Wednesday, October 22
9:00 am-10:30 am

801 Ethics SuperSession

Susan Hackett
Senior Vice President and General Counsel
Association of Corporate Counsel

Milton C. Regan Jr.
Professor of Law and Co-Director
Georgetown Law School

Faculty Biographies

Susan Hackett

Susan Hackett is the senior vice president and general counsel of the Association of Corporate Counsel (ACC), based in their Washington, DC offices. While she has held a number of roles and responsibilities since joining ACC, she is currently focused on ACC's advocacy and CLO segment efforts, including ACC's amicus program, attorney-client privilege protection, the development of in-house legal ethics and professionalism resources, ACC's Value Challenge initiative (to reconnect value to the cost of legal services), testimony and representation before decision-making authorities, in-house corporate responsibility initiatives, multijurisdictional practice (MJP) reform, and civil justice reform initiatives. Ms. Hackett also leads ACC's pro bono and diversity initiatives for corporate law departments, partnering with the Pro Bono Institute to create and implement Corporate Pro Bono (CPBO.org) and with Street Law, Inc., to create and implement the ACC/Street Law Corporate Legal Diversity Pipeline program.

Before joining ACC, she was a transactional attorney at Patton Boggs.

Ms. Hackett is a graduate (BA) of James Madison College at Michigan State University and a graduate of the University of Michigan Law School.

Milton C. Regan Jr.

Milton C. Regan Jr. is professor of law and co-director of the center for the study of the legal profession at Georgetown University Law Center. His work focuses on ethics, law firms, corporations, and the legal profession.

Before joining Georgetown, Professor Regan worked as an associate at Davis Polk & Wardwell, and clerked for Justice William J. Brennan Jr. on the US Supreme Court and then-Judge Ruth Bader Ginsburg on the US Court of Appeals for the DC Circuit.

Professor Regan participates in a wide range of both academic and professional conferences and other events. He is the author of *Eat What You Kill: The Fall of a Wall Street Lawyer*, co-author of the casebook *Legal Ethics in Corporate Practice*, and the author of numerous articles and book chapters.

ACC Association of Corporate Counsel

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ETHICAL ISSUES FOR CORPORATE COUNSEL

Problem Discussion Material/Analysis

Created for ACC's 2008 Annual Meeting

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The Association of Corporate Counsel (ACC) has created this DVD to provide corporate counsel with a tailored and unique teaching tool to use when discussing the best navigation of difficult ethics issues that arise in the corporate in-house context. If you would like a presentation of this DVD to your law department or group by a representative of ACC, please send a request to advocacy@acc.com and a member of the ACC Advocacy Department will contact you for more information.

Also, for his many contributions and valuable insights on this project, ACC thanks:

Mitt Regan
Professor and Co-Director of
Georgetown University Law School's
Center for the Study of the Legal Profession

Ethical Issues for Corporate Counsel

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Inside Outsourcing

Discussion

1. Will Acme will be assisting the unauthorized practice of law by outsourcing this work to the Caribbean company?

Under the American Bar Association Model Rules, a person who is a member of the bar in India but of none in the United States is considered a "foreign lawyer." That term denotes "a person who has not been licensed generally to practice law by any state, territory, or commonwealth of the United States, but who is authorized to practice in a recognized legal profession by a jurisdiction elsewhere." ABA Formal Opinion 01-423 (2001), n. 3. By contrast, New York treats a foreign lawyer not admitted to practice in New York or any United States jurisdiction as a "non-lawyer." New York State Bar Association Committee on Professional Ethics, Opinion 721 (1999). Florida regards a non-lawyer as any person who is not a member of the Florida Bar. Professional Ethics of the Florida Bar Proposed Advisory Opinion 07-02 (January 8, 2008).

With limited exceptions, a person must be a member of the bar in a jurisdiction in order to practice law within it. Whether they are regarded as "foreign lawyers" or "nonlawyers," none of the persons whom the Caribbean company will use are members of the bar in any United States jurisdiction, and none qualify for any exception to the requirement of bar membership under Rule 5.5(c)(temporary practice) or Rule 5.5(d)(in-house counsel).

ABA Model Rule 5.5(a) says that a lawyer shall not assist another person in practicing law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction. By hiring this Caribbean company to do extensive work in defending Acme in its lawsuit with Fontana, will Acme be assisting this company in the unauthorized practice of law in the United States?

Acme will not be in violation of Rule 5.5(a) if it takes certain steps in its use of the Caribbean company to perform work for the company. The ABA and the Florida, New York City, Los Angeles County, and San Diego County bar associations have addressed this issue. *See* ABA Formal Opinion 08-451: Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services (August 5, 2008); Professional Ethics of the Florida Bar Proposed Advisory Opinion 07-02 (January 8, 2008); Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 2006-03, August 2006; Los Angeles County Bar Association Professional Responsibility and Ethics Committee, Opinion No. 518, June 19, 2006; San Diego County Bar Association, Ethics Opinion 2007-01.

All these opinions conclude that outsourcing work to persons not admitted to practice law in any United States jurisdiction does not constitute assisting the unauthorized practice of law as long as a lawyer admitted to practice in the relevant

jurisdiction supervises and takes responsibility for the work of the contractors. In such cases, the contractors are not engaged in the practice of law, but are performing work that assists the lawyer in practicing law. The lawyer then "exercise[s] independent judgment in deciding how and whether to use [the contractors' work] on the client's behalf." San Diego County Bar Association, Ethics Opinion 2007-01, at 4. *See also* ABA Formal Op. 08-451, at 6 (ordinarily individual not admitted to practice law in jurisdiction may work with lawyer who is, "provided that the lawyer remains responsible for the work being performed").

