Tuesday, May 19
2:30-4:00pm

109 Ethics for In-house Counsel

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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 (B.A.) of James Madison College at Michigan State University and a graduate of the University of Michigan Law School.

Ethics Immersion for In-House Counsel:
A "Top Ten" Tour of the Issues

Susan Hackett
Senior Vice President and General Counsel
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ACC's New-to-In-House Seminar
May 2009, Atlanta, GA

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Top Ten Ethics Issues for In-House Counsel

1. Licensing, MJP and Lawyer Mobility
2. "Who's the Client?"
   The interests of management vs. the interests of the entity
   Business versus Legal
3. Conflicts of Interest – Internal to Your Company
   When your employer includes multiple entities
   Conflicts in mobility
4. Conflicts and Waivers – Outside Counsel

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Top Ten Topics … (Cont.)

5. Supervisory responsibilities – are you paying attention?
6. Suing your employer-client/retaliatory discharge
7. Confidentiality and privilege under stress
8. Navigating the internal investigation process
9. Privilege, Confidentiality and Financial Transparency: audits and financial disclosures
10. Gatekeeping/Emerging theories of IHC liability

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Overview: Ethics and Professional Regulation

- The rules were created with outside practice in mind
- Representing a single client entity poses challenges that the rules don’t address, and many courts and regulatory authorities don’t understand in-house practice
- From the date of your admission to the moment you realize that you’re practicing “business decision-making,” and not just law, in-house counseling presents challenges.
- A small comfort: in-house counsel are empirically least likely to be brought up on disciplinary charges (we’ll get to the bad news -- the *increasing* likelihood you’ll be scrutinized in a criminal context -- later in our discussion).

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Gatekeeping challenges in the Post-Enron prosecutorial environment:

- Post-Enron, public opinion of companies has never been lower … and expectations are higher and scrutiny stronger.
- Has the role of lawyers actually changed post-Enron, or has the scrutiny applied to their actions (or inactions) simply increased or changed focus?
- A "sea change" for legal ethics: Professional responsibility has always been concerned with the lawyer's behavior, but is increasingly focused on the lawyer's responsibility for the client's behavior.
- The "gut test" is a dangerous strategy.

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Let's get started ….

…. At the beginning!

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ACC's Top Ten Ethics Issues
for Corporate Counsel

Number One:
MJP –
Multijurisdictional Practice

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MJP and Admissions/Licensing Basics

- Admission in a "home" state upon passage of the bar and an ethics/character review …
  - The profession is regulated by "geography"
  - Limits on the lawyer's license to practice - Rule 5.5
- What do you know about the confines of your practice? What is it that you're competent to do?
- What is it that your client needs you to do?
- Is it different when you're in-house?

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Raise your hand…

- Have you ever traveled to a state in which you are not admitted and worked on a client matter or returned client phone calls?
- Have you participated in pre-trial preparations or settlement discussions in another jurisdiction?
- Have you retained outside counsel to represent you "nationally"?
- Do you counsel clients located in a facility or anywhere outside of your "home" state?

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Congratulations ….

…. You're engaged in MJP.

(Multijurisdictional Practice)

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So what … who's watching?

Birbrower **brings it home:**

- **The California Supreme Court holds that a NY law firm can't collect its fees for work done in CA; MJP gains national attention.**

Guerilla warfare tactics:

- **The UPL rules used -- not for the protection of the public -- but as a "gotcha" tactic between opponents.**

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How does MJP "work" and where are the traps for the unwary?

Old and New Model Rule 5.5

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Old Model Rule 5.5

A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.

(The double whammy for in-house counsel)

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New Model Rule 5.5

5.5(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.

5.5(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

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5.5(c) [temporary incursions]

A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

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5.5(c) [temporary incursions, continued]

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternate dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (2) or (3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. *[the catch-all clause]*

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5.5(d) [permanent practice - in-house counsel]

A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized by federal or other law to provide in this jurisdiction.

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What is a temporary incursion under 5.5(c)? What are its limitations?

- How long is temporary?
- Recurring / anticipated?
- What about incursions in other states that haven't passed these rules, or non-US incursions?

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Is 5.5(d)(1) a 'complete' authority? IHC Registration Rules ….

State bars passing 5.5 often adopt an IHC registration rule even though it's not required by the rule.

State bars' discomfort with unregistered presence

"Model" registration rules…Which rules are better than others? ABA Model Rule.

Is "no rule" a good rule?

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MJP basics to remember:

- 5.5(d) Authorization or registration for "permanent practice" by IHC
- Temporary incursion authorization in states that have passed 5.5 reforms (outside of court)
- *Pro hac vice* admission when necessary in court
- Foreign counsel rules: inadequate but evolving - 5.5 does not help non-US educated/licensed lawyers
- No good guidance on "virtual" counseling
- Watch for "guerilla warfare" tactics: gotcha!
- Remember supervisory responsibilities [5.1 & 5.5(a)]
- Avoid complacency: No one cares until they move.

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What about boundaries beyond the 50 states?

The globalization of firm and IHC practice.

What to watch for:

- not just an issue of local admission, but whether IHC are recognized by the bar/ authorized to practice (e.g., *Akzo*)

Impact on client perceptions of IHC value

When giving cross-border advice, remember privilege and related concerns

GATS and other "treaty-level" discussions

ACC's IPA - a helpful resource

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Which states have adopted rules?

- Depending on how you count them, about 2/3 of states have adopted "robust" MJP reforms
- Prospects for further reform and regulation?
  - Admission on motion in the US?
  - National admission standards or practical policies?
  - Regional or Cross-Border pacts?
  - International reciprocity/recognition?

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Okay, so now you're properly authorized to practice ….

… just who the heck is your client, and how do you avoid replacing the client's judgment with your own?

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Number Two:

Who's the Client?

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Who's the Client?

The "entity" is a fiction. The board does not run the daily operations of the company. Yet the entity, as represented by the board, is your client.

Management is made up of (fallible) folks you counsel all day, who think of you (and whom you've cultivated to think of you) as "their lawyer."

And then there are the other "stakeholders" who think you owe them a duty: employees, regulators, shareholders, third party partners, the "public" …

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Who's the Client?

Against that background (of many clients, who may or not be those you're obligated to represent at any given time):

How do you decide any of those folks are acting within the best interests of the entity?

- What is appropriate risk (ERM)? Different companies have different appetites, and it doesn't make them criminals, does it?
- When should you exercise the "legal, but stupid" rule and assert your business judgment over the client's? (fiduciary role)
- Are you protecting shareholders? The public? What is their interest? Can that be determined without 20/20 hindsight?
- Is your obligation to "stop" clients and how: when do you need to withdraw or report them?

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Reporting up/out? Sarbox 307/Model Rule 1.13

The ethical rules include responsibilities to report up under 1.13

Post-Enron, Congress decided that state ethics rules weren't enough.

Sarbox 307 regulates attorneys "appearing and practicing" before the SEC (effectively all public company lawyers), mandating reporting

- This is law: criminal sanctions attach. [17 CFR Part 205]
- Basically codifies Model Rule 1.13 "reporting up" requirements, with some added specificity and teeth.
- Sarbox 307 dictates are now the "reasonable" standard under 1.13; so even if you're not in a public company ….
- Most notable: this is a wake up call … lawyers are now firmly part of the governance process responsible for executive wrongdoing.

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Business Versus Legal - are *you* the client?

- Fundamental value of IHC is their integration into the business and their intimate "knowledge" of the client – when do you move beyond objectively representing the client as independent legal counsel?
- Ethics programs for in-house counsel used to be relatively simple: we talked about how to take off your business hat and put on your legal hat.
- Now your hats are piled on top of each other for business leadership, governance, fiduciary and legal roles, but ethical regulations still assume that the hats will always be separately worn.
- Implications: professional regulation of business roles.

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Number Three:

Conflicts of Interest – Internal to You/Your Company

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Conflicts ("All in the Family")

Representing a corporate family - Model Rule 1.7

Most folks learn 'conflicts' issues in the law firm context: current client/past client: when you can take on a new client/matter and when you can't.

In the corporate family context, issues arise when your work for the parent or your employer-entity entails your work with subs, affiliates and ventures - the rules suggest you can treat wholly-owned subs / affiliates as divisions of your entity-employer.

So what are the issues?

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Conflicts -Representing the Corporate Family

- How can subs' interests diverge from the employer-entity?
- Do we all agree that it's valuable to represent subs/ affiliates even when they're not wholly-owned?
- Are there measures you can consider to avoid problems and help diffuse conflicts or privilege problems that do arise? Best practices to employ?
- *BCE v Teleglobe*: Judge Ambro's excellent advice.
- Joint defense agreements / scope of representation letters

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A few related conflicts considerations

… who's the client when financial troubles may lead to insolvency/bankruptcy?

… who's the client in a takeover or merger situation?

… who's the client in derivative litigation?

(See John Villa's excellent materials for more info…)

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Conflicts: Job Mobility

We know about the strict rules regulating outside lawyers moving from firm to firm, but remember: they apply to you, too.

- Non-disclosure and non-compete agreements:
  - Everybody signs them, but they're technically unenforceable – lawyers can't contract out of professional obligations
  - You shouldn't convey that you can abide by their terms
  - Is there a form that can be developed for lawyers? That contemplates the rules' requirements to retain professional independence and avoid conflicts / breaches of confidentiality?

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Number Four:

Conflicts and Waivers – Outside counsel

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And of course! The conflicts stuff you know…

- More "rule time" spent here than anywhere – are these the most important rules of ethics for lawyers? Or for the business of lawyering?
  - Model Rule 1.7 and 1.8: Current Client Conflicts.
  - Model Rule 1.9: Duties to Former Clients
  - Model Rule 1.10: Imputation – a new model rule
  - Model Rule 1.11 and 1.12: Rules for gov't. lawyers and judges
- Conflicts rules are under incredible pressure. Is reform needed? What's really important here?
- When do you grant a waiver? Never?

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Number Five:

Supervisory Responsibility

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Don't underestimate 5.1, 5.2, and 5.3 ! Your responsibility: your client's representation.

- Do you transfer responsibility for your client's work when you hire or retain others to do it? Does their individual responsibility make yours moot?
- MANAGERS are responsible for the work of subordinates, as well as their own work, and for ethical performance
  - Outside counsel you manage
  - Inside counsel you manage
  - Non-lawyers you manage, including lawyers not admitted in your jurisdiction.

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Number Six:

Suing the Client and Retaliatory Discharge

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Suing Your Employer - Your Client

- What happens when the lawyer's employment rights conflict with her duties under the rules?
  - The *Balla v. Gambro* case as illustration
  - Cases often arise in the context of an argument over poor performance (management's view) vs. allegations of wrongdoing ignored (discharged lawyer's view).
  - Can outside counsel sue clients who fire them for any reason? Do we want our employment status to make us less attractive than outside counsel?
  - Classic conflict between professional responsibility and lawyers' personal interests: which wins? And why?

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Number Seven:

"Is it a privilege anymore?"

Confidentiality, Attorney-Client Privilege, and Work Product Protection: the basics and their erosion under duress.

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Conflicting duties come to a head: protecting attorney-client privilege

When the client entity is under the microscope, everyone expects the company and its lawyers to cooperate fully: "full frontal transparency." Does that means producing privilege?

