Corp., 39 Wm. & Mary L. Rev. 1397(1998)

Weaver, Client Confidences in Disputes Between In-House Attorneys and Their Employer-Clients: Much Ado About Nothing -- Or Something?, 30 U.C. Davis L. Rev. 483 (1997)

Webb & Kinsman, Wrongful Discharge Suits by In-house Counsel: Refining the General Dynamics Standard, 11 Lab. Law. 35 (1995).

Weiss, Note: In-House Counsel Beware: Wearing the Business Hat Could Mean Losing the Privilege, 11 Geo. J. Legal Ethics 393 (1998)

Wissman, Firing Corporate Counsel Can Be A Risky Proposition. They May Reveal the Skeletons In Your Closet, Corp. Legal Times, Mar. 1998, at 1 (col. 1)

### Cases

*Who is the client?*

Musheno v. Gensemer, 897 F. Supp. 833 (M.D. Pa 1995), court disqualified counsel from representing the corporation when directors accused of fraud.

Waggoner v. Snow, Becker, Kroll, Klaris & Krauss, 991 F.2d 1501 (9th Cir. 1993), no lawyer-client relationship with CEO when lawyer informed officer he attended board meeting only as counsel for corporation. Bell Atlantic Corporation v. Bolger, 2 F. 3d 1304 (3d Cir. 1993), dual representation permitted of individual defendants and corporation were there no allegations of fraud, intentional misconduct, or self dealing.

Carlson v. Fredrikson & Byron P.A., 475 N.W. 2d 882 (Minn. Ct. App. 1991) representation of business does not amount to representation of business's owner.

In re Consumers Power Co. Derivative Litig., 132 F. R. D. 455 (E.D. Mich. 1990), lawyer who represents corporation, owes allegiance to corporation, not individual directors or officers.

*Attorney-Client Privilege*

United States v. Adlman, 134 F.3d 1194 (2d Cir. 1998) holding that attorney-client privilege did not extend to communications between in-house counsel and accounting firm, because purpose of communications was not for counsel to render legal advice, but that a document created because of anticipated litigation does not lose its work-product protection merely because it is intended to assist in making a business decision influenced by the likely outcome of the anticipated litigation.

In re Subpoena Duces Tecum Served on Wilkie Farr & Gallagher, 1997 WL 118369 (S.D. N.Y.) company's outside counsel had to turn over interview and meeting notes to plaintiffs because investigation results of the company's accounting practices were disclosed to company's outside auditing firm.

Kelly v. Ford Motor Co., 110 F.3d 954 (3rd Cir. 1997) general counsel's legal advice to the Board is protected by privilege even if used as the basis of a business decision and work product produced by agents of company's attorneys is protected even if developed in anticipation of litigation in another suit.

Ga. Pacific Corp. v. GAF, 1996 WL 29392, 1996 U.S. Dist. LEXIS 671, privilege did not apply to in-house counsel performing business function.

Shirsat v. Mutual Pharmaceutical Co., 1996 WL 745235 (E.D. Pa.) crime fraud exception applied to in-house counsel's memo regarding illegal firing of employee.

US v. Rowe, 96 F.3d 1294 (1996) attorney-client privilege applied to law firm's internal investigation of partner misbehavior.

Upjohn v. U.S., 449 U.S. 383 (1981), Supreme Court rejected control group test; considered scope of attorney client privilege in corporate setting.

*Suing the Client*

Douglas v Dyn McDermott Petrol, 144 F.3d 364 (5th Cir. La. 1998), any betrayal of client's confidences that breaches ethical duties of attorney places attorney's conduct outside Title VII's protection against retaliation by employer-client for activity in opposition to unlawful employment practice.

Seidle v. Putnam Investments, Inc., 147 F.3d 7 (1st Cir. Mass. 1998), in-house counsel's duty to hold information obtained from the client during the course of representation in the strictest confidence requires counsel's complaint against his former employer to be sealed in instances in which it may reveal confidential attorney-client information.

Kachmar v. SunGard Data Systems, Inc., 109 F.3d 173 (1997), Title VII claim brought by in-house counsel for sex discrimination permitted and potential threat to the attorney-client privilege not sufficient to dismiss case.

Bigda v. Fischbach Corp., 898 F. Supp. 1004 (S.D.N.Y. 1995) aff'd. 1996 WL 107342

Bigda v. Fischbach Corp., 898 F. Supp. 1004 (S.D.N.Y. 1995) aff'd. 1996 WL 107342 (2nd Cir. N.Y.), permitted breach of contract claim by in-house counsel and found no breach of fiduciary duty on in-house counsel for suing for breach of contract while still accepting pay check.

GTE Prods. Corp. v. Stewart, 653 N.E.2d 161 (1995), in-house counsel could maintain wrongful discharge claim but plaintiff failed to prove he receive constructive discharge prior to resigning.

General Dynamics Corp. v. Rose, 876 P.2d 487 (1994), in-house counsel allegedly fired for cumulative reasons, all of which violated fundamental public policies.

Chyten v. Lawrence and Howell Invs., 23 Cal. App. 4th 607 (1993), in-house counsel could enforce the termination provisions of his negotiated employment contract.

Nordling v. Northern State Power Co., 478 N.W.2d 498 (Mn. 1991), in-house counsel should not be precluded from maintaining an action for breach of a contractual provision included in an employee handbook, provided that the essentials of the attorney-client relationship are not compromised.

---

[Back to Top](#)

American Corporate Counsel Association. 1025 Connecticut Ave, NW, Suite 200, Washington, DC 20036-5425. 202/293-4103. [webmistress@acca.com](mailto:webmistress@acca.com). © [Copyright 1999](#) American Corporate Counsel Association. All rights reserved.