In order to avoid violating Rule 5.5(a), the Acme legal department therefore needs to ensure that someone in the department will supervise and monitor the work that the Caribbean company performs. The New York City Bar Opinion suggests that a lawyer should take several steps in order to fulfill this duty: (1) obtain background information about any company employing or retaining the person performing the work, and review that person's professional resume; (2) check references; (3) interview the person in advance to determine his or her suitability for the assignment; and (4) communicate with the person during the assignment to ensure that he or she fully understands it and is performing as requested. Formal Opinion 2006-3, at 5. The Bar stresses that a lawyer must be especially "vigilant and creative" in fulfilling her supervisory responsibility when the person performing the work is located overseas. *Id.*

2. Should Acme accept the conditional refund provision in the contract?

For work by a contractor to constitute assistance to a lawyer in practicing law, rather than the practice of law itself, a lawyer admitted in the relevant United States jurisdiction must retain final discretion over the work product of the contractor. As the San Diego County Bar Association has stated, "the greater the independence of the non-lawyer in performing functions, the greater the likelihood that the non-lawyer is practicing law." Ethics Opinion 2007-1, at 4.

Similarly, as the Los Angeles County Bar Association has noted, "if a term of the agreement between the attorney and the [contractor] Company delegates to Company a decision-making function that is non-delegable, then the attorney may be assisting Company in the unauthorized practice of law or violating the ethical duties of competence and obligation to exercise independent professional judgment." Opinion No. 518, at 9.

Opinion No. 518 specifically addresses a contract that requires an attorney to accept and use any work product of the contractor "as is" and without change, or to obtain the contractor's approval of any changes to it. It concludes that such a term is an improper delegation of the attorney's "fundamental obligation" to exercise independent professional judgment on behalf of the client. *Id.* An attorney therefore cannot agree to any contractual provision that gives the contractor "control over the final work product produced for the client." *Id.* at 10.

Thus, no matter how attractive it might be to have the right to a refund if Acme does not prevail in the Fontana litigation, the company cannot obtain this right at the cost of forgoing the ultimate authority over the work that is generated in connection with the case. Doing so would violate the Acme lawyers' obligation to the company to exercise their best professional judgment on behalf of the company. It also would mean that Acme would be assisting the Caribbean company in the unauthorized practice of law in the United States.

3. Should Lauren serve as the supervising attorney for the work of the Caribbean company?

A lawyer has the duty to act competently. Model Rule 1.1. He or she may enlist the assistance of other persons, either lawyers or non-lawyers, in complying with this obligation. *See* San Diego County Bar Association, Ethics Opinion 2007-1, at 6 ("An attorney may, consistent with the duty of competence, enlist the services of others when they are unfamiliar with the area of law at stake"). In doing so, however, the lawyer assumes the responsibility to supervise the person lending assistance to ensure that this person's conduct satisfies the lawyer's professional obligations. *See* Model Rule 5.1(b)(duty to supervise subordinate lawyer); Model Rule 5.3(b)(duty to supervise non-lawyer).

The question in this situation is whether Lauren has enough familiarity with intellectual property law to provide adequate supervision over the work of this Caribbean company. She has admitted that "I don't know much about IP law." The San Diego County Bar Association has emphasized that obtaining work product from a contractor experienced in intellectual property litigation does not satisfy a lawyer's duty to act competently. "To satisfy that duty," the Bar says, "an attorney must be able to determine for himself or herself whether the work under review is competently done. To make such a determination, the attorney must know enough about the subject in question to judge the quality of the work." Ethics Opinion 2007-1, at 7. The attorney may not rely on a contractor to evaluate the quality of its own work. "The duty to act competently requires informed review, not blithe reliance." *Id.*

Comment 2 to Model Rule 1.1 says that a lawyer need not have special training or prior experience to handle legal matters of a type with which she is unfamiliar. The lawyer may be able to provide adequate representation "through necessary study"(Comment 2), when "the requisite level of competence can be achieved by reasonable preparation" (Comment 4), or by associating with a lawyer who is familiar with the field (Comment 2).

Whether Lauren can adequately supervise the work of the Caribbean company will therefore depend upon whether she will be able in a relatively brief period of time to learn enough about intellectual property law and litigation to provide informed review of the contractor's work. If not, she would be violating her duty to provide competent services to Acme. In addition, the absence of adequate supervision of the contractor

would mean that Acme was assisting the Caribbean company in the unauthorized practice of law by outsourcing work to that company.

It may be difficult for Lauren to do a crash course to get up to speed in intellectual property, particularly in the context of ongoing litigation, on top of her other responsibilities. If this is the case, the question is whether you or Mark have enough familiarity with the field to provide adequate supervision of this Caribbean company. If not, the only other option would be to retain an intellectual property expert to do so – but it was the desire to avoid retaining an outside law firm that led to considering outsourcing in the first place. Ultimately, outsourcing the work in this situation may simply not be a viable option.

This potential problem illustrates that a legal department will need to think carefully when contemplating outsourcing legal work overseas. The department will be responsible for the quality of the work, and must be able to satisfy itself that it can provide meaningful review of it. For small departments, this may mean that outsourcing work in a specialized field may not be feasible. It may be more appropriate to consider using contractors for work that is more generic or that recurs with some frequency, with which the lawyers are more familiar.

4. Assume that Acme proceeds with the arrangement. Aside from provisions dealing with performance and cost of the services, are there any other subjects Acme should make sure that the contract addresses?

Acme should: (1) ensure that the Caribbean company protects from disclosure Acme confidential information that the company provides to the contractor and (2) determine if the Caribbean company has any conflict of interest by virtue of current or former work for any parties adverse to Acme.