An increased focus on detecting and reporting frauds and failures can make lawyers and the privilege they (cannot) protect targets of prosecutors and pariahs to clients.

When lawyers act as regulators, it's impossible to balance confidentiality, employee reliance, and stakeholder interests.

Ever-shifting sands of determining who is the client, who controls the privilege, and what is in the client's best interest at any given moment, long or short term.

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Confidentiality / Attorney-Client Privilege Defined

Confidentiality is protected under 3 distinct doctrines:

Privilege is a sub-set of confidentiality

Lawyer conduct regulations

1. ABA MRPC 1.6 - Confidentiality

Evidentiary Privileges (a client's right to exclude requested matter in a discovery dispute):

2. Attorney-client privilege
3. Work product protections

Exceptions to Privilege:

Cannot facilitate fraud • Does not survive waiver • Does not protect facts

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Number Eight:

Privilege – Navigating Internal Investigations

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Reports of privilege protection problems arose in the investigatory context between 2003-08.

ACC surveys showed that when the company is under scrutiny:

- Waiver is expected and the price of admission for leniency/survival
- Waiver requests were increasing
- Erosions in the protections of the privilege had a negative effect on preventive compliance.

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Privilege in the corporate context

- *Upjohn* is the law. It acknowledges privilege in the corporate context
- Prosecutors and regulators bypass clients' rights by "requiring" waivers or deferred prosecution agreements that negate privilege rights; companies can't afford to push back
- "Just the facts": that's all investigators want, right? What about facts in A/C or W/P docs or conversations/interviews? Waiver?

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Employees and Privilege

- The entity is your client, but employees act as the entity's reps so long as they are in concert with the entity's interests.
- The Thorny Problem: application of privilege to employees and their statements:
  - Corporate policies require EE cooperation
  - Balanced against 5th/6th Amendment rights
  - Presumption of innocence? Or guilt?
  - EE's lawyering up … when should you encourage them to get their own counsel: advancement of fees, joint defense agreements
  - Who decides when an employee has left the zone of the entity's best interests?
  - Investigators target employee interviews

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US v. Stein: the KPMG Case

Illustrates how employee issues in the context of investigation can create lawsuits and liability on their own (in which counsel's advice and actions will be front and center):

- Advancement of fees
- Sharing documents
- Joint defense agreements
- Discipline/termination of targeted EEs

The Result:

KPMG is sued for doing what the government coerced its counsel to do: throw EEs under the bus.

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Privilege and work product protections raised in investigations fall outside of the courtroom context -

Today it's unlikely that there will be a impartial third party court poised to protect your client's privilege rights.

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DOJ / SEC "Cooperation" Standards

- **Holder Memo** (1999) - an effort to educate prosecutors and create a common standard: nine criteria established.
- **Thompson Memo** (2003) - a mandatory checklist for prosecutors. Waiver requests become routine.
- **Seaboard** - SEC's cooperation standards … other agencies following suit. Waiver assumed.
- **McNulty Memo** - DOJ Main attempts to procedurally address a problem that's really a "field" issue.
- **Attorney-Client Privilege Protection Act of 2007/8** - focused on "push back" rights of companies, and protection of EE rights.
- **The Filip Memo (2008)** – US Attorneys Manual, the possibility of an Executive Order? Eric Holder returns to the fray….

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Is Limited Waiver the "answer"?

- DOJ/SEC would like you to think so
- FRE 502: Federal Courts' study committee addresses the problem: a majority of courts don't recognize limited waiver; 502 moving forward does not codify waiver, but does help in some e-discovery/inadvertant disclosure contexts
- Audit/some regulatory contexts: is disclosure really a waiver when there's no adversary? (common interest doctrine)
- Subject matter waivers: long-term consequences.
- Third party plaintiffs.

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Number Nine:

Privilege, Confidentiality and
Corporate Financial Transparency:
in the Audit / Disclosure context

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Privilege Issues in the Audit Context

- **Discussing Privilege issues with:**
  - **Board Audit Committee – of course!**
  - **Internal Auditors – maybe …**
  - **External Auditors – be careful!**
  - The ABA/AICPA "Treaty" is functionally dead.
  - Under PCAOB rules, no stone left unturned
  - Are confidences are shared with auditors waived?
  - Audit results threatened/withheld or qualified/no opinion offered if full disclosures or access to confidential docs is not granted
  - Recent cases suggest plaintiffs can go around privilege rights by subpoenaing auditors

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Privilege Issues in the Disclosure Process

- FAS 5 and 141R – contingent liabilities and valuation: current / proposed rules
- Are private companies in the clear because they don't have public company reporting requirements? (nope)
- IASB and the coming "global" standards of accounting practices

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Number Ten:

Emerging Theories of Liability, Culpability, and Responsibility for In-House "Gatekeepers"

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How did we get here? What happened?

- A spate of highly publicized corporate failures: a crime spree?
- Where were the lawyers?
- Lawyers and compliance - a legal or fiduciary role/responsibility?
- Government takes action: Corporate Fraud Task Forces: sending messages to corporate America about accountability for failures

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Let's all agree at the outset:

- We're not here to suggest that lawyers should not be gatekeepers, or should be less than aggressive in their roles.
- The focus is on the difficulty in navigating your role in the Post-Enron practice environment, and on offering practical advice to avoid landmines that could land you in the crosshairs of scrutiny.
- The risk of being targeted has exponentially increased, even if it's still a relatively unusual event. The greater likelihood is that your involvement in client representation will be used to "roll" you against your client's interests.

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CLO Question: How many executive roles (such as internal team leadership or additional titles - VP, CCO, CPO, etc.) do you carry in addition to CLO?

1.	None: I'm the CLO/ general counsel only	12%
2.	1 - 2 additional roles	36%
3.	3 - 5 additional roles	38 %
4.	6 or more	10%
5.	I can't count that high this fast	4%

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Why are IHC increasingly in the crosshairs?

- Regulators/prosecutors like the idea of going after lawyers: they know the law; their violation of it is particularly distasteful.
- They're senior executives - they have management's ear/trust
- They likely have unparalleled access to clients and events (though not as much knowledge as prosecutors often think)
- They often carry corporate functional (read: fiduciary or strict liability) responsibility for ethics and compliance initiatives.
- They come with strings that are more easily pulled: they're professionally regulated by defined rules and higher standards.

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IHC Liability for Corporate Failures

- ACC's extensive research into this subject
  - (100+ pages of it in your written materials)
- Three theories of liability: culpability, "omissions," obstruction
- Increasing criminalization of corporate failures
- Lawyers and financial fraud: are we competent?
- "Advice of counsel" defenses

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Criminal prosecutions of IHC

- Increasingly, the rhetoric of lawyers as "gatekeepers" is becoming reality.
- Perceptions of acceptable conduct can change.
- Big losses increase the risk of criminal prosecution.
- Wearing two or more hats carries real risks for corporate counsel.
- Wearing only one hat may be less of an excuse for ignorance than it used to be.

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Criminal prosecutions of IHC, cont.

- Some recent liability experiences suggest an element of “bystander liability” for lawyers near the scene of a business disaster.
- A demonstrable ethical culture matters more today than ever: how the prosecutor is pre-disposed to view your company (essentially, as law abiding or as a rogue) is critical
- Check your license and your colleagues’ licenses so they don’t wreck you

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“Gatekeeping” is a natural extension of what in-house counsel are particularly well-trained and well-situated to do.

We work in difficult times, but I believe that gatekeeping is on balance a strategic opportunity for in-house lawyering, rather than a liability.

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Conclusions:
Legal ethics and the rules of evidence don't provide much navigational or reliable guidance

Indeed, mixing legal ethics and some kinds of compliance / fiduciary responsibilities leaves lawyers exposed to unresolved and significant contradictions in their daily responsibilities.

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Chapter 3

Ethical Issues for Inside Counsel

§ 3:1 Introduction
§ 3:2 Licensing and conflict of law for corporate counsel: Where must the corporate counsel be licensed and what ethics rules apply?
§ 3:3 When is corporate counsel's conduct governed by the ethical rules?
§ 3:4 Corporate law department as a "firm"—Imputed disqualification
§ 3:5 —Vicarious civil liability of corporate counsel for acts of other counsel
§ 3:6 Corporate counsel as legal advisor—In general
§ 3:7 —The interests of the corporation versus the interests of management: Model Rule 1.13
§ 3:8 —Special problems in identifying the client—Corporate affiliates
§ 3:9 — —Contest for control of the corporation by takeover
§ 3:10 — —Derivative litigation
§ 3:11 —Duties to the entity—The duty of confidentiality
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§ 3:14 —Duties to constituents—The errant officer
§ 3:15 — —Partners and coventurers
§ 3:16 —Closely held corporations
§ 3:17 Corporate counsel as business advisor
§ 3:18 Corporate counsel as advocate—Is non-litigating corporate counsel governed by Model Rule 3.1 to 3.7?
§ 3:19 —Truth and the tribunal
§ 3:20 The corporate counsel's ethical duty to resign because of improper or unlawful corporate conduct
§ 3:21 Adverse party's contact with corporate employees—In general
§ 3:22 —The "no-contact" rule applies beyond adjudicative proceedings
§ 3:23 —Contacting current corporate employees
§ 3:24 —Contact with former employees
§ 3:25 —Contact through a third party
§ 3:26 —Contacts by government investigators and prosecutors
§ 3:27 —Contact with the federal government as litigant

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§ 3:28 —Requesting corporate employees not to communicate with opposing parties or counsel
§ 3:29 —Requesting corporate employees not to talk to federal investigators
§ 3:30 Ethical responsibility for the actions of other lawyers and non-lawyers in corporate counsel's office
§ 3:31 The ethics of dealing with regulators
§ 3:32 Ethical limitations on the attorney as director
§ 3:33 Ethical restrictions on contact with the press
§ 3:34 Limitations on working for competitors
§ 3:35 Ethical limits on consultation
Bibliography
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Appendix 3-2 Attorneys' Liability Assurance Society, Inc. (ALAS) Chart Showing Various States Versions of Rule 1.6(b)
Appendix 3-3 American Bar Association Formal Ethics Opinion 97-407 Lawyer as Expert Witness or Expert Consultant
Appendix 3-4 ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-390 Conflicts of Interest in the Corporate Family Context
Appendix 3-5 Limitation in Retainer Letter Re Corporate Affiliates
Appendix 3-6 ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-361 Representation of a Partnership
Appendix 3-7 Model Informed Consent Provision for Joint Venturer
Appendix 3-8 Code of Federal Regulations
Appendix 3-9 ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 Communications with Represented Persons
Appendix 3-10 American Bar Association Formal Ethics Opinion 97-408 Communication with Government Agency Represented by Counsel
Appendix 3-11 ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 93-375 The Lawyer's Obligation to Disclose Information Adverse to the Client in the Context of a Bank Examination
Appendix 3-12 American Bar Association Formal Ethics Opinion 98-410 Lawyer Serving as Director of Client Corporation
Appendix 3-13 Parallel Tables of Restatement Third Section Numbers and of Annual Meeting Draft Section Numbers

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◆ **Author's Note: This Summary is provided to give the reader a broad and general overview of the entire subject before focusing on those areas of primary interest. The Summary cannot be relied upon to analyze the issues in detail. If there is any inconsistency between the Summary and the detailed analysis in the text, the analysis is authoritative and governs.**

SUMMARY

§ 3:1 Introduction

The ethical rules have been developed based on the paradigm of the private lawyer and the individual client. The rules are poorly suited to the corporate counsel's office's relationship with the corporation. Despite this awkward fit, ethics have become increasingly important for corporate counsel. One reason is their role in defining the civil liabilities of lawyers although the ethics rules specifically eschew that role. Because of the growing likelihood that control of a corporate entity will pass due to merger, sale or even bankruptcy or receivership, corporate lawyers may find their conduct—and their adherence to the ethical rules—subject to review by unfriendly eyes.

