Top Ten Things In-House Lawyers Need to Know about Ethics

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Some in-house lawyers let their guard down, ethics wise, now and again. Here is a quick reminder of some of the ethics rules that may affect you relatively often.

1. The Ethical Rules Still Apply to You

In writing and speaking on ethical issues for in-house counsel for over 15 years, I've encountered numerous in-house lawyers who believe that for some reason the ethical rules don't apply to them. To be blunt, they are wrong. In addition to the fact that the rules as written never suggest that they do not apply to in-house counsel, we now have the case of *Kaye v. Rosefielde*, 75 A.3d 1168, 1204 (New Jersey Super.Ct.App.Div. 2013). There, the in-house lawyer engaged in a business transaction with his client (he got an equity interest in a new company he formed) without going through the steps required by Rule 1.8.

When the lawyer was later sued by his by-then former client, one of his defenses was that the requirements of Rule 1.8 did not apply to him

because he was in-house counsel. This was soundly rejected by the

court:

> Independent of the particular facts of this case, we also discern no rational basis to exempt attorneys who have been hired by corporate clients to serve as in-house counsel from the ethical requirements of Rules of Professional Conduct (RPC) 1.8. . . . We find nothing in the plain language . . . to suggest or even imply that lawyers who are retained by corporate clients as in-house counsel or general counsel are exempt from the proscriptions of RPC 1.8(a). (Emphasis added.)

2. It is Actually Pretty Easy for In-House Counsel to have Conflicts of Interest

"Directly Adverse" Conflicts under Rule 1.7(a)(1). When in-house counsel represents groups of related companies, or officers, directors, owners, or employees at the company where he is in-house, it is easy to develop a "directly adverse" conflict under Rule 1.7(a)(1). Representation of subsidiaries may occur in dealing with a third-party, and this can lead to a conflict when issues arise between the subsidiary and parent. In other cases, it may be mere inadvertence that creates the attorney-client relationship between the in-house lawyer and someone other than the company that employs him. For example, when an in-house lawyer answers legal questions from officers, employees, or owners about their legal issues (not those of the company), this can create an attorney-client relationship and thus the chance of a "directly adverse" conflict.

For example, in *Yanez v. Plummer*, 164 Cal. Rptr. 3d 309 (Cal Ct. App. 2013), the in-house lawyer gave advice to an employee on their way to the employee's deposition. This created an attorney-client relationship between the lawyer and the employee, which in turn led to a conflict of interest for the lawyer that the lawyer failed to recognize. It also led to a malpractice suit against the in-house lawyer by the (by then former) employee. In *Dinger v. Allfirst Fin*., Inc., 82 Fed. Appx. 261 (3d Cir. 2003),

the in-house lawyer gave officers advice on when to cash in their stock options. This also led to a malpractice suit against the in-house lawyer, brought by the (by-then) former officers.

"Material Limitation" Conflicts under 1.7(a)(2). Conflicts under Rule 1.7(a)(2) exist for in-house counsel, as well. These "material limitations" conflicts can arise based on the lawyers' own interest in the company, the involvement of others with whom the lawyer has a personal relationship, or a myriad of other reasons. For example, if the in-house lawyer has stock in the company and thinks about what will happen to his specific stock (as opposed to the good of the company, generally) when deciding on advice to the company, then he could have a "material limitation" conflict.

Simply owning stock and wanting the company to do well, without more, does not create this conflict. But imagine if the company was considering two courses of action: one where the stock spikes in the short run, but may be riskier in the long run, and another with no spike, but more stable long-term growth. If the lawyer lets his personal retirement plans (for example) weigh into his analysis of the course to take, then he has is a conflict of interest.

3. Being Offered Stock or Stock Options in your Client is a "Business Transaction" with the Client Covered by Rule 1.8.

This was the particular rule that *Kaye* (as quoted above) was addressing. Analytically, there is no difference between an outside counsel going in on a business venture with a client and an in-house counsel being offered stock or stock options in the client. In both instances, the lawyer is engaging in a business transaction with the client, and so the requirements of Rule 1.8 must be followed.