Confidentiality. Acme's attorneys have an obligation to preserve Acme's attorney-client privilege, as well as to prevent the disclosure of confidential information under Model Rule 1.6. They do not violate these obligations by sharing privileges or confidential information with agents working on their behalf. In Compulit v. Bantec, Inc., 177 F.R.D. 410 (W.D. Mich. 1977), the court held that a law firm could use an outside document copy service or hire an independent document copy service to copy privileged communications without losing abrogating the privilege. Likewise, the court held that a law firm does not waive its client's privilege by contracting with an independent contractor in order to provide a service that the law firm regards as necessary in order to represent its clients effectively.

The contract between Acme and the Caribbean company should spell out the company's obligation to protect privileged and confidential information from disclosure. ABA Formal Op. 08-451 says that "[w]ritten confidentiality agreements . . . are strongly advisable in outsourcing relationships."*Id.* at 5. It would be useful to specify precisely in the contract which material is covered by this obligation. This is because some countries afford less protection to communications with counsel than does United States. Relevant

to this case, India does not recognize the attorney-client privilege for communications between in-house counsel and company officials and employees. Timothy P. Mahoney, *Drawbacks to Outsourcing Subjective Document Review Projects to India*, Metropolitan Corporate Counsel, March 2007, p. 62. Acme will need to ensure that the Caribbean company is aware of the protected nature of these communications in the United States, and that Acme expects the contractor to treat them accordingly. The contract may wish to specify remedies or damages for breach of this obligation.

Conflicts of Interest. Because foreign conflict of interest rules may differ from those in the United States, Acme must first determine if the Caribbean company has any current or former clients whose interests would be adverse to Acme under the state equivalents of ABA Model Rules 1.7 and 1.9, respectively. While one way to conceptualize this concern is that lawyers may be held responsible for non-lawyers' conflicts of interest, Acme's concern is less this than it is the practical fear that work for a party adverse to Acme may increase the likelihood that the company's confidential information will be disclosed to an adversary or otherwise used against it. The New York City Bar recommends that a lawyer outsourcing services ask the intermediary hiring the personnel "about its conflict-checking procedures and about how it tracks work performed for other clients." Formal Opinion 2003-3, at 6. *See also* ABA Formal Op. 08-451 at 5.

Acme also should specify in the contract with the Caribbean compay that it must abide by United States conflicts rules, and may want to spell out in the contract the specific terms of the state equivalents of Model Rules 1.7 and 1.9 with which the contractor must comply.

5. Does Acme have a cause of action against Stern & Wright for the Caribbean company's disclosure of the Acme documents to Fontana?

Stern & Wright has an ethical obligation at common law to protect from disclosure any documents subject to attorney-client privilege or work product protection. The law firm continued to have this obligation when it outsourced the task of document review to the Caribbean company. The issue is whether Stern & Wright violated this duty. If so, the firm would be liable for malpractice.

Section 405(2) of the Restatement of Agency provides that an agent such as Stern & Wright is liable to its principal if "having a duty to appoint or to supervise other agents [such as the Caribbean company], he has violated his duty through lack of care or otherwise in the appointment or supervision," and the principal thereby is harmed. In other words, the firm is not vicariously liable for the Caribbean company's disclosure of confidential information, but can be liable if the disclosure occurred through Stern & Wright's negligence.

The firm could have been negligent, for instance, by failing adequately to inform the Caribbean company that the contractor was required to keep the Acme documents confidential, or by failing to provide supervision sufficient to ensure that the Caribbean

company would meet this obligation. Model Rule 5.3(b) says that a lawyer with direct supervisory authority over a non-lawyer [*i.e.*, someone not subject to the Model Rules] must make reasonable efforts to ensure that this person's conduct is "compatible with the professional obligations of the lawyer." The Rule is the basis for discipline, not legal liability, but evidence of its violation may be introduced as evidence on the question of breach of the duty of care.

In determining whether Stern & Wright was negligent, the standard is what steps a reasonable firm would have taken in order to satisfy its obligations. One source of guidance on this is the measures described above by the Opinion of the New York City Bar, which includes determining a contractor's suitability for an assignment and fully communicating what the matter entails. Formal Opinion 2006-3 at 5. The contract between the firm and the Caribbean company should have explicitly required the contractor to abide by the privilege and work product provisions of the relevant United States jurisdiction. Given the possible difference in the scope of protection in the United States and the Bristol Isles, Acme can argue that the contract also should have described specifically what information was to be protected from disclosure.

The New York City Bar opinion suggests including a provision in the contract dealing with remedies in the event of a breach confidentiality, a suggestion with which the Florida Bar has concurred. In addition, the Florida Bar has stated that "[a] law firm should obtain prior client consent to disclose information [to a contractor] that the firm reasonably believes necessary to serve the client's interests."

Finally, Stern & Wright should have engaged in some periodic review to ensure that the contractor was following these requirements. As the New York City Bar Opinion emphasizes, a lawyer must be especially "vigilant and creative" in fulfilling her supervisory responsibility when the person performing the work is located overseas. *Id.* In particular. Stern & Wright should not have left the final decision about which documents to produce to the Caribbean company. At least one lawyer in the firm should have reviewed the contractor's determination of which documents would be produced and which were protected from disclosure.

6. Does Acme have a cause of action against Stern & Wright for failing to inform the company that it was outsourcing document review to the Bristol Isles?

Acme may argue that Stern & Wright's failure to notify it that the firm was outsourcing document review: (1) breached the firm's duty to it, and (2) caused injury because Acme would have objected to the use of this Caribbean company, which would have prevented the disclosure of privileged documents that occurred.

ABA Formal Opinion 88-356 (1988) provides that a lawyer ordinarily need not disclose to a client the use of a temporary lawyer "where the temporary lawyer is working under the direct supervision of a lawyer associated with the firm." *Id.* at 8. By contrast, such disclosure is required when the temporary lawyer is "performing independent work for a client without the close supervision of a lawyer associated with the law firm." *Id.* This is because the client by hiring the law firm can't be deemed to have consented to the involvement of a lawyer independent of the firm.