Unfortunately, there is scant guidance for the practical problems faced by corporate counsel on a daily basis. As a result, this chapter offers practical recommendations for many of these problems with the admonition that there are often no controlling cases or ethics opinions.

This chapter must be read in conjunction with portions of Chapter 6—Individual Rights and Liabilities of Corporate Counsel—especially § 6:7, which discusses corporate counsel's employment rights and ethical duties to resign when faced with corporate misconduct, and § 6:16, which discusses the ethical restrictions on former corporate counsel to litigate against his former employer. This chapter must also be read in conjunction with Chapter 7, which discusses additional responsibilities imposed on corporate counsel who are subject to the rules of professional conduct issued by the Securities and Exchange Com-

mission (SEC) pursuant to the Sarbanes-Oxley Act of 2002.[1]

§ 3:2 Licensing and conflict of law for corporate counsel: Where must the corporate counsel be licensed and what ethics rules apply?

The modern corporation, as well as the modern corporate counsel's office, operates in many states and, indeed, in many countries. Assuming that the corporate counsel is properly licensed in one state, the question remains whether he must be licensed in every state affected by his actions or advice? Unfortunately, there is no uniform answer and corporate counsel must look to the state law and bar association interpretations in this increasingly hostile area. State and local ACC chapters can provide guidance for corporate counsel on the most recent interpretations of state law.

Failure to be licensed if so required by state law carries potentially serious consequences including disciplinary action, forfeiture of attorney-client privilege for communications to the unlicensed attorney and possible prosecution for a misdemeanor. These sanctions are, however, unlikely to be visited upon a corporate lawyer who represents only the corporation. The corporation is a sophisticated consumer of legal services and not the type of client that is typically protected by the ethics rules governing unauthorized practice of law.

A lawyer who is practicing in two or more states frequently faces the question of which state's ethical rules will govern his conduct. This question is addressed by Model Rules of Professional Conduct (ABA) Rule 8.5(b). In many instances, however, there is no true conflict between the ethical rules of the various states because most jurisdictions follow the ABA's Model Rules of Professional Conduct. If there is a conflict of law issue, the general rule as prescribed by Model Rules of Professional Conduct (ABA) Rule 8.5(b) is to determine if the conduct is in connection with a proceeding in a court or other tribunal where the lawyer has been admitted to practice. If so, the rules of the tribunal will govern; with courts that will typically be the jurisdiction in which the court sits. This we call the "tribunal trumps" rule.

If the tribunal trumps rule does not provide the basis for decision and the lawyer is admitted in only one state, then the ethics rules of the state where the lawyer is admitted will govern. If the lawyer is admitted in two or more states, the governing ethics

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[1]Pub. L. No. 107-204, 116 Stat. 745 (July 30, 2002).

rules are those of the state in which the lawyer "principally practices" *unless* the particular conduct has a predominant effect in another jurisdiction in which the lawyer is licensed—in which case the principally affected jurisdiction's rules govern. Some states apply a variant of Model Rules of Professional Conduct (ABA) Rule 8.5 which provides that if a lawyer practices in a state in which he is not licensed, he is subject to the disciplinary rules of that state.

There are few guideposts for choice of law rules in multinational practice. The most that can be gleaned from a few reported cases is some analogies to the multistate cases: where a tribunal is involved, the laws of the forum in which the court sits will ordinarily govern. If that rule does not apply, then the law of the licensing country will govern.

In practice, there is little likelihood that a foreign country or foreign bar association can exercise jurisdiction over an American lawyer for disciplinary purposes. The more serious threat is that an American lawyer who violates the rules of a foreign bar association will find that sanctions may be imposed on his client for his alleged misconduct.

§ 3:3 When is corporate counsel's conduct governed by the ethical rules?

In modern corporate America, the corporate lawyer often engages in conduct that falls outside of the traditional notion of professional legal services and, increasingly, has responsibility for some purely business activities of the corporation. When and to what extent are the ethical rules applicable to this conduct? The answer is far from clear.

If the lawyer has acted in a manner which reflects moral turpitude or fraud, then that conduct is prohibited by the rules even if he is not acting in a professional capacity. See Model Rules of Professional Conduct (ABA) Rule 8.4. Indeed, it has long been the rule that a lawyer must comply at all time with all *applicable* ethical rules whether or not he is acting in a professional capacity. ABA Formal Opinion 74-336. Assuming, however that the conduct does not reflect general unfitness for the bar, what ethics rules are "applicable" to the lawyer who is not performing professional legal services?

The question must be answered on a rule-by-rule basis. Virtually every rule applies only to professional conduct in that it applies only to services involved in the attorney-client relationships. What of the situation in which the lawyer is performing some professional services for a client and, in addition, performs other

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services that do not fall within the traditional notion of legal advice but are closely-related?

Model Rules of Professional Conduct (ABA) Rule 5.7 provides the answer: "[a] lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services . . . if the law-related services are provided by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients . . . . " The definition of "law-related services" is "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-lawyer."[2]

The rule is far more important for where the line is drawn and what is apparently excluded than for what is included. Can one reasonably infer from this rule that if a lawyer is providing services to a client that (i) are not professional legal services and do not fall within the definition of law-related services, or (ii) are law-related services but the services are distinct from the lawyer's provision of legal services, then the lawyer's conduct even involving a client may not be subject to the disciplinary rules? It would seem so, and this is one of the first clear lines that has been evident in the ethical rules and opinions exempting lawyers from their reach.

Where does that leave the corporate lawyer who also has non-legal employment responsibilities to the corporate client? To be safe, a lawyer who provides any legal services to the corporate client must assume that all of his conduct is governed by the ethical rules and that the burden will be on him to demonstrate why the other activities he is engaged in do not constitute "law-related services" or if they are "law-related services," they are distinct from the legal services.

§ 3:4 Corporate law department as a "firm"—Imputed disqualification

The general principle of the ethical rules is that the prescriptions apply to individual lawyers not firms. Many of the rules, particularly those involving disqualification, have been broadened to apply to the "firm" in which the individual lawyer is employed

[2]Examples of law-related services in the commentary include "providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting."

through the imputed disqualification principle of Model Rules of Professional Conduct (ABA) Rule 1.10. The question whether a corporate counsel's office is a "firm" for these purposes is answered by the commentary to Model Rules of Professional Conduct (ABA) Rule 1.10 (Imputed Disqualification): " . . . the term 'firm' includes lawyers . . . in the legal department of a corporation or other organization . . . . " As the commentary further observes, the application of this rule to the parent/subsidiary relationship raises questions of "whether the legal department of a corporation represents a subsidiary or an affiliated corporation."

Since imputed disqualification presumptively applies to the entire corporate general counsel's office, the corporation should be aware of the potential that the entire office may be disqualified by hiring a lateral lawyer, paralegal or even a legal secretary who, in their prior position, possessed confidential information from a party adverse to the current corporate client. In order to guard against this possibility and the corporation should carefully identify potential conflicts, and secure waivers from the former clients or forego hiring the lawyer.

If the corporation fails to identify a potential conflict or fails to secure a waiver from the former client, can it erect a "Chinese wall" or other similar barrier to overcome the presumption that the tainted lawyer will share confidences with others in the general counsel's office? While there is some precedent for recognizing a barrier that would overcome the presumption of shared confidences, many jurisdictions will not entertain such arguments.

The foregoing principles of imputed disqualification have frequently been applied to private law firms but we are unaware of reported cases in which they have been applied to corporate legal departments. Their application, however, is clearly mandated by the commentary and, thus, corporate counsel must be vigilant in identifying potential disqualifying conflicts.

§ 3:5 Corporate law department as a "firm"—Vicarious civil liability of corporate counsel for acts of other counsel

Despite the rule that a corporate general counsel's office constitutes a "firm" for purposes of imputed disqualification, it will likely not be deemed a "firm" for purposes of vicarious civil liability. Thus, one lawyer in the corporate counsel's office will probably not be liable for the torts of another. This issue is not governed by the Model Rules.

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§§ 3:6 to 3:7 Corporate counsel as legal advisor—The interests of the corporation versus the interests of management: Model Rule 1.13

One of the most difficult problems for corporate lawyers is to distinguish between the interests of the corporate client and the interests of the corporate officers who control the corporate client. Put another way, recognizing that the corporate counsel's loyalty is to the corporation not its officers or directors, how does a lawyer decide what is in the best interests of the corporation when his views of the corporate interest are at odds with the views expressed by the corporation's management?

The Model Rules do *not* provide a structure for deciding what is in the best interests of the corporation. Instead, they provide in Model Rules of Professional Conduct (ABA) Rule 1.13 a comprehensive, if somewhat ambiguous, structure for deciding when corporate counsel must defer to the judgment of the businesspeople.

The structure requires the corporate lawyer to answer a series of questions in deciding whether she needs to challenge the decision of a corporate officer that she believes is not in the best interests of the corporation. The first question is whether the questioned corporate action is "related to the representation"? If not, there is no further obligation under Model Rules of Professional Conduct (ABA) Rule 1.13.

If so, then the next question is whether the lawyer "knows" that corporate officer's action or decision is a violation of a duty to the entity or constitutes a violation of law for which the entity may be held liable. The application of this standard requires a high degree of certainty, *i.e.*, the lawyer need not ordinarily proceed under Model Rules of Professional Conduct (ABA) Rule 1.13 where the question is a close one with reasonable arguments on both sides.

There are relatively few conceptual difficulties in applying this rule to situations where the officer is breaching a duty of loyalty or committing a criminal or fraudulent act for which the corporation may be held liable. The analytical problem arises where the corporate officer is acting in good faith (*i.e.*, not disloyally) but, in the corporate counsel's judgment, is making erroneous or even grossly negligent business decisions. The commentary to Model Rules of Professional Conduct (ABA) Rule 1.13 clearly indicates that second-guessing the business judgments of management is ordinarily not required, and that conclusion is consistent with corporate reality as corporate lawyers (either inside or outside) are not expected to (or even competent to) pass on the wisdom of

business decisions. Unfortunately, there is very little precedent on this point and there remains the possibility that Model Rules of Professional Conduct (ABA) Rule 1.13 may be interpreted to require a lawyer to take action for a good faith business judgment. If so, when? At most, this would apply if she knew it to be reckless or, possibly, grossly negligent.[3]

Assuming that the corporate lawyer concluded that all of the above conditions had been met, the next question is whether the action in question results in injury to the corporation of sufficient severity? Model Rules of Professional Conduct (ABA) Rule 1.13 requires "substantial injury to the organization." The severity-of-injury requirement probably has a relatively low threshold if the conduct is either disloyalty or committing a violation of law for which the corporation would be held liable. If, however, good faith but reckless (or possibly grossly negligent) conduct falls within the purview of Model Rules of Professional Conduct (ABA) Rule 1.13, then we would expect that the injury to the corporation must be serious to trigger any obligation under Model Rules of Professional Conduct (ABA) Rule 1.13.

