401 Chair's Choice Taking the High Road: CEO? Management? Company? Shareholders? Who's Your Client?

Mark Chandler
Vice President, Legal Services & General Counsel
Cisco Systems, Inc.

Ray B. Hansen
General Counsel
Syncrude Canada Ltd.

Thomas D. Hickey
Vice President & Deputy General Counsel
Nextel Communications, Inc.

Richard K. Jeydel
Secretary & General Counsel
Kanematsu USA Inc.

M. Elizabeth Wall
General Counsel
The European Lawyer

Faculty Biographies

Mark Chandler

Mark Chandler is vice president legal services and general counsel of Cisco Systems, Inc. in San Jose, CA, where he manages a 110 person staff of attorneys and contract professionals supporting Cisco's worldwide legal and regulatory requirements.

Previously, he was Cisco's managing attorney for Europe, the Middle East, and Africa, based in Paris, and was general counsel of StrataCom, Inc. in San Jose until Cisco's acquisition of StrataCom. Prior to working for StrataCom, Mr. Chandler was vice president corporate development and general counsel of Maxtor Corporation, a Fortune 500 manufacturer of computer storage peripherals.

Mr. Chandler is a former member of the City of Palo Alto Utilities Commission, former member and chair of the City of Palo Alto Planning Commission, and he was a participant in the Robert Bosch Foundation Fellowship Program in Bonn and Munich, Germany. Mr. Chandler is currently a member of the U.S. Department of Commerce Industry Advisory Committee on Ecommerce, a member of the Board of Visitors of Stanford Law School, and a member of the Corporation of Belmont Hill School in Belmont, MA.

He received a BA from Harvard College and a JD from Stanford Law School.

Ray B. Hansen

Ray B. Hansen is general counsel of Syncrude Canada Ltd. with attendant legal responsibilities to the corporation, its board of directors, and the management committee of the Syncrude Project, a joint venture undertaking among several of Canada's largest oil companies which produces approximately 14% of Canada's crude oil consumption from the oils ands in northeastern Alberta. Mr. Hansen joined Syncrude as corporate counsel and later became manager of the law department.

Prior to joining Syncrude, Mr. Hansen practiced at the law firm of Brownlee Fryett.

Mr. Hansen currently serves as the president of the Canadian Corporate Counsel Association and is the past president of the University of Alberta faculty of law Alumni Association. He taught business law as a sessional instructor at Keyano College for 11 years and teaches construction law for the Faculty of Extension of the University of Alberta. He is a member of the Conference Board of Canada's Council of Senior Legal Executives, the Law Society of Alberta, the Canadian Bar Association, and the member of the Alberta General counsel Association. He is chair of the Keyano College Business Advisory Committee, regional corporate representative of the Canadian Diabetes Association, and past director of the Fort McMurray YMCA Association.

Mr. Hansen holds a BA and Bachelor of Laws degree from the University of Alberta. He is also a graduate of the University of Western Ontario's Executive Management Program and the Harvard Law School Advanced Negotiation Program. In 2000, he was appointed Queen's Counsel by the Government of Alberta.

Thomas D. Hickey

Thomas D. Hickey is vice president and deputy general counsel for Nextel Communications, Inc., a Fortune 300 company based in Reston, VA. During his 13 years with Nextel's legal department, he has provided legal support for every Nextel function. His current responsibilities include managing the legal support provided by the Nextel legal department's employment, regulatory, and commercial practice groups.

Prior to joining Nextel, Mr. Hickey served as a member of the Telecommunications Section of Jones, Day, Reavis & Pogue in Washington, DC.

Mr. Hickey received a BA from Duke University and is a graduate of the Washington University School of Law.

Richard K. Jeydel

Richard K. Jeydel is secretary and general counsel with Kanematsu USA Inc. in New York. While at Kanematsu, Mr. Jeydel has represented the company and its affiliates in numerous transactions, and in the litigation, arbitration, and mediation of a substantial number and variety of international, commercial, and other cases.

Prior to joining Kanematsu, Mr. Jeydel was in the U.S. Army and was an associate at McCarter and English.

Mr. Jeydel is a former member of the New Jersey Supreme Court Ethics Committee, a past president of ACCA's New Jersey Chapter, and a founding officer and master of the Justice Marie L. Garibaldi Inn of Court. He is on the American Arbitration Association President's Panel, has been an advocate, arbitrator, or mediator in over 500 cases, and serves on ACCA's Board of Directors as well as on the Board of Directors and Executive Committee of the American Arbitration Association.

Mr. Jeydel is a graduate of Harvard Law School.