ABA Formal Op. 08-451 indicates that Formal Op. 88-356 does not apply to outsourcing because "the relationship between the firm and the individuals performing the services is attenuated[.]" *Id.* at 5. In this situation, says the ABA, "no information protected by Rule 1.6 may be revealed without the client's informed consent." *Id.* This effectively requires the lawyer to notify the client before engaging in outsourcing.

The New York City, Los Angeles County, San Diego County, and Florida Bar Associations have all adopted ethics opinions that provide a more complex standard for disclosure. In New York, the foreign lawyers retained by the Caribbean company would be considered "non-lawyers." The New York City Bar has opined that a firm may have a duty to disclose the fact that it has outsourced services to such persons if: (1) the non-lawyers will play a significant role in the matter, *e.g.*, "several non-lawyers are being hired to do an important document review"; (2) non-lawyers will receive client confidences and secrets; (3) the client expects that only law firm personnel will be handling its matter; or (4) the firm will be billing non-lawyers to the client on a basis other than cost. Formal Opinion 2006-3, at 8.[1]

Persons retained by the Caribbean company were responsible for reviewing Acme documents to identify which should be produced and which were protected from disclosure. This would seem to fall within the New York City Bar's reference to the conduct of "an important document review" that would require notifying the client. One relevant consideration is the course of dealing between Acme and Stern & Wright. It has become increasingly common for firms to outsource document review responsibilities. If Stern & Wright has done this regularly in the past without first notifying Acme, and Acme later has learned of and failed to object to it, the company may be deemed to ratify it.

The Los Angeles and San Diego County Bar Associations have adopted the same standard to determine when lawyers have a duty to notify a client before outsourcing legal work. Such notification is required if the outsourcing represents a "significant development" in the matter. In evaluating if this case the case, a firm should consider whether: (1) responsibility for overseeing the matter is being changed; (2) the person to whom the work is outsourced "will be performing a significant portion or aspect of the work"; and (3) staffing of the matter has been changed from what was represented or agreed to by the client. Unlike the New York City Bar Opinion, neither the Los Angeles or San Diego Opinion indicates whether document review constitutes a "significant" activity.

[1] By contrast, the New York City Bar has stated that a firm must disclose to the client in every instance the use of temporary contract lawyers. The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 1989-2. The New York State Bar has opined that disclosure of the use of temporary lawyers is not required in every case. The use of a lawyer whose work "is limited to legal research or tangential matters," for instance, need not be disclosed. New York State Bar Association Opinion 715 (1999). Disclosure may be required, however, if a contract lawyer makes strategic decisions or plays a role in the matter that the client would expect of a senior lawyer in the firm.

The San Diego County Bar Opinion goes on to say that "if the service is not a service that is within the client's reasonable expectation that it will be performed by the attorney," the attorney need not notify the client beforehand that the service is being outsourced, absent any other compelling consideration. As with analysis under the New York City Bar Opinion, the course of dealing between Acme and Stern & Wright will be relevant. Also relevant will be whether Acme has explicitly or implicitly consented to the practice of outsourcing document review by the other law firms that do work for the company.

Finally, the Florida Bar has said that whether a client should be informed of the use of an overseas contractor depends on "factors such as whether a client would reasonably expect the lawyer or law firm to personally handle the matter and whether the non-lawyers will have more than a limited role in the provision of the services." The Bar's statement that a law firm should obtain prior client consent to disclose client information, however, effectively means that in most instances a firm will need to notify the client of the outsourcing arrangement.

Stern & Wright may argue that, notwithstanding the criteria set forth in these Bar Opinions, Acme was on notice that the firm would outsource the document review by virtue of the provision in the engagement letter that stated that Stern & Wright would use nonlawyers to perform work where doing so would be efficient. Acme can argue that it understood this provision to apply to nonlawyer employed by the firm, since it had confidence that those employees would be closely supervised by lawyers. Outsourcing the work to another country, the company can claim, does not provide such assurance.

How this issue is resolved will turn on testimony about the parties' understanding at the time the provision was negotiated. The lesson for inside counsel is that it should make clear to the firms that it uses whether cost-saving measures may reasonably include outsourcing work overseas without first notifying the company.

7. Is Stern & Wright responsible for a conflict of interest because the Caribbean company was doing work for Acme and Fontana at the same time?

Model Rule 5.3(b) says that a lawyer with direct supervisory authority over a non-lawyer [*i.e.,* someone not subject to the Model Rules] shall make reasonable efforts to ensure that this person's conduct is compatible with the professional obligations of the lawyer. The fact that the Caribbean company's simultaneous work for Acme and Fontana was not a conflict under the ethics rules of the Bristol Isles therefore does not automatically defeat a claim that there was a conflict. It the ethics rules of the jurisdiction in which *the supervising lawyer* is admitted to practice that is relevant, not the country in which the contract lawyer is admitted to practice. This is consistent with the idea that it is the firm's lawyers, not the contractor, who are performing legal services for the client and must abide by their ethical obligations in doing so.

As with the claim that Stern & Wright is liable for the Caribbean company's disclosure of privileged information, the claim that the firm is responsible for the Caribbean company's violation of the relevant United States conflict rule will depend on whether the firm was negligent. A reasonable lawyer would have explicitly described the scope of the United States conflict rules and would have requested an adequate investigation to determine if the Caribbean company was performing or had performed any work for Fontana. Stern & Wright also should have satisfied itself that the Caribbean company had in place an effective system for conducting a conflicts check before accepting any new work.