If all of these conditions are met, what must the corporate lawyer do? Prior to its amendment in 2003, the rule's answer was that the lawyer "shall proceed as is reasonably necessary in the best interests of the organization . . . . " No particular action was mandated although several were specifically mentioned: asking for reconsideration of the matter, advising that a separate legal opinion on the matter be sought for presentation to the corporation, and going up the corporate ladder, *i.e.*, referring the matter to a higher authority in the organization. The former rule, however, specifically stated that "[a]ny measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization." Thus, former Model Rule 1.13 could in no way be read to require or even permit disclosure to third parties.

While the 2003 version of the rule contains the same admonition as to minimizing disruption of the organization, and encourages similar action on the part of counsel in addressing wrongful conduct, the amended rule varies significantly from the prior version because it now *requires* disclosure within the organization if all of the conditions are met. In addition, even though the 2003

[3]Once again, it is doubtful that a corporate lawyer would have the knowledge, experience and training to conclude with the requisite level of certainty that a business judgement by a properly authorized corporate officer was clearly wrong, let alone grossly negligent or reckless.

version contains the same admonition as to minimizing the risk of disclosure to persons outside the organization, it *permits* such disclosure under specified circumstances "to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization." See Model Rules of Professional Conduct (ABA) Rule 1.13(c). Where counsel is discharged because of actions taken pursuant to the rule, or withdraws under circumstances warranting action under the rule, the rule *requires* counsel to proceed as he or she deems reasonably necessary in order "to assure that the organization's highest authority is informed of [counsel's] discharge or withdrawal." See Model Rules of Professional Conduct (ABA) Rule 1.13(e).

§ 3:8 Corporate counsel as legal advisor—Special problems in identifying the client—Corporate affiliates

In general, a corporate lawyer who represents one member of a corporate family may without fear of conflict represent the other members who have identical ownership. Thus, corporate counsel can treat a parent corporation and all of its wholly-owned subsidiaries essentially as divisions or departments of a single corporate client. There are several limitations to this rule—where the ownership is less-than-identical or where one of the corporations is either insolvent or, possibly, on the verge of insolvency.

Where there is not an identity of ownership, the minority shareholders in one corporation (typically a subsidiary) may have an interest that is different than that of the majority shareholder (typically the parent). Also, if one member of a corporate family is either insolvent or on the verge of insolvency, the loyalties of fiduciaries (including the lawyers) of that company may shift from the corporation's shareholders to its creditors.

The foregoing potential conflicts of interest do not mean that a lawyer cannot represent both members of the corporate family; it only means that they cannot, without appropriate consent, represent both corporations in transactions where there is a potential for a conflict of interest. The potential is most obvious in transactions between the two entities. It could also manifest itself in transactions that the two entities engage in with a common third party in which one corporation/client may claim that benefits or burdens were unfairly allocated.

Where there is the potential for conflict in a transaction, corporate counsel should treat the corporate family members as if they were separate clients and obtain a consent before representing two or more corporations. The consent must satisfy Model Rules of Professional Conduct (ABA) Rule 1.7. Of particu-

lar importance is Model Rules of Professional Conduct (ABA) Rule 1.13(e), which requires that the consent be given by "an appropriate official." In this context, Model Rules of Professional Conduct (ABA) Rule 1.13(e) means that informed consent is provided by an official of the organization that is himself not subject to the same conflict of interest, *i.e.*, is not under the control of the other client.

Another distinct body of jurisprudence has addressed the general question whether a lawyer who represents one member of a corporate family is deemed to represent other members of the corporate family. This issue has arisen in disqualification motions involving private law firms. The question is addressed, but not answered, by ABA Ethics Opinion 95-390, which holds that "[t]he fact of corporate affiliation, without more, does not make all of a corporate client's affiliates into clients as well." If mere affiliation is not sufficient, what is the standard? The jurisprudence looks at a variety of issues including the relationship between the corporate counsels' offices. Because of the uncertainty in how this rule will be applied, corporate counsel should make clear in the retainer letter the nature of the client so as to avoid unnecessary issues involving disqualification.

§ 3:9 Corporate counsel as legal advisor—Special problems in identifying the client—Contest for control of the corporation by takeover

A contest for corporate control can present knotty decisions about the best interests of the corporation. Fortunately, corporate counsel are generally not required to resolve the issue of what course is best for the corporation. Corporate lawyers apply the same analysis to decisions involving corporate control that they do to all other corporate decisions: they should defer to the decisions of management as to the best interests of the corporation unless counsel conclude that management is breaching a duty to the entity under Model Rules of Professional Conduct (ABA) Rule 1.13. See § 3:7.

§ 3:10 Corporate counsel as legal advisor—Special problems in identifying the client—Derivative litigation

Another instance which presents a potentially difficult problem for corporate counsel is shareholders' derivative litigation in which the corporation has rejected the derivative demand and the plaintiff is proceeding against existing management and/or the board of directors. Since the shareholder is ostensibly bring-

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ing the case in the name, and for the benefit, of the corporate entity, does the corporate counsel's loyalty lie with the derivative plaintiff or with management?

Model Rules of Professional Conduct (ABA) Rule 1.13 requires that corporate counsel accept the decision of corporate management as to the best interests of the corporation unless counsel concludes that management is breaching a duty toward the corporation. Thus, if corporate management rejects the shareholders' derivative demand, corporate counsel will ordinarily be required to accept that decision. There is even support for the notion that corporate counsel can seek dismissal of a "frivolous" shareholders' derivative suit—a curious conclusion in light of the highly subjective nature of the evaluation and the fact that any recovery would go to the corporation.

A secondary question is whether corporate counsel can properly represent both the corporation and the individual defendants—typically management and the board? There are a number of potential conflicts that may preclude counsel from doing so. For example, counsel may have given legal advice on which some of the corporate officers or directors relied (or will claim they relied) in making the decision in question or counsel may possibly be a fact witness to the events in question.

Assuming that counsel's personal involvement in the conduct is not disqualifying, the general rule appears to be that corporate counsel can represent both the corporation and the defendant directors and officers where the allegations involve questions of business judgment but not where the allegations are fraud or self-dealing. Even in those jurisdictions where this may be permitted, however, the potential for mischief is great and warns that such dual representation should be avoided.

Corporate counsel must also be aware of the potential for shareholders in a derivative case invading the corporation's attorney-client privilege if they can demonstrate "good cause" under the rule of *Garner v. Wolfinbarger*.

§ 3:11 Corporate counsel as legal advisor—Duties to the entity—The duty of confidentiality

The lawyer's duty of confidentiality is governed by Model Rules of Professional Conduct (ABA) Rule 1.6. Unfortunately, the state to state variations on Model Rules of Professional Conduct (ABA) Rule 1.6 are greater than the variations of any other ethics rule. Thus, in the same factual circumstances, disclosure may be required in one state, permitted in another state and absolutely prohibited in a third state. It is, therefore, impossible to prescribe

a universally accepted rule and corporate counsel must be guided by the text of the governing rule. For the purposes of our analysis, we have focussed on the ABA's version of Model Rules of Professional Conduct (ABA) Rule 1.6.

Apart from disclosure impliedly authorized as part of the representation, counsel must keep confidential all information relating to the representation except as disclosure is expressly permitted by the Rules. Information relating to the representation is a much broader category than merely attorney-client privileged information and it includes "all information relating to the representation, whatever its source."

A lawyer may reveal such client information where the lawyer believes it necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm. Pursuant to the 2003 amendments to the rule, the lawyer may also reveal confidential information where he believes that disclosure is necessary to prevent the client from committing a crime or fraud that the lawyer is reasonably certain will result in substantial injury to the financial interests or property of third persons and in furtherance of which the client has been using the lawyer's services. In addition, disclosure is now authorized to prevent, mitigate or rectify substantial injury to the financial interests of third persons resulting from the client's commission of a crime or fraud while using the lawyer's services. A lawyer's right to reveal client information is examined in greater detail in Sections relating to counsel's right to defend or exonerate himself, and relating to ethics-based termination of employment. See §§ 6:8, 6:21.

In addition to the ethical restrictions on the disclosure of client information, every employee or other agent has duties of confidentiality as prescribed by the Restatement Second, Agency, or analogous state law jurisprudence. In general, this forbids the use of confidential information from an employer or principal in competition with the employer or to the detriment of the employer.

As a general rule, there is no ethical prohibition on sharing information between various corporate officers although the disclosure of confidential information should be limited as much as possible to avoid jeopardizing the attorney-client privilege.

§§ 3:12 to 3:13 Duties to offer advice

A lawyer has a general duty to be informed. When does a corporate lawyer have a duty to offer advice? The commentary to Model Rules of Professional Conduct (ABA) Rule 2.1 (Advisor)

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makes clear that a lawyer is not required to give advice until asked by a client. The limitation on that rule is, however, that "when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client . . . may require the lawyer to act if the client's course of action is related to the representation."

This rule may operate differently for private lawyers, whose scope of representation is often defined, than for inside corporate counsel, who may be responsible for all legal affairs of the company. Thus, it may be difficult to conclude that any corporate matter is not related to the representation by an inside general counsel. Even so, the commentary does not require that the lawyer offer advice but merely permits her to do so, and it requires a high degree of certainty ("knows") of the adverse consequences.

Another portion of the commentary to Model Rules of Professional Conduct (ABA) Rule 1.2 makes clear that the "lawyer ordinarily has no duty to initiate investigation of a client's affairs . . . . " Where the matter falls outside of the agreed-upon scope of representation, the lawyer is not required to investigate. If, notwithstanding the lack of investigation, the lawyer knows that an adverse consequence will befall the client, she may (but is not required to) offer advice to the client.

Finally, the commentary to Model Rules of Professional Conduct (ABA) Rule 1.2 strongly suggests that in giving advice the lawyer is not required to challenge or question the veracity of statements by corporate officials but may accept them as true. The limitation on this rule is that a lawyer may not turn a blind eye to evidence known to the lawyer suggesting that the officers' statements are untrue.

§ 3:14 Corporate counsel as legal advisor—Duties to constituents—The errant officer

There is no absolute prohibition against corporate counsel representing both the corporation and one or more of its directors, officers, employees or agents. Indeed, dual representation often occurs with adequate consent as prescribed by Model Rules of Professional Conduct (ABA) Rule 1.7. Corporate counsel must be sensitive to the potential for conflict of interest when considering this joint representation or even when receiving information from a corporate officer or employee who is himself involved in possible liability-causing activity. Depending on the nature of the problem, the officer may have interests that conflict with the corporation. Receiving confidential information from the officer

without adequate notice to the officer of the fact that corporate counsel represents only the corporation, and not the officer individually, may allow the officer to argue later that counsel was his personal lawyer.

To avoid this problem, counsel must be able to identify immediately situations which have a high likelihood for a conflict of interest between the corporation and the officer. Where those indications are present, counsel should avoid dual representation. He must also take timely steps to assure that officer knows that corporate counsel does not represent him.