M. Elizabeth Wall

Elizabeth Wall is general counsel for The European Lawyer in London.

Prior to joining The European Lawyer, Ms. Wall was senior vice president, general counsel, and director of regulatory affairs with Equant NV, prior to its merger with Global One and takeover of control by France Telecom in 2001. At Cable & Wireless plc, Ms. Wall established the law function from scratch and, over a period of nine years, built the department to over 60 lawyers colocated with their clients in eight locations. The C & W law department provided a comprehensive range of legal services to the group including privatisations, strategic alliances and joint ventures worldwide. Ms. Wall took over responsibility for the group's regulatory function. Her earlier roles included chief international counsel for McDonnell Douglas Systems International, general counsel of the Clarendon Group, New York and assistant general counsel for Itel Corp, San Francisco.

Ms. Wall serves as a governor and chairman of the Strategy Committee of the College of Law in the UK and is currently vice chair of ACCA's Board of Directors.

Ms. Wall received an LLB with honours from the Victoria University of Manchester.

Hard Knocks Counsel

Hard Knocks Manufacturing and its CEO were named as co-defendants in a shareholder suit when it announced that its past three years financial statements would have to be restated, resulting in a $500 million reduction to the previously represented pre-tax earnings. When Jade Green, Deputy General Counsel, discusses the case with the CEO he tells Green that obviously the restatement is negative but the company is sound. There is no use wasting money on this issue, why not save money by using the same law firm to defend both himself and the company.

The CEO also informs Jade that he has just obtained a $500 million short-term credit secured by pledging stock in a recently acquired paper company. Jade believes the board must approve such an action and questions the CEO who responds that he is "being paid to be a leader" and his decision to obtain the credit needed to be done quickly and was for the good of the company. He's done similar transactions in the past without any problems and doesn't see why it would be any different now. He tells Jade to keep this information confidential. He knows the General Counsel approves because he reviewed the transaction documentation.

Jade Green has never met the Chair of the board or the head of the Audit Committee and does not know how they might react.

Jade's friend Garnet Stone is an experienced litigator with expertise in shareholder suits. Jade considers discussing the situation with Garnet.

Lawyers, Lies and Videotape

Orville is senior counsel for Airframe Manufacturing. Airframe builds airframes for many of the commuter airlines (those carrying 20 to 75 passengers on "short hop" routes). Because commuters fly into and out of small airports in bad weather, there are always two or three lawsuits or investigations pending somewhere in the country that involve charges that the company produced a defective product. Orville's position, however, is to oversee international tax issues and does not involve the defense of these cases.

One afternoon Sarah, a young lawyer from the litigation section of the general counsel's office comes in to see Orville with a concerned look on her face. She describes the following situation: she and outside counsel had been preparing company witnesses for depositions through practice questioning of them on videotape and then allowing them to see themselves. After the practice session was over, she and outside counsel left the room and left the witness and his assistant – both aeronautical engineers – alone. Unbeknownst to the two engineers, the videotape camera was still running and recorded their conversation.

Sarah later viewed the tape. She believes from the recorded discussion that the two witnesses intended to lie in their testimony in the upcoming deposition and trial about the question of whether the company ever used refurbished parts in new aircraft. Apparently, the plaintiffs allege that the use of refurbished parts increases the likelihood of stress-related failures, and thus air crashes, although there is no reliable scientific evidence to support that theory. According to jury research, the theory is quite effective if they can get it to a jury. Sarah recalled that these two individuals had testified at <u>prior</u> trials that no refurbished parts were used.

Sarah confronted the witnesses with the videotape (without outside counsel present). They told her that outside counsel had told them that their answers were okay – that they didn't have actual "knowledge" of facts so that they could lawfully deny their existence. Sarah doubts this but is not fully aware of what was said. They told her that if she made that tape public, she would wreck the company. Sarah panicked and destroyed the tape. Now she was terrified that she had done something terribly wrong so she was going to leave it to Orville's judgment, as a senior lawyer, about what to do.

Orville asks her a few questions. Sarah tells him that in the prior depositions and trials, she and outside counsel for the corporation had put in appearances for the company *and* for all corporate employees who were called to testify (including these two individuals). Furthermore, she tells Orville, she has prepared and submitted answers to interrogatories that were based upon her belief (from questioning all company witnesses including these employees), and the answers were sworn to by a corporate representative. She actually presented these two engineers as witnesses in one non-jury trial. It is her personal opinion that the issue about which the witnesses probably lied does not truly affect safety but the plaintiffs try to find some basis to get the issue before the jury.