4. Just because Something is Confidential to you does not Mean it is Protected by the Attorney-Client Privilege

Mean it is Protected by the Attorney-Client Privilege

Many laymen, and a disturbing number of lawyers, believe that the attorney-client privilege attaches to all communications with a lawyer. This is not true. The attorney-client privilege only applies where the communications are between a lawyer and a client for the purpose of giving or receiving legal advice, and are expressed in confidence.

Thus, for example, when a CEO requests business advice from the in-house lawyer, neither the question nor the answer is protected by the attorney-client privilege. While the lawyer must not speak of this under Rule 1.6, that does not mean it's protected from discovery by a third party should litigation ensue. Similarly, routine human resources or employment discussions may not be protected by the attorney-client privilege, and there are multiple cases holding so.

Not everyone that works at the same company as you is the "client." This is one of the most troubling aspects of applicability of the attorney-client privilege. Many people who work at the same company as you are not the "client" for attorney-client privilege analysis. Generally, a person would have to be one who regularly consults with the lawyer regarding a particular matter or has the authority to bind the company regarding the matter to be the "client" for purposes of the attorney-client privilege. If your communications are with others at the company, they may well not be covered by the attorney-client privilege. (Of course, under Rule 1.6 you generally cannot voluntarily disclose any information about a representation without client consent, regardless of whether it is privileged.)

5. Just Because a Company has a Lawyer, Does Not Mean it is Represented for Purposes of the Rules

Just because another company with whom you are dealing has a lawyer,

even in-house counsel, does not mean it is "represented" on the particular matter involving you. Rule 4.2 analyzes representation on a matter-by-matter basis. Thus you may be dealing with a layman in the procurement department and that is perfectly acceptable under the Rules until you "know" the client is represented on that particular matter.

6. The Imputed Disqualification Rule can Disqualify an Entire In-House Legal Department

The only substantive Rule in the Model Rules of Professional Conduct that directly addresses in-house counsel is Rule 1.10, Imputed Disqualification. It reminds all lawyers that the definition of "Firm" in Rule 1.0 includes "the legal department of a corporation or other organization." As such, when one in-house lawyer is disqualified, the disqualification can be imputed to the entire in-house department.

7. Confidentiality Walls Don't Always Work

Rule 1.11 allows a confidentiality wall to segregate an attorney who previously "personally and substantially" worked on a matter for an adverse government agency. If the lawyer that previously "personally and substantially" worked on a matter came from another in-house job or private practice, however, then a confidentiality wall is ineffective and the entire in-house department may be disqualified.

8. Your Client is the Organization Itself

Rule 1.13 provides that the client is the organization itself-not the officers, management, or even the board of directors. Many times executives or owners at companies treat in-house counsel as their own personal counsel, and this can lead to the conflicts described above (among other bad things).

9. Acting in a Capacity other than Lawyer does not Excuse you from the Rules

you from the Rules

Many in-house counsel also have another job (Vice-President, Secretary, etc.). Most courts addressing these "dual capacities" have held the legal ethical rules still apply even when the lawyer is acting in his "other" capacity. This was another argument made by the lawyer but rejected in Kaye.

10. In-House Lawyers Should be Licensed in the State(s) Where They Regularly Office

Many in-house lawyers allow their licenses to lapse, thinking they are unnecessary. This is dangerous. Practicing law without a license is a crime, an ethical violation where you are licensed, can get your colleagues in ethical trouble (as they are prohibited from assisting in the unauthorized practice of law by the Rules), and may impact your client's attorney-client privilege. The good news is many states have "single-client" rules that allow in-house counsel to register in the state where they office but keep up their licenses in another state.

Conclusion

You are not off the hook, ethically speaking, by going in house. Failure to be aware of the ethical rules can have negative consequences for both you and your client.

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