If the lawyer concludes that the company's interest is adverse to the officer's, then counsel should advise the officer that there is adversity, that corporate counsel cannot represent the individual, and that the person may wish to hire separate counsel.

§§ 3:15 to 3:16 Duties to partners, coventurers and to participants in closely-held corporations

Another treacherous situation is where corporate counsel also represents a partnership or joint venture in which the corporation is a participant. The problem is that by becoming counsel for the partnership or venture, corporate counsel undertakes duties to the entity, and may even be deemed to undertake duties to each participant. These duties to the partnership entity and/or its participants may place corporate counsel in a conflict of interest situation with his primary corporate client. The problem will become aggravated if a dispute arises between the partners or venturers.

The risks from this situation are considerable and counsel should strive to avoid being placed in this position. After formation of the partnership or venture, the entity should hire separate counsel. If corporate counsel cannot avoid the situation, careful written clarification of the role of counsel, and segregation of files may reduce the risks to counsel and the corporate client.

Corporate counsel should also be aware that some cases have found a closely held corporation more akin to a partnership than to a corporation. A court that reaches such a conclusion may preclude counsel for the closely held corporation from filing suit against a shareholder—a result that would not ordinarily obtain in public corporations.

§ 3:17 Corporate counsel as business advisor

Lawyers in business transactions have ethical duties under

Model Rules of Professional Conduct (ABA) Rule 4.1 not to knowingly make a false statement of material fact. In addition, a lawyer may not fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client unless disclosure is prohibited by Model Rules of Professional Conduct (ABA) Rule 1.6. "Fact" in this context excludes estimates of value and other puffery that is commonly engaged in during negotiations.

While Model Rules of Professional Conduct (ABA) Rule 4.1 forbids withholding information that would assist in a crime or fraud (unless confidentiality is required by Model Rules of Professional Conduct (ABA) Rule 1.6), it does not address the larger issue of an attorney's ethical duties for misrepresentation by silence. In the absence of a duty to disclose information, an attorney has no obligation to disclose information to an adversary and is, indeed, ethically prohibited from doing so under Model Rules of Professional Conduct (ABA) Rule 1.6. A duty to disclose information may arise where the lawyer has previously made a representation that is no longer true and upon which he knows his adversary is relying.

§ 3:18 Corporate counsel as advocate—Is non-litigating corporate counsel governed by Model Rule 3.1 to 3.7?

Model Rules of Professional Conduct (ABA) Rules 3.1 to 3.7 provide pertinent ethical rules for the lawyer as advocate. These rules include restrictions on asserting unmeritorious claims or defenses, engaging in dilatory litigation practices, presenting false and misleading evidence, being unfair to opposing counsel and the like. While there is no doubt that these rules apply to trial counsel and all others who have entered an appearance before the court, the question is whether the rules apply to corporate counsel who are directing or monitoring litigation but are not identified as advocates in pleadings. The absence of direct authority on the reach of the lawyer-as-advocate rules is probably irrelevant because there are so many other ethical rules that would reach the activity of the corporate lawyer who is monitoring or directing litigation.

In some instances, Model Rules of Professional Conduct (ABA) Rule 8.4 may control because it prohibits a lawyer from "knowingly assist[ing] or induc[ing] another" person from violating the ethical rules. Thus, where trial counsel is violating the rules, corporate counsel cannot assist or encourage the conduct. In extreme cases, actions that violate the lawyer-as-advocate rules may also violate Model Rules of Professional Conduct (ABA) Rule

8.4(d) which prohibits "engag[ing] in conduct that is prejudicial to the administration of justice."

Model Rules of Professional Conduct (ABA) Rule 5.1(b) is also likely to impose obligations on corporate counsel because it provides that a "lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the [ethical rules]."

§ 3:19 Corporate counsel as advocate—Truth and the tribunal

The obligations of the lawyer to be truthful to the tribunal during litigation are prescribed by Model Rules of Professional Conduct (ABA) Rule 3.3. The four prohibitions are *knowingly* (1) making a false statement of fact or law to a tribunal, (2) failing to disclose a material fact to a tribunal "when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client," (3) failing to disclose adverse legal authority in the controlling jurisdiction that has not already been disclosed by opposing counsel, and (4) offering evidence she knows to be false.

§ 3:20 The corporate counsel's ethical duty to resign because of improper or unlawful corporate conduct

The corporate counsel's duty to resign because of improper or illegal corporate conduct is governed by the complex interplay of three rules: Model Rules of Professional Conduct (ABA) Rule 1.13, Model Rules of Professional Conduct (ABA) Rule 1.2 and Model Rules of Professional Conduct (ABA) Rule 1.16. In general, this problem arises where the lawyer has advised the corporation that it must disclose some fact or take some action related to the lawyer's representation, and the company refuses to do so.

The first step, as in virtually every corporate lawyer dilemma, is to at least examine whether the decision is being made by the most senior authority within the corporation. Put another way, has the lawyer gone as high up the corporate ladder as she can go or is it possible that a higher authority will agree with her and avert the crisis? This is essentially a Model Rules of Professional Conduct (ABA) Rule 1.13 problem and should be examined in detail before proceeding to more drastic measures.

Model Rules of Professional Conduct (ABA) Rule 1.2(d) categorically prohibits a lawyer from counseling or assisting a client in activity that the lawyer "knows is criminal or fraudulent." If directed by the client to perform such acts, a lawyer must resign as required by Model Rules of Professional Conduct (ABA)

Rule 1.16(a)(1).

One significant problem, however, may be determining whether a proposed activity will be characterized as criminal conduct. This is true because if things go badly, many seemingly non-criminal acts may be viewed as part of a criminal conspiracy to defraud or to injure third parties such as consumers. One point is clear: Model Rules of Professional Conduct (ABA) Rule 1.2(d) does not require a lawyer to refrain from counseling or advising a client based on the fact that the client's *prior* acts were criminal or fraudulent. Many clients come to lawyers for advice or representation regarding the potential consequences of past misconduct and it is perfectly proper to provide such representation.

Model Rules of Professional Conduct (ABA) Rule 1.2(d) requires that the lawyer "know" that the client's acts are criminal or fraudulent. This imports a high standard of certainty into the rule and, thus, the rule does not prohibit a lawyer from representing a client where the legality of the proposed action is debatable as a matter of law. This would include where the law is unsettled or the lawyer has a good faith belief that the positions are warranted under existing law or by a good faith argument for an extension, modification or reversal of existing law.

What if the client's proposed action is non-fraudulent or non-criminal based upon the facts as represented by the client but the lawyer has not independently verified the facts? The general rule is that a lawyer is not required for purposes of Rule 1.2(d) to challenge the client's veracity or to verify independently everything that the client represents. That does not mean, however, that the lawyer is free to accept a client's assertions that are implausible or that the lawyer can turn a blind eye to what is plain to be seen. Balancing these two principles, especially in light of the likelihood that the lawyer's conduct is likely to be judged only if there is a corporate catastrophe, may be one of the most difficult decisions that a corporate lawyer will be required to make.

Even if the lawyer concludes that the client's conduct is neither criminal nor fraudulent, the lawyer may be forced to resign if the representation will result in the lawyer personally engaging in a violation of law or a violation of an ethical rule. This is prescribed by Model Rules of Professional Conduct (ABA) Rule 1.16(a). A very significant unanswered issue is whether a lawyer is required to resign if the "other law" that he would be required to violate through the continued representation is a law other than a criminal law or statute. Self-protective reasons may compel a lawyer to give this provision a broad reading.

Apart from the circumstances in which the lawyer is required

to resign, there are a number of situations in which she is permitted to resign. There are two standards for permissive resignation. Where resignation can be accomplished without material adverse effect on the interests of the client, a lawyer can resign without a reason. Otherwise, permissive resignation is governed by Model Rules of Professional Conduct (ABA) Rule 1.16(b) which provides in pertinent part that a lawyer may resign if the "client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent." The difference between this standard for permissive resignation and the standard for mandatory resignation is that resignation is not *required* unless the lawyer's services are being used to assist or further a fraud (Model Rules of Professional Conduct (ABA) Rules 1.2(d) and 1.16(a)(1)). A lawyer may, but is not required to, resign, if her services have already been used to perpetrate a crime or fraud.

Even resignation, however, does not relieve a lawyer of the obligations of confidentiality except where a "noisy withdrawal" is permitted.

§§ 3:21 to 3:27 Contracting corporate employees without corporate counsel present

Model Rules of Professional Conduct (ABA) Rule 4.2 prohibits a lawyer from contacting a party who is represented by counsel without the approval of the other party's lawyer. Violation of this rule has led to disqualification of counsel, suppression of statements taken in violation of the rule and, of course, professional discipline. Because of conceptual problems of defining which corporate employees are "the client" in a corporate representation, the application of this rule to corporate litigation has become a quagmire.

The prohibition against contacting directly a represented person, once thought to apply only where there were proceedings or litigation pending, is now clearly applicable to all situations where the person is represented with respect to the subject matter of the contact. Thus, a lawyer is prohibited from contacting a principal (without the consent of his lawyer) in non-litigation matters such as contract negotiations as well as in court proceedings. The prohibition is also not limited to situations in which the clients are adverse—although it is presumed that if they are working cooperatively, their respective lawyers, if asked, would permit the clients to talk directly with the other counsel.

The reach of Model Rules of Professional Conduct (ABA) Rule 4.2, when applied to the corporation, has been addressed in Com-

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ment 4 to that rule which prohibits contact with "persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." Unfortunately, this formulation is very difficult to apply with any precision and predictability except to those individuals at the very top of the organization (who will presumably be included). There appears to be a trend in the cases to exempt from the reach of Model Rules of Professional Conduct (ABA) Rule 4.2 low level corporate employees who were purely witnesses to the incident although even that rule is not absolute. In the absence of clear precedent in the jurisdiction, counsel contacting any corporate employees without reaching agreement with corporate counsel about the application of Model Rules of Professional Conduct (ABA) Rule 4.2 or securing a court order in the pending case, face great uncertainty in the vast gray area where most of the important witnesses are likely to be found.

As a general rule, former employees of a corporation or other entity are not viewed as falling within the no-contact provisions of Model Rules of Professional Conduct (ABA) Rule 4.2 unless the corporate employee was centrally involved in the transaction or the employee has confidential, bordering on privileged, information about the litigation. Even where the lawyer is permitted to contact employees or former employees of a corporate adversary, the lawyer should disclose her identity and the fact that she represents a party that is adverse to the employee's current or former employer in pending or prospective litigation.

If a lawyer is prohibited from contacting a represented person without the consent of that person's counsel, the same restriction applies to non-lawyer agents acting as the lawyer's behest. This is the rule derived from ABA Formal Opinion 95-396 which prohibits a lawyer from sending an investigator to contact the represented person. See Model Rules of Professional Conduct (ABA) Rules 5.3(c) and 8.4(a). This should not, however, prevent client-to-client contacts although there is a question whether the lawyer can ethically employ the client to extract uncounselled admissions in such contacts.