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Additional Resources

Ethical Rules

ABA Model Rule 1.1: Competence

ABA Model Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

ABA Model Rule 1.4: Communication

ABA Model Rule 1.6: Confidentiality of Information

ABA Model Rule 1.7: Conflict of Interest: Current Clients

ABA Model Rule 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers

ABA Model Rule 5.3: Responsibilities Regarding Nonlawyer Assistants

ABA Model Rule 5.5: Unauthorized Practice of Law: Multijurisdictional Practice of Law

Ethics Opinions

ABA Formal Opinion 08-451: Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services, August 5, 2008

ABA Formal Opinion 88-356: Temporary Lawyers, December 16, 1988

Professional Ethics of the Florida Bar Proposed Advisory Opinion 07-02, January 8, 2008

Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 2006-03, August 2006

Los Angeles County Bar Association Professional Responsibility and Ethics Committee, Opinion No. 518: Ethical Considerations in Outsourcing of Legal Services, June 19, 2006

San Diego County Bar Association, Ethics Opinion 2007-01

Cases

Compulit v. Bantec, Inc., 177 F.R.D. 410 (W.D. Mich. 1977)

Restatements

Restatement (Third) of the Law Governing Lawyers §4: Unauthorized Practice by a Nonlawyer

Restatement (Third) of the Law Governing Lawyers §11: A Lawyer's Duty of Supervision

Restatement (Third) of the Law Governing Lawyers §60: A Lawyer's Duty to Safeguard Confidential Client Information

Restatement (Third) of the Law Governing Lawyers §121: The Basic Prohibition of Conflicts of Interest

Restatement (Third) of the Law Governing Lawyers §128: Representing Clients with Conflicting Interests in Civil Litigation

Restatement (Third) of the Law Governing Lawyers §132: A Representation Adverse to the Interests of a Former Client

Articles

Mary C. Daly & Carole Silver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services,* 38 Geo. J. Int'l. Law 401 (2007)

Joshua A. Bachrach, *Offshore Legal Outsourcing and Risk Management: Proposing Prospective Limitation of Liability Agreements Under Model Rule 1.8(h),* 21 Geo. J. Legal Ethics 631(2008)

K. William Gibson, *Outsourcing Legal Services Abroad,* 34 Law Practice 47, July/August 2008

Ken Wollins, *Outsourcing Legal Services Overseas,* 17 Business Law Today, November/December 2007: http://www.abanet.org/buslaw/blt/2007-11-12/wollins.shtml

Timothy P. Mahoney, *Drawbacks to Outsourcing Subjective Document Review Projects to India*, Metropolitan Corporate Counsel, March 2007, p. 62.

Marcia L. Proctor, *Considerations in Outsourcing Legal Work,* Michigan Bar Journal, September 2005, p. 20.

Lexadigm Solutions, LLC, *Practical and Ethical Considerations of Legal Outsourcing*, February 20, 2007, http://www.lexadigm.com/docs/Practical%20and%20Ethical%20Considerations%20of%20Legal%20Outsourcing_Lexadigm.pdf

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ACC Articles

Ann Rose Stouthuysen, *Belgium: Managing the Legal Risks in Outsourcing Deals,* ACC Docket (October 2006), p. 96

Michael Hintze & Michael Fekete, *Keeping Secrets,* ACC Docket (November/December 2004), p. 45

The Brave New World of Global Outsourcing, February 2003, *available at* http://www.acc.com/protected/pubs/docket/fm03/brave2.php

ACC InfoPAKs

Outsourcing Transactions InfoPak 2006, available at http://www.acc.com/infopaks/outsourcing/transactions.php

All in the Family?

Discussion

1. Solutions argues that the presence of OfficeCo CEO Grant at the meeting means that information regarding Parent's analysis of options for OfficeCo was shared between Parent and OfficeCo. That suggests that the Parent legal department was representing both entities in the matter, not just Parent.

-- In order to avoid the claim that it may not invoke the privilege, Parent must establish that communications with Carol were for the purpose of providing legal advice only to Parent to help it decide what to do with OfficeCo. Parent's interest in that matter was separate from OfficeCo's, and Carol had an attorney-client relationship only with Parent with respect to it.

-- Claiming that Carol's communications on legal exposure at the meeting were solely in her capacity as counsel for Parent is undercut by Grant's presence at the meeting. Grant is the CEO of OfficeCo. If OfficeCo were not regarded as a joint client, then communications in Grant's presence would constitute a waiver of Parent's privilege. Thus, Solutions has a strong claim based either on a joint client theory or on waiver.

-- What could you have done to avoid this? Invite Grant to the meeting to provide a briefing on OfficeCo's business prospects, along with answers to questions that the others may have. Excuse him from the discussion, however, when it turns to the best course of action for OfficeCo based on Parent's interests.

2. Solutions can argue that even if Grant were not at the meeting, the presence of Tom and Megan at the meeting, both of whom were directors of OfficeCo, means that information regarding Parent's analysis of options for OfficeCo was shared between Parent and OfficeCo. That suggests that the Parent legal department was representing both entities in the matter, not just Parent.

-- *Teleglobe* makes clear that in cases of persons holding dual parent-subsidiary positions the *capacity in which the person is acting* determines whether a communication to that person constitutes a disclosure to the parent or the subsidiary. In this case, Tom and Megan were acting in their capacities as officers of Parent. They were deliberating about what course of action was in Parent's best interest, not about what would be best for OfficeCo. The communications therefore were confined to persons acting on behalf of Parent, which confirms that they were solely for the benefit of Parent.

-- What can you do to minimize the risk that this claim will be the basis for finding that parent and subsidiary were joint clients? Make clear at the meeting that Tom and Megan are participating in their capacities as officers of Parent.

3. Solutions may claim that the Parent legal department provides all the legal services for its subsidiaries. Carol therefore represented OfficeCo on an ongoing basis, which made Parent and OfficeCo her joint clients.

-- A member of the Parent legal department can represent a subsidiary on a variety of discrete matters without the subsidiary becoming her client with respect to everything she does. A parent may have legal concerns and interest distinct from those of the subsidiary, and can consult its legal department with respect to them. The communications that Carol had with Tom and Megan were to advise only Parent with respect to its deliberations about OfficeCo, and Parent was her only client on that matter.

