



the in-house bar association[®]

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Title: Ethical Issues for In-House Counsel

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**AMERICAN CORPORATE COUNSEL ASSOCIATION
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ETHICAL ISSUES FOR IN-HOUSE COUNSEL

HYPOTHETICAL #1

A shocking announcement about sharply lower earnings at Integrity Bank sends its stock plummeting and prompts the filing of 25 class actions, naming the Bank, its officers and directors, its auditors, its law firm and its underwriters. You decide to hold a beauty contest to select counsel for the Bank. You call your old friend Bill at Caldwell & Moore and tell him "We're interviewing three or four firms. I'd like to send you a copy of the complaint so that you can be prepared to tell our little committee what strategy you would pursue."

Sources

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1996)

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101

Restatement (Third) of the Law Governing Lawyers § 112 (American Law Institute, Preliminary Draft No. 13, 1997)

48 Rec. Ass'n B. City N.Y. 1003 (1991)

Kenneth D. Agran, *The Treacherous Path to the Diamond Studded Tiara: Ethical Dilemmas in Legal Beauty Contests*, 9 Geo. J. Legal Ethics 1307 (1996)

Griffen v. East Prairie, 945 F. Supp. 1251 (E.D. Mo. 1996).

Discussion

The beauty contest permits an exploration of a number of important ethical concepts. To what extent is pre-retention information deemed confidential? What steps should a lawyer participating in a beauty contest undertake to assure she is not conflicted out of alternative representations in the same matter by what she learns or provides during the beauty contest? To what extent will screening the lawyers who participated in the beauty contest from others in the firm be efficacious in solving the ethical problems presented?

HYPOTHETICAL #2

You are General Counsel of Magnum Industries which has just been sued by that famous class action law firm, Smith & Wesson in a huge product liability class action. As you are chatting about the case in the Magnum Industries executive dining room one of your colleagues says he recalls that Smith & Wesson regularly does legal work for Magnum's forest products subsidiary.

Sources

MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.13, 1.7 (1996)

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-310(B)

ABA Formal Op. 95-390 (1995)(Conflicts of Interest in The Corporate Family Context)

State Bar of California Rules of Professional Conduct Rules 3-600 and 3-310(B)

State Bar of California, Standing Committee on Professional Responsibility and Conduct Formal Op. 1989-113 (1989)

Carlyle Towers v. CrossLand, 944 F. Supp. 341 (D. N.J. 1996)

Gould v. Mitsui, 738 F. Supp. 1121 (N.D. Ohio 1990)

Discussion

This hypothetical facilitates a thorough review of the current terrain of the law governing conflicts. Students may start off suggesting they get a waiver; play acting a telephone conversation with either Lord Silversmith or Movies Unlimited quickly demonstrates how that won't work in the context of a takeover. Then the students will explore how to take on the new representation anyway. Target's not a client, the takeover is in the best interests of Movies Unlimited, complete the Movies Unlimited assignment quickly, screen the Miami office, fire the new partner, fire the client all may be suggested. Someone will raise the issue of how good it would have been if the firm had a prospective waiver from Movies Unlimited which will provide a chance to discuss the soundness of prospective waivers.

HYPOTHETICAL #3

You call up Caldwell & Moore to see if they will represent Magnum in this new class action. The partner at Caldwell & Moore says they will be glad to but they want Magnum to execute their usual form of waiver for any future conflicts. He tells you "My partners will kill me if we can never take a position adverse to Magnum again."

Source

ABA Formal Op. 93-372 (1993) (Waivers of Future Conflicts of Interest)

Discussion

This hypothetical presents directly the issue of prospective waivers, when they can be sought, how they should be structured, how likely they are to be successful.

HYPOTHETICAL #4

You are general Counsel of Colossus Corporation. A recent subpoena from the local U.S.

attorney has led you to investigate the lending practices of your subsidiary Consumer Finance Company. Your investigation reveals not only problematic conduct but additional discussions with the president of that subsidiary disclose that "We've always done business this way and we don't plan to make any changes now." Do you have any obligation to disclose to the U.S. attorney? Are the results of your investigation subject to the privilege?

Source MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.13, 1.6 (1996)
MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101
Restatement (Third) of the Law Governing Lawyers § 117A (American Law Institute, Preliminary Draft No. 13, 1997)

Discussion

This hypothetical raises several different issues. First, how one conducts internal investigations in a way that secures the necessary information without misleading the individual corporate employees as to whom you represent. Second, what are the contours of the obligation to take further action in the face of a refusal by a corporate official to follow your advice about matters likely to result in substantial injury to the client. Third, the duty and/or the right, if any, to report outside the corporation confidential information to prevent or rectify a client fraud. Whether that right or duty is any different in the context of a regulated industry may also be explored here.

HYPOTHETICAL #5

You are General Counsel to a major corporation headquartered in California. You employ 14 lawyers. You receive in the mail a letter from the disciplinary board asking you to list all your attorneys in the San Francisco office and their dates of admission to the California bar. An interoffice memo from you discloses that only 4 of your colleagues are admitted in California.