The application of Model Rules of Professional Conduct (ABA) Rule 4.2 to contacts by government prosecutors and investigators has been a major source of controversy and conflict between the Justice Department and the organized bar. The Justice Department has insisted that it is exempt from the ethical rules governing all other lawyers and that in investigations of corporations, it

can contact a much broader range of corporate employees without the consent of corporate counsel. This self-proclaimed exemption from the ethical rules was memorialized in former versions of 28 C.F.R. part 77. The Justice Department's position, however, has been rejected by ABA Formal Opinion 95-396 and now by federal legislation, 28 U.S.C.A. § 530B, which subjects government attorneys to the same rules as other lawyers. It is doubtful that the Justice Department will accept the new legislation and further developments can be expected.

A party may have somewhat broader rights to communicate with federal government officials without the consent of the government's lawyer. This right derives from the First Amendment guarantee that citizens may "petition for the redress of grievances." ABA Formal Opinion 97-408 specifically addresses this point: it holds that Model Rules of Professional Conduct (ABA) Rule 4.2 is generally applicable to contacts with government officers but that in certain circumstances a private person may contact a government official without government lawyer's consent. The government lawyer, however, must be given advance notice of the contact (and copies of any written material) so that the lawyer may advise the government official regarding whether to meet. Some state bar associations may have more liberal rules for contacting government officials.

§§ 3:28 to 3:29 Requesting corporate employees not to communicate with opposing parties or the government

As a general rule, a lawyer cannot request a person to refrain from giving relevant information to another party. See Model Rules of Professional Conduct (ABA) Rule 3.4(f). The only exceptions are where the person is "a relative or employee or other agent of a client" and the "lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information." Under this rule, corporate counsel can ethically request all corporate employees not to give information to another private party. Although not resolved, we also believe that corporate counsel is ethically permitted to couple that "request" with a directive from senior management making it a condition of employment that no such information be voluntarily disclosed.

In general, corporate counsel (and corporate management) have been much less likely to direct or even request corporate employees not to provide information to law enforcement investigators. The fear, of course, is that the government will claim obstruction of justice.

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§ 3:30 Ethical responsibility for the actions of other lawyers and non-lawyers in corporate counsel's office

Model Rules of Professional Conduct (ABA) Rule 5.1 requires a supervisory attorney or partner in a law firm to have in place "measures giving reasonable assurance that all lawyers in the office conform to the [Model Rules]" and imposes upon supervisors a duty to monitor subordinates. Liability for the actions of a subordinate attorney, however, requires that the supervising attorney order or ratify the unethical conduct of a subordinate with knowledge of the specific conduct or know of the conduct when its consequences can be avoided or mitigated, and fail to take action. Model Rules of Professional Conduct (ABA) Rule 5.1(c).

Model Rules of Professional Conduct (ABA) Rule 5.2 provides that a subordinate lawyer is bound by the ethics rules notwithstanding directions of another, and presumably senior, lawyer. Rule 5.2(b) however provides that a subordinate lawyer who "acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty" does not violate the ethical rules.

Model Rules of Professional Conduct (ABA) Rule 5.3 applies to nonlawyer assistants the same principles that are applied to subordinate lawyers in Model Rules of Professional Conduct (ABA) Rule 5.1. Thus, a supervisory lawyer may be liable for the actions of non-lawyer assistants in these circumstances.

§ 3:31 The ethics of dealing with regulators

Model Rules of Professional Conduct (ABA) Rule 3.9 and ABA Opinion 93-375 address the issue of when a lawyer's involvement in the administrative process constitutes litigation for the lawyer-as-advocate rules (Model Rules of Professional Conduct (ABA) Rules 3.1 to 3.7). Rule 3.9 extends certain lawyer-as-advocate rules to the attorney who represents a client "before a legislative or administrative tribunal in a non-adjudicative proceeding."[4] If those rules apply, a lawyer may in some circumstances be required to volunteer damaging information about a client despite the general obligations of confidentiality of Model Rules of Professional Conduct (ABA) Rule 1.6. ABA Opinion 93-375 makes clear that the administrative proceeding so envisioned refers only to trial-type proceedings in which evidence is presented for deci-

[4] Representation in administrative proceedings that are adjudicative in nature are clearly deemed litigation for purposes of the lawyer-as-advocate rules.

sion to a neutral fact-finder by parties, witnesses are examined, arguments presented, etc. Thus, the vast majority of administrative and agency activity would not be subject to the ethical rules governing litigation.

Formal Opinion 93-375 is clearly a response to, and total repudiation of, the position taken by the Office of Thrift Supervision in its well-known case involving Kaye, Scholer, Fierman, Hays & Handler in which the OTS pursued the law firm in essence for its failure to disclose information adverse to a client in a bank examination. Another conclusion of equal importance for those who practice administrative law is that "a lawyer has no obligation to bring to the attention of the examiners conduct the lawyer believes is not a violation, even if she has reason to believe that the examiners have a contrary view."

§ 3:32 Ethical limitations on the attorney as director

The ethical issue for the attorney-director is whether the obligations of a corporate director conflict with her ethical duties as a lawyer for the corporation, and thus present a conflict of interest under Model Rules of Professional Conduct (ABA) Rule 1.7(b). We conclude that there is no inherent ethical impropriety in an attorney also acting as a director for a corporation which she, or her firm, represents provided that she abstains from certain types of decisions and makes appropriate disclosures. This conclusion, however, has been overshadowed by the reality that attorney-directors are primary targets in litigation, can seldom secure adequate liability insurance and may find themselves in awkward and ambiguous situations particularly in a company that faces serious problems.

Some of the more serious problems that the attorney-director can face involve the attorney's ethical obligations of candor to tribunals (Model Rules of Professional Conduct (ABA) Rule 3.3(a)(4)) and, in some instances, third parties (Model Rules of Professional Conduct (ABA) Rule 1.6(b)) that may be seen by the corporation's other directors as not being in the best interests of the company. An attorney-director may also find that her personal liability as a director may affect the advice she gives as a lawyer. These situations must be avoided, if possible, or remedied, if necessary, by resignation from the board.

Other problems involve the somewhat ambiguous role of the attorney-director in giving advice at board meetings and otherwise. If litigation results from activities in which the attorney-director played a significant role, there is frequently a question whether the advice was legal advice or a business judg-

ment and whether the other directors were entitled to rely upon the lawyer's views, or even her silence, as giving the law firm's stamp of approval to the decision.

These practical problems have culminated in ABA Formal Opinion 98-410 which reluctantly concludes that a lawyer may serve on the board of a company she represents if she adequately informs the company of the risks and refrains from certain types of work. The Opinion's extensive conclusions are reviewed in the text.

A much more detailed analysis of this same issue, which reaches much the same conclusions, can be found in "Report of the Task Force of the Independent Lawyer—The Lawyer-Director: Implications for Independence" (1998) issued by the ABA's Section on Litigation.

§ 3:33 Ethical restrictions on contact with the press

Model Rules of Professional Conduct (ABA) Rule 3.6 prescribes the ethical limitations on a lawyer's ability to discuss matters with the press. These limitations are in addition to the confidentiality requirements of Model Rule 1.6 and the restrictions in any gag order, protective order or confidentiality provision imposed by court order or court rule.

In general, a lawyer who has participated in an investigation or litigation of a matter cannot make extrajudicial statements to the press that will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. Excepted from this rule is certain objective information about the proceeding. See Model Rules of Professional Conduct (ABA) Rule 3.6(b). A lawyer is also permitted a limited right to reply to recent publicity not initiated by the client or lawyer which has had a substantial undue prejudicial effect on the client's rights.

§ 3:34 Limitations on working for competitors

A lawyer's ability to work for a competitor of his current corporate employer is governed by the general rules of agency and by Model Rules of Professional Conduct (ABA) Rule 1.9 (Conflict of Interest—Former Client). Absent consent, Model Rules of Professional Conduct (ABA) Rule 1.9 prohibits a lawyer who has represented a corporation/client in one matter from being adverse to his former client in that matter or a substantially related matter. The lawyer cannot work on the same specific litigation or contract for his new employer in which he represented his former employer—that much is clear.

The more difficult interpretive problem under Model Rules of Professional Conduct (ABA) Rule 1.9 is the definition of "substantially related matter" and, specifically, whether general knowledge of how one company approaches business opportunities precludes the lawyer from moving to a direct competitor. Apparently the only court which has attempted to apply this rule to corporate counsel moving between competitors has rejected the argument that the lawyer gained "general knowledge" of his former client's business that should prevent all employment by a competitor. Instead, the court only prohibited the lawyer from working on matters for his new corporate employer of the type he handled (lease negotiations) for his former employer in which the former employer had a direct competitive interest.

More difficult, and unanswered, questions involve the lawyer who moves between corporations that are head-to-head competitors on virtually all matters such as long distance carriers, airlines on competing routes, software companies, etc.

§ 3:35 Ethical limits on consultation

While it is commonplace for lawyers to consult informally with one another to resolve ethical or legal issues that arise in their practices, such consultations may present problems for corporate counsel. The problem arises from the fact that because of corporate counsel's position, such consultations instantly disclose the identity of the client and thus may imperil client confidences. The ethical rules, as interpreted and applied by ABA Formal Opinion 98-411, require approval by the client of such disclosures. One way to address this issue would be to seek advice from the corporation's outside counsel and thus not reveal confidences outside of the privileged relationship.

Additional problems are encountered where the corporate counsel is considering her ethical obligations in a manner that is adverse to the corporate client's professed interest. There, corporate counsel cannot consult the corporation's outside lawyers because of adversity of interest and must disclose the information to her own lawyer even without client approval although that would appear to be a risky alternative.

ANALYSIS

§ 3:1 Introduction

As I observed in the introduction to this volume, the paradigm for the American legal profession is a single private lawyer and an individual client. The modern world of corporations and in-

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Multijurisdictional Practice (MJP)

ACC MJP Web Page
Check this site for developments and documents related to Multijurisdictional Practice. The page includes links to MJP rules and contacts for each jurisdiction – a first step for any inquiry.
http://www.acc.com/advocacy/keyissues/mjp.cfm

ABA MJP Commission homepage:
This site offers a comprehensive overview of regulation related to MJP in the US, including more material on such topics as pro hac vice, foreign counsel admission, admission on motion, etc. The site also features the reports of the ABA MJP Commission which promoted adoption of what is now new Model Rule 5.5, and charts that offer status on the states' adoption of 5.5 and related rules.
http://www.abanet.org/cpr/mjp/

MJP Resources

ABA Model Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice
http://www.abanet.org/cpr/mrpc/rule_5_5.htm

Birbrower: ACC amicus brief in the case that made MJP a national priority
http://www.acc.com/legalresources/resource.cfm?show=93690

Morrison v. Board of Law Examiners, ACC Amicus Brief, U.S. S. Ct. 2006
http://www.acc.com/vl/public/AmicusBrief/upload/TitleMorrisonvBoardofLawExaminersBriefofACCUSSCt103106.pdf
ACC argues that the current admission on motion system is unnecessarily restrictive and does not accommodate the realities of modern business practices or the increasing mobility of lawyers serving corporate clients.