-- What can you do to minimize the risk that this claim will be the basis for finding that parent and subsidiary were joint clients? Make clear at the meeting that you are there to advise Parent on the legal ramifications of its strategy with respect to OfficeCo. Perhaps there are other measures that the legal department could adopt on an ongoing basis that would serve to distinguish among its work for Parent, for OfficeCo, and for both entities.

4. Solutions can argue that Carol represented OfficeCo with respect to the establishment and operation of its legal compliance program. This means that Parent and OfficeCo were joint clients with respect to legal compliance. Any communications by Carol regarding OfficeCo's potential legal exposure therefore are communications made in the course of this joint representation. Once OfficeCo, through Solutions, brings a claim against Parent, Parent is unable to assert any privilege against OfficeCo with respect to these communications.

-- Carol represented OfficeCo in ensuring that its compliance program was effective and consistent with Parent's overall compliance system. Carol also could advise OfficeCo with respect to any potential litigation that it might face. Her assessment of OfficeCo's potential legal risks for Tom and Megan, however, was provided for the purpose of aiding Parent in making a business decision about what to do with OfficeCo. That is a different matter, and one in which Parent was her sole client.

-- What can you do to minimize the risk that this claim will be the basis for finding that parent and subsidiary were joint clients? Make clear at the meeting that you are there to advise Parent on the legal ramifications of its strategy with respect to OfficeCo.

5. Solutions will note that Parent and OfficeCo were Carol's joint clients in the negotiations over the sale of OfficeCo to Solutions. Any communications that related in any way to the sale were made in the course of this joint representation. Such communications included discussions of OfficeCo's potential legal exposure, since this was relevant to the terms of the sale that Parent proposed. Now that OfficeCo, through Solutions, has brought a claim against Parent, Parent may not assert any privilege against OfficeCo with respect to these communications.

-- Parent will need to argue that the fact that it and OfficeCo were Carol's joint clients in the negotiations with Solutions does not mean that they were her joint clients in the discussions about what Parent should do with OfficeCo. Solutions could claim, however, that the dual representation in the negotiations is a strong indication that Parent didn't distinguish between itself and OfficeCo as clients throughout the entire process of determining and implementing a course of action.

-- As with respect to the other legal work it does for OfficeCo, Parent can distinguish joint representation in the negotiations from representation solely of Parent in Parent's earlier deliberations. Because both matters deal with the sale of OfficeCo, however, it may be more difficult to distinguish them than it is to distinguish, say, work on a compliance program and Parent's deliberations.

-- **What could you have done?** At the point at which Parent decides to sell OfficeCo, it could have secured separate outside representation for the subsidiary. This would make clear that Carol is representing only Parent's interests in the negotiations, and thus make more difficult any claim of joint representation with respect to the deliberations about what to do with OfficeCo.

All in the Family?

Additional Resources

Ethical Rules

ABA Model Rule 1.7

ABA Model Rule 1.9

ABA Model Rule 1.13: Organization as Client

Ethics Opinions

ABA Formal Opinion 95-390: Conflicts of Interest in the Corporate Family Context

Cases

Teleglobe Commun. Corp. v. BCE, Inc., 493 F.3d 345 (3d. Cir. 2007)

Bowles v. National Association of Home Builders, 224 F.R.D. 246 (D.D.C. 2004)

Transmark, USA, Inc. v. Dept. of Insur., 631 So.2d 1112 (Fla Ct. App., 1st Dist. (1994)

United States v. Schwimmer, 892 F.2d 237 (2d Cir. 1989)

Polycast Technology Corp. v. Uniroyal, Inc., 125 F.R.D. 47 (S.D.N.Y. 1989)

Medcom Holding Co. v. Baxter Travenol Laboratories, Inc., et al., 689 F.Supp. 841 (N.D. Ill. 1988)

Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985)

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

United States v. American Telephone & Telegraph Co., 86 F.R.D. 603 (D.D.C. 1980)

Restatements

Restatement (Third) of the Law Governing Lawyers §68: Attorney-Client Privilege

Restatement (Third) of the Law Governing Lawyers §73: The Privilege for an Organizational Client

Restatement (Third) of the Law Governing Lawyers §76: The Privilege in Common Interest Arrangements

Articles

Robert B. Cummings, *Get Your Own Lawyer! An Analysis of In-House Counsel Advising Across the Corporate Structure After Teleglobe,* 21 Geo. J. Legal Ethics 683 (2008)

Jeffrey W. Rubin, *When Parent and Subsidiary Are Public,* New York Law Journal, November 20, 2006

Stefan J. Padfield, *In Search of a Higher Standard: Rethinking Fiduciary Duties of Directors of Wholly-Owned Subsidiaries,* 10 Fordham J. Corp. & Fin. L. 79 (2004)

Emma D. Enriquez, *Honor Thy Shareholder at All Costs? Towards a Better Understanding of the Fiduciary Duties of Directors of Wholly-Owned Subsidiaries,* 32 Sw. L. Rev. 97 (2003)

Andrew R. Taggart, *Parent-Subsidiary Communications and the Attorney-Client Privilege,* 65 U. Chi. L. Rev. 315 (1998)

ACC Articles

Peter R. Jarvis & Rene C. Holmes, *All in the Family? In-House Counsel Representing Parents/Subs/Affiliates: Conflicts and Confidentiality* (2006), *available at* http://www.acc.com/resource/v8609

ACC Annual Meeting Material

Frank Allen, Bernard Schulte, & Alan Tse, *402: Parents and Subs: Avoiding Pitfalls in Dealings Between Affiliates*, 2007 Annual Meeting, *available at* http://www.acc.com/resource/v9075

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ETHICAL ISSUES FOR CORPORATE COUNSEL

Problem Discussion Material/Analysis

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Discussion

Issues

1. When should the remarks of a company officer alert counsel to the possibility that the officer is counsel to look after the officer's personal interests in working on a matter?