Sarah has talked with Wilbur, Group Executive – one level below the Company President – asking him "what if" they learned that refurbished parts had been used? Wilbur had dismissed the issue and said it was a ridiculous claim and had no effect on safety. He said that if he learned that it had been done, however, he would fire the employees on the

spot. It seemed clear to her that Wilbur had no knowledge that refurbished parts had in fact been used because doing so is strictly against company policy.

Sarah tells Orville she is resigning as of today and turning the matter over to him and will do whatever he says. Orville gets up to walk into the General Counsel's office to discuss the issue, and Sarah tells him that she has already told the General Counsel. The General Counsel told her to forget that the videotape ever existed.

Selected Resources

CONFIDENTIALITY OF INFORMATION
RULE 1.6 ABA MODEL RULES OF PROFESSIONAL CONDUCT

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to secure legal advice about the lawyer's compliance with these Rules;
(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
(4) to comply with other law or a court order.

ABA Proposed Rule Change to 1.6

Extend permissible disclosure under Rule 1.6 to reach conduct that has resulted or is reasonably certain to result in substantial injury to the financial interests or property of another, and **require disclosure** under Rule 1.6 to prevent felonies or other serious crimes, including violations of the federal securities laws, where such misconduct is known to the lawyer.

MODEL RULE 1.9 CONFLICT OF INTEREST: FORMER CLIENT

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client consents after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

ORGANIZATION AS CLIENT
RULE 1.13 ABA MODEL RULES OF PROFESSIONAL CONDUCT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any 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. Such measures may include among others:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when

the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

ABA Proposed Rule Change to 1.13

1. Amend Rule 1.13 to require the lawyer to pursue remedial measures for misconduct whether the problem is related to the representation or learned through the representation and to communicate with higher corporate authority where other efforts fail to prevent or rectify the problem, to make clear that disclosure of confidential client information to higher authority within the corporation does not violate Rule 1.6, and to revise language that discourages lawyers from communicating with higher corporate authorities.

To amend 1.13 to reach beyond “actual knowledge” to circumstances in which the lawyer “reasonably should know” of the crime or fraud.

Sarbanes-Oxley Act of 2002

Selected Sections

SEC. 307. RULES OF PROFESSIONAL RESPONSIBILITY FOR ATTORNEYS.
Not later than 180 days after the date of enactment of this Act, the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule– (1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

SEC. 402. ENHANCED CONFLICT OF INTEREST PROVISIONS.
(a) PROHIBITION ON PERSONAL LOANS TO EXECUTIVES.
Section 13 of the Securities Exchange Act of 1934
(15 U.S.C. 78m), as amended by this Act, is amended by
adding at the end the following:

‘‘(k) PROHIBITION ON PERSONAL LOANS TO EXECUTIVES.

''(1) IN GENERAL.—It shall be unlawful for any issuer (as defined in section 2 of the Sarbanes-Oxley Act of 2002), directly or indirectly, including through any subsidiary, to extend or maintain credit, to arrange for the extension of credit, or to renew an extension of credit, in the form of a personal loan to or for any director or executive officer (or equivalent thereof) of that issuer. An extension of credit maintained by the issuer on the date of enactment of this subsection shall not be subject to the provisions of this subsection, provided that there is no material modification to any term of any such extension of credit or any renewal of any such extension of credit on or after that date of enactment.

''(2) LIMITATION.—Paragraph (1) does not preclude any home improvement and manufactured home loans (as that term is defined in section 5 of the Home Owners' Loan Act (12 U.S.C. 1464)), consumer credit (as defined in section 103 of the Truth in Lending Act (15 U.S.C. 1602)), or any extension of credit under an open end credit plan (as defined in section 103 of the Truth in Lending Act (15 U.S.C. 1602)), or a charge card (as defined in section111 127(c)(4)(e) of the Truth in Lending Act (15 U.S.C. 1637(c)(4)(e)), or any extension of credit by a broker or dealer registered under section 15 of this title to an employee of that broker or dealer to buy, trade, or carry securities, that is permitted under rules or regulations of the Board of Governors of the Federal Reserve System pursuant to section 7 of this title (other than an extension of credit that would be used to purchase the stock of that issuer), that is—
''(A) made or provided in the ordinary course of the consumer credit business of such issuer;
''(B) of a type that is generally made available by such issuer to the public; and
''(C) made by such issuer on market terms, or terms that are no more favorable than those offered by the issuer to the general public for such extensions of credit.

''(3) RULE OF CONSTRUCTION FOR CERTAIN LOANS.—Paragraph (1) does not apply to any loan made or maintained by an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), if the loan is subject to the insider lending restrictions of section 22(h) of the Federal Reserve Act (12 U.S.C. 375b).''.