ACC Statement to ABA re: Proposed Model Rule for Registration of In-House Counsel, July 2008
http://www.acc.com/vl/public/PolicyStatement/loader.cfm?csModule=security/getfile&pageid=17097
ACC Comment Letter, Re: ABA Model Rule for Registration of In-House Counsel, 2007
http://www.acc.com/vl/public/PolicyStatement/upload/ACCCommentLetterReABAModelRuleforRegistrationofInHouse.pdf
ABA Model In-House Counsel Registration Rules (adopted August 2008)
http://www.abanet.org/leadership/2008/annual/adopted/OneHundredTwelveA.doc

MJP: We're All Guilty, Legal Times article by S. Hackett, 2002
http://www.acc.com/legalresources/resource.cfm?show=16173

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Attorney-Client Privilege Erosion in the In-House Context

(Last Updated 4/09)

Supplemental Material
Provided by Susan Hackett

This bibliography can be found (and is regularly updated) online at http://www.acc.com/advocacy/privilege-bibliography

General Information:

ACC's Attorney-Client Privilege homepage: (offers articles, resources, testimony, links, etc.)
http://www.acc.com/advocacy/keyissues/privilege.cfm

ACC's Pragmatic Practices in Privilege Protection:
http://www.acc.com/public/attyclientpriv/pragpract.pdf

ACC's Attorney-Client Privilege InfoPAK (a manual summarizing the privilege):
http://www.acc.com/resource/v6327

"Wither" Attorney-Client Privilege
An ACC Docket article by ACC's General Counsel, Susan Hackett, on Privilege in the In-house Context Post-Enron: http://www.acc.com/protected/pubs/docket/sept05/wither.pdf

ACC Acts to Protect the Privilege:

Attorney Client Privilege Protection Act of 2007/08 (endorsed by ACC and its coalition partners): The same legislation introduced in December of 2006 was reintroduced in 2007 by Senator Specter as S.186: http://www.acc.com/chapters/aust/upload/S186 Atty Client Privilege Protection Act.pdf . **Identical legislation was introduced on July 12, 2007, in the House as H.R. 3013** [http://www.acc.com/public/attyclientpriv/hr3013.pdf] and passed the House on voice vote. The current iteration of the bill is in the Senate Judiciary Committee, and **new legislation was reintroduced by Senator Specter in June of 2008 as S. 3217**:
http://www.acc.com/advocacy/keyissues/upload/accpa2008.pdf

ACC Statement: Senator Specter Re-introduces S. 186 as S. 3217, an amended bill:
http://www.acc.com/aboutacc/newsroom/pressreleases/2008/Attorney-Client-Privilege-Protection-Bill.cfm

ACC Statement: US House Adopts HR 3013 - Attorney-Client Privilege Protection Act of 2007
http://author.acc.com/aboutacc/newsroom/accinthenews/Not-above-the-Law-2.cfm

ACC's 2005 survey: Is the Privilege Under Attack?
http://www.acc.com/Surveys/attyclient.pdf

ACC's 2006 survey: The Decline of the Attorney-Client Privilege in the Corporate Context
http://www.acc.com/Surveys/attyclient2.pdf

The Veasey Report – ACC's 2007 member survey pipelining privilege and prosecutorial abuse stories relayed by respected neutral Former Chief Justice of Delaware E. Norman Veasey.
http://www2.acc.com/public/veasey.pdf.

ACC and its Coalition's Executive Summary of Why Congress Should Act to Protect the Attorney-Client Privilege:
http://www.acc.com/public/policy/attyclient/attyclientcoalitionmcnultyrebuttal.pdf

ACC and its Coalition partners' testimony before the US Senate's Judiciary Committee hearings, September 18, 2007
- Coalition to Protect the Attorney-Client Privilege's statement on the hearings (ACC's statement): http://www2.acc.com/public/coalition-statement.pdf
- Statement of former Attorney General Dick Thornburgh
http://www2.acc.com/public/thornburgh-testimony.pdf
- Statement of Andrew Weissmann, former head of the DOJ's Enron Task Force
http://www.acc.com/public/senatejudiciary.pdf
- ABA written submission to the Senate for the hearings:
http://www.acc.com/public/aba-testimony.pdf

ACC and its Coalition partners' testimony before the US House Judiciary Committee's Subcommittee on Crime, Terrorism and Homeland Security, March 12, 2007:
- Testimony of ACC Board Chairman Richard T. White:
http://www.acc.com/public/policy/attyclient/richardwhitemcnultytestimony.pdf
- Testimony of Andrew Weissmann, former DOJ Enron Task Force Chairman:
http://www.acc.com/legalresources/resource.cfm?show=16255
- Testimony of ABA President Karen Mathis:
http://www2.acc.com/public/policy/attyclient/abatestimonytohousejudsubcomm.pdf
- Testimony of William Sullivan, Partner, Winston & Strawn:
http://www.acc.com/advocacy/keyissues/loader.cfm?csModule=security/getfile&pageid=61909&page=/index.cfm&qstring
- Testimony of Barry Sabin, US Department of Justice:
http://www.acc.com/advocacy/keyissues/loader.cfm?csModule=security/getfile&pageid=61939&page=/index.cfm&qstring=

ACC and its Coalition partners' testimony before the US Senate Judiciary Committee, September 12, 2006:
http://www2.acc.com/public/attyclientpriv/coalitionsenjudtestimony.pdf

Testimony and Statements made at the Senate Hearings (Sept. 12, 2006):
http://www2.acc.com/public/attyclientpriv/writtentestimonyussenate.pdf

ACC and its Coalition partners' testimony before the US House of Representatives Judiciary Subcommittee on Crime, Terrorism and Homeland Security, March 7, 2006:
http://www.acc.com/legalresources/resource.cfm?show=16229

Letter to Sen. Leahy from former US Attorneys supporting S. 186 (6/2008):
http://www.acc.com/resource/v9833

Letter from former DOJ officials re the need for action on legislation (2007):
http://www2.acc.com/public/attyclientprivissue.pdf

Letter from former senior DOJ officials criticizing the Thompson Memo (2006):
http://www2.acc.com/public/attyclientpriv/agsept52006.pdf

Letter from former senior DOJ officials - US Sentencing Commission (re Thompson) (2005):
http://www2.acc.com/public/policy/attyclient/doj.pdf

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- The Auditor's Need For Its Client's Detailed Information vs. The Client's Need to Preserve the Attorney-Client Privilege and Work Product Protection: The Debate, The Problems, and Proposed Solutions (ACC endorsed position paper, 2004):
http://www.acc.com/public/article/attyclient/debate.pdf

- Comments of the Association of Corporate Counsel to the ABA Attorney-Client Privilege Task Force Hearings (2005)
http://www.acc.com/public/comments/attyclient/privilege.pdf

- American Corporate Counsel Association November, 2002 Policy:
In-House Counsel's Role in Ensuring Corporate Responsibility
http://www.acc.com/public/accapolicy/corpresponspolicy.pdf

- ACC and Coalition Comments to US Sentencing Commission on Chapter 8 Organizational Guidelines, Section 8C2.5, Waiver of Attorney-Client Privilege (August 2005)
http://www.acc.com/public/accapolicy/attyclient.pdf

ACC's Comparison "Chart" The Thompson and McNulty Memos and S. 186/H.R. 3013:
http://www.acc.com/public/attyclientpriv/mcnultychart.pdf

ABA Attorney-Client Privilege Task Force homepage:
Contains Task Force reports to the ABA House of Delegates, which are law review type articles outlining privilege issues. These include resolutions on privilege passed by the ABA House in August of 2006 which focus on privilege erosion in the context of audits and problems associated with employee or individual rights (a la the KPMG issues). It also has a resources section, where collected material resides, and info on Task Force activities. ACC is a member of the Task Force and supports their efforts.
http://www.abanet.org/buslaw/attorneyclient/home.shtml

Department of Justice/Prosecutorial Practices Eroding the Attorney-Client Privilege:

DOJ Charging Policies Used to Assess Corporate Cooperation – Chronological Order

The DOJ's Holder Memorandum (1999):
http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html

Establishment of the DOJ's Corporate Fraud Task Force (2002) (Executive Order 13271):
http://www.usdoj.gov/dag/cftf/execorder.htm

The DOJ's Thompson Memorandum (2003):
http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm

The DOJ's response to the ABA regarding proposals to amend the Thompson Memo:
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McNulty Statement on Thompson Memo Before Senate Judiciary Committee, Sept. 2006:
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The McNulty Memo (Dec. 2006) (amending the Thompson Memo):
http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf

- Deputy AG McNulty's prepared remarks on release of the Memo:
  http://www.usdoj.gov/archive/dag/speeches/2006/dag_speech_061212.htm

- DOJ Executive Summary of the McNulty Memo:
  http://www.acc.com/public/policy/attyclient/dojexecsummary.pdf

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http://www.usdoj.gov/dag/morford-useofmonitorsmemo-03072008.pdf

The "Filip" Letter and Sen. Specter's response (July 2008, prior to the release of Filip Memo)

The Filip Letter: http://www.acc.com/legalresources/resource.cfm?show=16449

Sen. Specter's Response: http://www2.acc.com/public/specterlettertodagfilip.pdf

The New DOJ Guidelines retracting the McNulty Memo policies (issued by DAG Filip in August of 2008), now housed in the US Attorney's manual:
http://www2.acc.com/public/prin-fede-pros-busi-orga.pdf

Info on the DOJ's Corporate Fraud Task Force
http://www.usdoj.gov/dag/cftf/

Review Significant Criminal Cases and Charging Documents of the DOJ against corporate targets
http://www.usdoj.gov/dag/cftf/cases.htm

DOJ's Fact Sheet report on the Corporate Fraud Task Force Fifth Anniversary
http://www.usdoj.gov/opa/pr/2007/July/07_odag_507.html

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The SEC's new guideline - essentially repeals privilege waiver as defined by the Seaboard Report (October 2008)
http://www.sec.gov/divisions/enforce/enforcementmanual.pdf

SEC's Seaboard Report [the SEC's internal document setting policy on (non-) "recognition" of privilege, picking up on the same concepts developed in the DOJ's Thompson Memorandum]:
http://www.sec.gov/litigation/investreport/34-44969.htm

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http://www.acc.com/protected/article/ethics/seccrimproceed.pdf

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SEC's general counsel explains the 307 rules and their context:

http://www.sec.gov/news/speech/spch040304gpp.htm

SEC's director of enforcement speaks on lawyers' responsibilities as gatekeepers of client conduct and shareholder interests:

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SEC Commission Atkin's Remarks before the Federalist Society (see about page 6):

http://www.sec.gov/litigation/investreport/34-44969.htm

Privilege in the Audit Process

ACC's Interim Report of the Working Group to Improve the Relationship Between Lawyers and Auditors: http://www2.acc.com/php/cms/index.php?id=368

ACC's Comments on the Financial Accounting Standards Board's Proposals to Amend FAS 5: story and links.