2. If counsel believes that an officer is implicitly asking him or her to look after the officer's personal interests, what, if anything, should counsel do?

3. When, if ever, should counsel suggest that the company take into account an officer's personal wishes in the course of a discussion about that officer's compensation?

4. If managers decide on a course of action that is legal, when if ever should counsel raise non-legal considerations? In this problem, the decisions relate to:

a) The appropriate benchmark to use in determining the CEO's compensation package.

b) Disclosure of the decision to include pension returns in the calculation of company earnings when determining the CEO's entitlement to performance-based compensation.

c) Disclosure to the full Board of the tax risks from a compensation plan.

Discussion

1. When should the remarks of a company officer alert corporate counsel to the possibility that the officer is asking counsel to look after the officer's personal interests in working on a matter?

The remarks here suggest that the CEO may be seeking to enlist you to represent his interests on the plane issue. Assuming this role would be in derogation of your responsibilities as counsel for the company, who does not represent any of its individual officers or employees. As ABA Model Rule 1.13(a) says, a lawyer employed or retained by an organization represents "the organization acting through its duly authorized constituents." Your work with the compensation committee is on behalf of the company as an entity in its negotiations with the CEO. The CEO will have his own counsel to represent his interests in those negotiations.

If you undertake to represent the CEO's interest on the company plane issue, that would conflict with your responsibility to represent the company in negotiations with the CEO. That would be a concurrent conflict under American Bar Association (ABA) Model Rule 1.7(a). Such a conflict exists when, *inter alia*, "the representation of one client will be directly adverse to another client." Rule 1.7(a)(1).

Of course, a corporate entity can only act through its constituents, as Comment 1 to Rule 1.13 acknowledges. Who is authorized to speak on behalf of the entity may differ, however, depending on the context and the issue at hand. When the CEO says that "I'd appreciate your help on that," it is unlikely that he intends to be speaking on behalf of the company. Indeed, given that he and the company are on opposite sides of the bargaining table with respect to his compensation package, he would not be authorized to speak for the entity on this issue.

Furthermore, the CEO refers to the impasse between himself and the compensation committee on the matter of use of the company plane. This clearly distinguishes his interests from that of the corporate entity. He implicitly appeals to your solidarity by saying that, implicitly unlike the other members of the committee, *you* understand why being able to use the plane for social events is important to him. When he says that he'd appreciate your help, the implication is fairly clear that he means that he *personally* would be grateful if you spoke up for him. In addition, although he hardly needs to mention it, the CEO likely has considerable influence on issues such as your salary, scope or responsibilities, and continued tenure with the company. He thus is in a position to express his gratitude or disgruntlement.

2. If counsel believes that an officer is implicitly asking him or her to look after the officer's personal interests, what, if anything, should counsel do?

One way to deal with the situation is to use it as an opportunity explicitly to clarify your role in the compensation negotiations. Doing so would make clear that the CEO should not expect you to represent his interest in these negotiations, and may preempt any future requests by him that you do so. The philosophy of this approach is: I better put an end to this right now. You might say, "Well, Bill, you know I've got to represent the company's interests on this. Your lawyer's doing a good job for you, and I think you'll end up with a fair package." Referring to his lawyer underscores that the CEO already has someone looking out for his interest – and it isn't you.

If you think such a direct approach might provoke a confrontation, you may try to finesse the situation by being noncommittal. You could say something like, "We're all just trying to do what's best for everyone. I'm sure we'll keep talking about it." This provides some opportunity for the CEO to save face. It implies that you are interpreting his remarks as innocuous, rather than as an effort to try to exert inappropriate influence on you. Finally, you may be concerned that if you respond directly in any way to what the CEO says, it's likely that there will be further discussion of the issue of use of the company plane. In that case, you may simply want to say, "Well, I'm going to be late; I should get going. Call me if you need anything on the presentation to the board."

3. When, if ever, should counsel suggest that the company take into account an officer's personal wishes in the course of a discussion about that officer's compensation?

You should say something *only* if you believe it would be in the best interest of the company to discuss the issue further. For instance, although the committee has been discussing the issue with the CEO's lawyer, it may not fully appreciate the depth of the CEO's feelings on the issue. Although the issue may seem petty, it may be of particular symbolic importance to the CEO, and he may believe that the inability to use the plane to go to social functions lessens his status in the eyes of his peers. If this is the case, this seemingly trivial matter could be the source of ongoing resentment that would impair the CEO's loyalty to the company and his relationship with the board. This would not be in the best interest of the company.

If you believe that these dynamics are at work here, it might be useful for you to apprise the committee so that it can make a fully informed decision. You might say something like, "You know, I've been struck by how strongly Bill feels about this issue. I think it may be of particular personal importance to him because he perceives that other CEO's are able to have this privilege. We should at least be aware of this when we make our decision." In making these comments about the importance that Bill seems to attach to the issue, you would be ensuring that the company acts in accordance with its best interests. You would *not* be representing Bill's interest to the board.

4. If managers decide on a course of action that is legal, when if ever should counsel raise non-legal considerations? In this problem, the decisions relate to:

a) The appropriate benchmark to use in determining the CEO's compensation package.

Model Rule 2.1 says that 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." While there is no concern that the use of high-tech firms as a compensation benchmark would in any sense be illegal, doing so could create problems for the company.

