

Acting as In-house Counsel: Ethical and Practice Management Issues

In-House Counsel Professionalism Conference Fall 2011

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- **“...the most ethically challenged position in the American legal profession...” Stephen Gillers, New York, University School of Law**



- **What has changed in the last two decades**

- Increase in the number of in-house counsel
- Changing role of in-house counsel
- Increased focus on corporate malfeasance

- **Changes to professional rules as they apply to in-house counsel**

- SOX

- Rule 2

- Noisy withdrawal proposal

AGENDA

1. **Who is your client**
2. **Wearing two hats**
3. **Up the ladder reporting**
4. **Working with outside counsel**

1. Who is your client

Rule 2.02(1.1) When Client an Organization

- Notwithstanding that the instructions may be received from an officer, employee, agent, or representative, when a lawyer is employed or retained by an organization, including a corporation, in exercising his or her duties and in providing professional services, the lawyer shall act for the organization.

2. Wearing two hats

Business Advisor and Lawyer

- Most if not all in-house counsel act as both business advisor and lawyer
- Communications and work product are not privileged simply because they come from counsel
- You cannot cloak non-legal matters under privilege – rules of professional conduct – reporting-up
- Your colleagues and superiors do NOT understand privilege – need to be educated.
- Have a rough understanding of privilege, how to protect it, and jurisdictional difference

2. Wearing two hats

Business Advisor and Lawyer

➤ Do's

- Be aware of the issue – educate your in-house clients
- Seek outside counsel advice if in doubt
- Within reason - separate business and legal advice
- Clearly designate legal communications as privileged
- Assume that all emails will be seen by opposition counsel – govern yourself accordingly

2. Wearing two hats

Business Advisor and Lawyer

➤ Don'ts

- Designate all communications as privileged – has the opposite effect
- Distribute sensitive communications to other than those with 'need to know'
- EVER use 'Reply to all'
- Provide private legal advice to executives or employees – your client is your employer.

3. Up the ladder reporting

Rule 2.02(5.1) Dishonesty, Fraud, etc. when Client an Organization

- When a lawyer is employed or retained by an organization to act in a matter and the lawyer knows that the organization intends to act dishonestly, fraudulently, criminally, or illegally with respect to that matter, then in addition to his or her obligations under subrule (5), the lawyer for the organization shall
 - (a) advise the person from whom the lawyer takes instructions that the proposed conduct would be dishonest, fraudulent, criminal, or illegal,

3. Up the ladder reporting

Rule 2.02(5.1) Dishonesty, Fraud, etc. when Client an Organization

- (b) if necessary because the person from whom the lawyer takes instructions refuses to cause the proposed wrongful conduct to be abandoned, advise the organization's chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct would be dishonest, fraudulent, criminal or illegal,

3. Up the ladder reporting

Rule 2.02(5.1) Dishonesty, Fraud, etc. when Client an Organization

- (c) if necessary because the chief legal officer or the chief executive officer of the organization refuses to cause the proposed conduct to be abandoned, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct would be dishonest, fraudulent, criminal, or illegal, and
- (d) if the organization, despite the lawyer's advice, intends to pursue the proposed course of conduct, withdraw from acting in the matter in accordance with rule 2.09.

3. Up the ladder reporting

Rule 2.09(7) Mandatory Withdrawal

- (7) Subject to the rules about criminal proceedings and the direction of the tribunal, a lawyer shall withdraw if
 - (a) discharged by the client,
 - (b) the lawyer is instructed by the client to do something inconsistent with the lawyer's duty to the tribunal and, following explanation, the client persists in such instructions,
 - (c) the client is guilty of dishonourable conduct in the proceedings or is taking a position solely to harass or maliciously injure another,

3. Up the ladder reporting

Rule 2.09(7) Mandatory Withdrawal

- (d) it becomes clear that the lawyer's continued employment will lead to a breach of these rules,
- (d.1) the lawyer is required to do so pursuant to subrules 2.02 (5.1) or (5.2) (dishonesty, fraud, etc. when client an organization), or
- (e) the lawyer is not competent to handle the matter.

4. Working with outside counsel

- **Managing “who does what” between the law firm and client**
- **The role in-house counsel may play when working with external counsel**

4. Working with outside counsel

- **Managing client expectations**

- Cost
- Time commitment
- Complexity of the deal
- Organizational readiness
- Filtering role

- **Panel discussion**

THANK YOU!