Source

MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 (1996)
Unauthorized Practice: Ethical Implications for In-house Counsel, ACCA DOCKET, p. 58 (Fall 1994) (includes comments from then California, General Counsel regarding attorneys not licensed in California practicing law.)

Discussion

This hypothetical addresses the issues relating to admission of in-house lawyers in the state where they are conducting business. Are they violating unauthorized practice of law statutes? Is there an exemption for in house counsel? Should there be? How does this impact issues like maintaining the attorney-client privilege between in-house counsel and clients?

HYPOTHETICAL #6

The case is a pharmaceutical products liability action. You are General Counsel to the drug company. All documents relating to toxicity of all ingredients in the allegedly offending drug are requested. Your client says it will be far too burdensome to produce those documents from the files of all drugs it produces. The client and you agree to object to the production on

the grounds that it would be too burdensome. After you get outside counsel to file this objection, the client tells you she possesses a damaging document relating to toxicity of one of the ingredients but "fortunately" she says "the document doesn't come from the files for this drug; it's from a warehouse in Germany."

Source

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(d) (1996)

FED. R.CIV. P. 26(g)

Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 858 P.2d 1054 (1993)

Lawrence J. Fox, *Why Do We Call It Discovery?*, LITIGATION, Spring 1996, at 1.

Stuart Taylor, Jr., *Sleazy in Seattle*, THE AMERICAN LAWYER, Apr. 1994, at 74-78.

Discussion

This hypothetical addresses appropriate discovery conduct. Is it enough to file an objection to a discovery request? Does that shift the burden to the other side or must the objecting party file a motion? What if you object to looking in a warehouse because it is too burdensome and then discover a document that was in that warehouse? What if the discovery of the document comes first? Can you refuse to produce and file the same objection?

HYPOTHETICAL #7

You have been acting as supervising counsel for a particularly nasty consumer class action brought against your telecommunications employer during which you have not hesitated to disparage the ethics of opposing counsel and his law firm to your clients. Your secretary tells you one day that she heard a rumor that the trusted associate general counsel who has been working on this case with you from the beginning is talking to plaintiff's counsel about possible employment.

Source

MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.6(a), 1.9(b), 1.10(a) (1996)

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B)(1)-(2)

Restatement (Third) of the Law Governing Lawyers § 204 (American Law Institute, Preliminary Draft No. 13, 1997)

ABA Formal Op. 96-400 (1996) (Job Negotiations with Adverse Firm or Party)

LAWRENCE J. FOX, MY LAWYER SWITCHED SIDES; DON'T WORRY, THERE'S A SCREEN, LEGAL TENDER: A LAWYER'S GUIDE TO HANDLING PROFESSIONAL DILEMMAS 122-125 (ABA/Section Litigation 1995)

Stanley v. Richmond, 41 Cal. Rptr. 2d 768 (Cal. App. 1995)

Discussion

Lawyers switching firms and employers has become an increasingly common phenomenon. Often the proposed switch is to a law firm or entity on the other side? Are such moves ethically permissible? At what point in the courtship must the possible employment be disclosed? Can or should screening of the moving lawyer be permitted to solve the conflict? Does it make any difference what the switching lawyer knows?

HYPOTHETICAL #8

You are defending the deposition of in house counsel who participated in negotiations over the purchase of a subsidiary that is now the subject of bitter litigation. Opposing counsel asks in house counsel what he reported to the CEO of the company after a pivotal meeting in which general counsel was the only representative of your client present.

Source

Model Rules of Professional Conduct Rule 1.6 (1996)

Model Code of Professional Responsibility DR 4-101

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)

Kuehne, *Protecting the Privilege in the Corporate Setting: Conducting and Defending Internal Corporate Investigations*, 9 *St. Thomas L. Rev.* 651 (1997)

ABA Resolution on attorney-client privilege, August 1997

Georgia-Pacific v. GAF Roofing, 1996 U.S. Dist. LEXIS 671 (S.D. N.Y. 1/25/96)

In Re Kidder Peabody Sec. Litig., 168 *F.R.D.* 459 (S.D. N.Y. 1996)

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).

U.S. v. Chevron, 1996 U.S. Dist. Lexis 4154 (N.D. Cal. 1996) (court held that company had burden to prove documents privileged because they were not purely legal advice but an amalgamation of business and legal advice).

Discussion

The privilege is always under attack, in particular the privilege between in house counsel and client. This hypothetical alerts lawyers to the issue and permits a discussion of steps in-house counsel can take to make it more likely the privilege will be sustained.

HYPOTHETICAL #9

Your client is fed up. This is the fifth time this particular plaintiff's lawyer has brought an action on behalf of a dealer. He turns to you and says "I'll pay this plaintiff \$1,000,000, and you \$100,000, if you will just guarantee me that lawyer won't sue us again."

Source

MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6(b) (1996)

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108(B)

ABA Formal Op. 93-371(1993) (*Restrictions on the Right to Represent Clients In the Future*)

LAWRENCE J. FOX, *MAKE HIM GO AWAY, LEGAL TENDER: A LAWYER'S GUIDE TO HANDLING PROFESSIONAL DILEMMAS* 281-289 (ABA/Section Litigation 1995)

Discussion

no notes

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