TechCo Manufacturing at this point is not yet a high-tech equipment firm, but hopes eventually to become one. The company will have to disclose in its Compensation Disclosure & Analysis in the proxy statement and Form 10-K that it is using these firms as a benchmark and the financial impact of doing so. The fact that these firms pay substantially more than Bill currently receives could leave the company open to the charge that it's manipulating the benchmarking process simply to arrive at a considerably more lucrative compensation package for the CEO. This could create especially intense ire on the part of shareholders in light of the fact that the company has missed its earnings projections. Shareholders may not look kindly upon a $10 million increase in CEO compensation under these circumstances. Executive compensation has been a particularly controversial topic in recent years, and Alice and Jeff's inclination to use high-tech firms as a benchmark could run the risk of generating negative publicity for the company.

b) Disclosure of the decision to include pension returns in the calculation of company earnings when determining the CEO's entitlement to performance-based compensation.

Including projected pension program returns as a component of earnings has drawn criticism in recent years as a reward to executives for events unrelated to their performance in running the company, and as being subject to manipulation. *See* Lucian Bebchuk & Jesse Fried, Pay Without Performance: The Unfulfilled Promise of Executive Compensation 125-126 (2004); Craig Wolf, *GE Severs Execs' Link to Pensions*, Poughkeepsie Journal.com, February 22, 2003. Theoretically, pension fund results can also reduce earnings, and therefore compensation, but some firms have included them as a component when the stock market is robust and have removed them when it falters. You might have particular concern about their inclusion in this case, because the CEO mentioned in his earlier conversation with you that he was asking the pension manager to revise her return projections upward.

Investors therefore might be interested in knowing of the company's change in policy and its potential implications for executive compensation. Is this information material? This is a legal issue, which suggests that the lawyers should make the final determination. It requires, however, evaluating the business significance of the information, a task in which managers have expertise.

In some cases, the lawyer is able to draw on his or her experience and background business knowledge to say definitively that certain information is material. When this is the case, the lawyer should have the final call. What about cases in which the lawyer doesn't have this level of certainty? That seems to be this case. There is some chance that the SEC would regard inclusion of pension projections as material information, and that it might file an enforcement action against the company for filing a misleading CD&A. It's also possible, however, that the agency would not regard such information as material in the context of all the information that the company provides in the CD&A. It probably isn't feasible to obtain timely guidance from the SEC on this issue, and the company in any event probably wants to avoid having to run every uncertain question by the agency. Even though you can't say that the SEC would regard the information as material, you believe that it would be wise to avoid the risk of an enforcement action. Management can argue, however, that the level of risk that the company should take is a business decision.

You're thus not in a position to insist as a matter of law, as opposed to practical judgment, that the company should include the information in the CD&A. Nonetheless, your role should be to make sure that the company's decision processes work effectively. This means that the disclosure committee, the Board, the CEO, and the CFO should all be aware of the risk of a CD&A violation. Furthermore, the CEO obviously has an interest

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in including pension fund projections. Although he will have to decide whether to sign the certification, the CEO should not have the final word on the issue. The full board should make the ultimate decision, informed by an assessment of the risks of a violation.

c) Disclosure to the full Board of the tax risks from a compensation plan.

As the discussion above indicates, materiality is both a legal and business question. Alice does not regard the risk that the company will not be able to take a tax deduction on $7 million in compensation as a material risk. In most companies of any size, a risk of this size would not be material. As a Board member, she is willing to adopt a compensation plan that carries this risk, and probably is reasonable in assuming that information about the risk would affect the decisions of other members of the board. You have aired the issue and the head of the committee understands it and has taken it into account. At this point, it's therefore appropriate for you to defer to her judgment.

Paying the Boss

Additional Resources

Ethical Rules

ABA Model Rule 1.13: Organization as Client

ABA Model Rule 2.1: Advisor

Regulations

12 C.F.R. §620.5(i): Contents of the Annual Report to Shareholders: Compensation of Directors and Senior Officers

26 U.S.C. §162(m): Trade or Business Expenses: Certain Excessive Employee Remuneration

Cases

Brehm v. Eisner, 906 A.2d 27 (Del. 2006)

In re The Walt Disney Company Derivative Litigation, 907 A.2d 693 (Del. Ch. 2005)

SEC v. Gemstar TV Guide Intern., Inc., 401 F3d 1031 (9th Cir. 2005)

Restatements

Restatement (Third) of the Law Governing Lawyers §96: Representing an Organization as Client

Books

Lucian Bebchuk & Jessie Fried, Pay Without Performance: The Unfulfilled Promise of Executive Compensation (2004)

Articles

Sean Donahue, *The New Executive Compensation Disclosure Rules Do Not Result in Complete Disclosure,* 13 Fordham J. Corp. & Fin. L. 59 (2008)

Emily Barker, *Money Talks*, 12 Corporate Counsel 70, July 2005

Melissa Master, *How Much Should A CEO Make?* Conference Board Review, 2007, *available at* http://www.conference-board.org/articles/articlehtml.cfm?ID-148

Christina Medland, *Surviving Change: Compensation Issues Arising in Transactions,* Director's Guide to Executive Compensation, November 2006

Daniel Bergstresser, Mihir Desai, & Joshua Rauh, *Earnings Manipulation, Pension Assumptions and Managerial Investment Decisions*, May 2005, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=551681

ACC Articles

Susan Hackett, *Top Ten Lessons Learned by CLOs about Executive Compensation from the Stock Options Crises*, January 2007, *available at* http://www.acc.com/resource/index.php?key=8042

ACC Annual Meeting Program Materials

John Henry, David Lynn, & Mark Wincek, *107: Current Issues in Executive Compensation,* 2007 Annual Meeting, *available at* http://www.acc.com/resource/v9014

Mark Borges, Michael D. Cahn, Ronald O. Mueller & Craig Nordlund, *607: Executive Compensation Disclosures & Arrangements,* 2006 Annual Meeting, *available at* http://www.acc.com/resource/getfile.php?id=8214&title=607+Executive+Compensation+Disclosures+%26+Arrangements&author=&year=2006&materialtype=Program+Material&keywordlist=Compensation+Issues&doc=true

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