The proposed rule, if adopted, will force companies to disclose privileged information and legal work product that could negatively impact their liability, litigation strategies and defense rights. Over 140 Companies have joined ACC in comments to the FASB. See the comments and more at the link below:

http://www.acc.com/advocacy/news/ACC-and-135-CLOs-Statement.cfm

FASB Amendments to FAS 141(R)-1, Accounting for Assets Acquired and Liabilities Assumed in a Business Combination That Arise from Contingencies (issued April 1, 2009). Moving away from FAS 141(R) as issued in December 2007, the changes effectively return the

standards to their original form with regard to reporting litigation related contingencies. While FAS 141(R) is limited to accounting in business combinations, it parallels some requirements under FAS 5: http://www.fasb.org/pdf/fsp_fas141r-1.pdf

ACC and the Courts - Privilege as a Court-Protected Doctrine:

Conference of Chief Justices Statement Supporting the Attorney-Client Privilege (and instructing States's Courts to Create Commissions to examine erosion issues):
http://ccj.ncsc.dni.us/resol9StateCommitteesOnAttorneyClientPrivilege.html

ACC's Comments to the Federal Courts' study committee examining proposed FRE 502 and its limited waiver provisions:
June of 2006:
http://www.acc.com/vl/public/PolicyStatement/loader.cfm?csModule=security/getfile&pageid=16218
January of 2007: http://www.acc.com/public/policy/attyclient/accfre502comments.pdf

All ACC Amicus (listing and links) on privilege-related issues:
http://www2.acc.com/php/cms/index.php?id=291

ACC's amicus briefs in U.S. v. Textron, supporting privilege in the audit process and encouraging the court to rule that documents divulged to auditors in the course of assuring financial integrity should not be deemed as waived to the government or third parties.

--Filed 4/22/09:
http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=207212

--Filed 4/8/08:
http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=15823

ACC's Amicus in a Texas Supreme Court case regarding the confidentiality of privileged documents produced to an auditor by a client during the regular audit process and then sought in discovery by a third party in litigation against the client.
http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=15845

ACC's amicus brief on limited waiver concerns: (QWEST)
http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=15844

ACC's amicus briefs on the issue of government pressure on companies to deny employees' indemnification and fee advancement under corporate policies:

- *US v. Stein*/KPMG case (3 amicus on related issues as requested by Judge Kaplan):

    - http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=15825
    - http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=15843
    - http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=15841
    - Judge Kaplan's decision in KPMG finding the Thompsom Memo unconstitutional: http://www2.acc.com/public/attyclientpriv/kpmg_decision.pdf
    - Judge Kaplan's dismissal of the charges against 13 of the 16 KPMG defendants: http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=15833

- *Lake/Wittig* case:
http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=15848

ACC's amicus in *Teleglobe v. BCE*, in which privilege rights of the employer-entity of an in-house legal team that provided advice for both the employer entity and affiliates in the corporate family are discussed:
http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=15837

Amicus of five Canadian corporations interested in the *Teleglobe v. BCE* case:
http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=15838

Third Circuit Opinion in *Teleglobe v. BCE* – Judge Ambro (citing to ACC's brief, amongst others): http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=15834

ACC's amicus in *Broadcom v. Qualcomm*, which argues that a jury instruction to consider absence of opinion of counsel an adverse inference further erodes attorney client privilege in the corporate context:
http://www.acc.com/advocacy/news/acc-files-amicus-brief.cfm

ACC's amicus in Tyco executive case, *NY v. Kozlowski and Schwartz*, opposes an attempt by former Tyco executives to obtain attorney work product:
http://www.acc.com/advocacy/news/ny-court-of-appeals-affirms-ruling.cfm

Other Related Issues:

ACC's Gatekeeper/Liability homepage:
http://www.acc.com/advocacy/keyissues/gatekeeping.cfm

ACC Reports: Corporate Counsel in the Liability Crosshairs (2007)
http://www.acc.com/vl/public/Article/loader.cfm?csModule=security/getfile&pageid=15927

ACC's "Paradise Tarnished: Today's Sources of Liability Exposure for Corporate Counsel" (2006)
http://www.acc.com/legalresources/resource.cfm?show=16075

Corporate Counsel: Caught in the Crosshairs (2005 - Lamberth)
http://www.acc.com/vl/membersonly/Article/loader.cfm?csModule=security/getfile&pageid=16038

ACC's Leading Practices Profile: Indemnification and Insurance Coverage for In-House Lawyers
http://www.acc.com/vl/membersonly/PracticeProfile/loader.cfm?csModule=security/getfile&pageid=16814

ACC's Sarbox 307 – Part 205 Rules homepage: This is the site of a significant number of primary and commentary resources on the SEC's new attorney conduct rules promulgated under the authority given in Sarbanes-Oxley Section 307, and codified at 17 CFR Part 205.
http://www2.acc.com/legres/corpresponsibility/attorney.php

Lawyers as Whistleblowers: The Emerging Law of Retaliatory Discharge of In-house Counsel
http://www.acc.com/vl/membersonly/Article/loader.cfm?csModule=security/getfile&pageid=16079

The appendix to this article contains the ABA Model Rules of Professional Conduct 1.6 (Confidentiality) and 1.13 (Organization as Client), which are most relevant to this discussion. The issue of lawyers as whistleblowers raises privilege questions in the context of privileged attorney-client conversations and information that the plaintiff lawyer would wish to introduce in order to make his or her case for retaliatory discharge.

Responsive Measures for Government Investigations (Warin)
http://www.acc.com/vl/membersonly/Article/loader.cfm?csModule=security/getfile&pageid=16040

ACC's InfoPAK on Responding to a Government Investigation:
http://www.acc.com/legalresources/resource.cfm?show=77637

ACC's InfoPAK on Conducting an Internal Investigation:
http://www.acc.com/legalresources/resource.cfm?show=19675

If you are an in-house counsel and not an ACC member, and therefore need a temporary password to access some of these documents, please contact Susan Hackett at hackett@acc.com.

Additional Ethics Resources
(Complementing primary materials that were reproduced for registrants)
Susan Hackett, Senior Vice President and General Counsel, ACC

General

ACC InfoPAK: In-house Counsel Ethics
http://www.acc.com/legalresources/resource.cfm?show=19656

Attorney-Client Privilege/Work Product Protections/Confidentiality

ACC Attorney-Client Privilege Resource Bibliography:
http://www.acc.com/advocacy/keyissues/upload/privilege-bibliography-2008.doc

This resource bibliography includes links to all of the work ACC has done, including legislation and the new US Attorneys Manual (the Filip Guidance) in the context of protecting privilege in government investigations. The bibliography also has sections on privilege in the audit process, as well as privilege in the litigation process (for instance, new FRE 502 on privilege in the e-discovery process), etc.

ACC InfoPAK – Attorney-Client Privilege:
http://www.acc.com/legalresources/resource.cfm?show=19681

ACC InfoPAK on Internal Investigations:
http://www.acc.com/legalresources/resource.cfm?show=19675

ACC Comments to FASB Regarding Proposed Amendments to FAS 5, August 2008:
http://www2.acc.com/public/ACCcommentFAS5072508_3.pdf

Top Ten Reasons Corporate Counsel Should Be On Alert to the FASB's Proposed Amendments to FAS 5, Accounting for Contingencies, July 2008
http://www.acc.com/legalresources/publications/topten/toptenfas5.cfm

More information on FAS 5 proposal developments and comments:
http://www.acc.com/advocacy/news/ACC-and-135-CLOs-Statement.cfm

In re: Teleglobe Communications Corporation v BCE, Third Circuit Opinion, July 2007:
http://www.acc.com/legalresources/resource.cfm?show=15834 (on the issue of privilege protection when counseling across corporate family affiliates)

In re: Teleglobe Communications Corporation v BCE, Amicus Brief of ACC, July 2006:
http://www.acc.com/legalresources/resource.cfm?show=15837 (on the issue of privilege protection when counseling across corporate family affiliates)

A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege, by John E. Sexton, NYU Law Review, June 1982:
http://www.acc.com/legalresources/resource.cfm?show=144543

Attorney-Client Privilege for a Corporate Client, by Lori E. Iwan, March 2006 (a multistate reference of state case law)
http://www.acc.com/legalresources/resource.cfm?show=16640

The Role of the Board of Directors In the Age of Corporate Investigations, Whiteford Taylor Preston presentation to the Baltimore Chapter of the Association of Corporate Counsel, October 2007:
http://www.acc.com/chapters/balt/upload/WTP%20BoardCorporateInvestigations.pdf

SEC Enforcement Manual, October 2008:
http://www.sec.gov/divisions/enforce/enforcementmanual.pdf

SEC's "Seaboard Report", October 2001:
http://www.sec.gov/litigation/investreport/34-44969.htm
United States v. Jeffrey Stein (KPMG),2nd Cir. Opinion, September 2008:
http://online.wsj.com/public/resources/documents/ruling-kpmg-20060627.pdf

United States v. Jeffrey Stein (KPMG), 3rd Amicus Brief of ACC, S.D.N.Y., January 2008:
http://www.acc.com/legalresources/resource.cfm?show=15825

MJP

ACC MJP homepage (includes MJP rules listed by jurisdiction):
http://www.acc.com/advocacy/keyissues/mjp.cfm

ABA MJP homepage:
http://www.abanet.org/cpr/mjp

Who's the Client?

In-House Counsel Responsibilities In The Post-Enron Environment, *ACC Docket*, March 2003: http://www.acc.com/legalresources/resource.cfm?show=151576

Audit Committees under the Sarbanes-Oxley Act: Establishing the New Complaint Procedures, *ACC Docket*, July 2003:
http://www.acc.com/legalresources/resource.cfm?show=178838

In-house Attorneys as Gatekeepers: Practical Advice for Navigating in the Post Enron Era, article by James B. Moorhead and Jeffrey E. McFadden, March 2007:
http://www.acc.com/legalresources/resource.cfm?show=15971

Maybe You Need A Lawyer: Does The Sarbanes-Oxley Act Make The SEC Your

Client?, *ACC Docket*, April 2003:
http://www.acc.com/legalresources/resource.cfm?show=150449

Guest Ethics—Noncompetes and In-house Counsel, by Eric Reicin,
ACC Docket, December 2006:
http://www.acc.com/legalresources/resource.cfm?show=14583

United States v. Jeffrey Stein (KPMG),2nd Cir. Opinion, September 2008:
http://online.wsj.com/public/resources/documents/ruling-kpmg-20060627.pdf

United States v. Jeffrey Stein (KPMG), 3rd Amicus Brief of ACC, S.D.N.Y., January 2008:
http://www.acc.com/legalresources/resource.cfm?show=15825

Conflicts and Waivers

ACC InfoPAK on Conflicts and Waivers
http://www.acc.com/legalresources/resource.cfm?show=19665

Gatekeeping/Liability

ACC Homepage on gatekeeping/corporate counsel liability for corporate failures:
http://www.acc.com/advocacy/keyissues/gatekeeping.cfm

ACC InfoPAK on In-house Counsel / Attorney Conduct Standards under Sarbanes-Oxley (Sarbox 307/SEC Part 205):
http://www.acc.com/legalresources/resource.cfm?show=19652

In-house Attorneys as Gatekeepers: Practical Advice for Navigating in the Post Enron Era, article by James B. Moorhead and Jeffrey E. McFadden, March 2007:
http://www.acc.com/legalresources/resource.cfm?show=15971

Batson Report on Enron- Final Report, January 2004 (final report of Neal Batson, bankruptcy court-appointed examiner responsible for investigation the parties involved in the Enron corporation fiasco):
http://www.acc.com/legalresources/resource.cfm?show=16098

Arthur Andersen LLP v. United States of America, Amicus Brief of National Association of Criminal Defense Lawyers, 2/22/2005 (focuses on issues that create additional personal liabilities for in-house counsel and defense counsel in general; the zealous representation, level of communication and overall relationship of in-house counsel and their clients; and Document retention policies and the resulting liabilities for those who administer them):
http://www.acc.com/legalresources/resource.cfm?show=15851