

IADC Corporate Counsel Training Academy for New Corporate Counsel

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The Ritz-Carlton Chicago, Illinois USA

Ethical Challenges - Unexpected and Unintended

In-house counsel face many unique challenges, many of which we are not prepared for by our specialized practices as outside counsel. As soon as you transition to in-house, these vexing challenges start cropping up immediately and you will need to be equipped to be able to handle them. Our experienced all in-house panel will help you navigate the landmines and will address ethical issues including:

- What should you do if your CEO directs you to do personal legal work on company time for her?
- Can you jointly represent your company and individual employees in litigation?
- Can you simultaneously represent your company and one or more of its affiliated companies in litigation or in transactional work where there might be differing interests at stake?
- In a family-owned business, how do you manage a situation in which one of the family shareholders who is the CEO seeks your advice regarding a direct conflict with another family member who is also a major shareholder and officer with respect to the vision for running the business?
- How do you conduct privileged Upjohn internal investigations without exposing yourself or your company to disqualification or ethical violations?
- When are your internal communications covered by the attorney-client privilege or work product doctrine?
- When involved in government investigations what can you never tell your employees?

Moderator: Patrick J. Conlon, Exxon Mobil Corporation, Houston, TX USA

Speakers: Jill Bond, Rich Products Corporation, Buffalo, NY USA;

Jerome Kraisinger, Avendra LLC, Rockville, MD USA;

Aldos Vance, Altec, Inc., Birmingham, AL USA

2018 Corporate Counsel Training Academy - Ethical Scenarios

Scenario 1: The CEO of Best Company walks into your office and explains that his daughter has been arrested for DUI. He is irate and informs you that he expects you to get her out of jail immediately and handle any related legal matters.

Question: Whether in-house counsel can perform personal legal work for the CEO of an organization?

Answer: ABA Model Rule 1.13 provides that the client is the organization itself—not the officers, management, or even the board of directors. Many times executives treat in-house counsel as their own personal counsel, and this can lead to the conflicts of interest.

Practice Tips: Tactfully explain the professional rules of responsibility to your CEO in a manner that he highlights ethical constraints that prevent you from personally handling his legal affairs. You must (if you would like to stay gainfully employed), however, find a competent attorney to handle the matter on behalf of the CEO.

Scenario 2: Best Company is conducting acquisition due diligence into Second Best Company. During the due diligence phase, the CEO inquires as to whether the documents related to the acquisition are in order. After you confirm that the paperwork is in order, the CEO requests business advice as it relates to the acquisition of Second Best Company.

Question: Whether the CEO's request for business advice and any subsequent advice is protected under the attorney-client privilege?

Answer: The communication is confidential under ABA Model Rule 1.6 but not every interaction with officers or employees of the company are privileged. 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. Additionally, not all of the employees of a company are clients. 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 in order to be a "client" for purposes of the attorney-client privilege.

Practice Tip: Be sure that your company understands the nuances of the attorney-client privilege versus confidentiality.

Scenario 3: The Island Company is served with a sexual harassment lawsuit. It is alleged that the CFO of Island Company has a two-year history of harassing females. Island Company has requested that you assign this matter to a law firm that will represent the company and the CFO.

Question: Whether in-house counsel or its assigned counsel can jointly represent the company and the CFO?

Answer: ABA Model Rule 1.17 addresses conflict of interest and exceptions. The in-house lawyer for a company can jointly represent the company and officer or employee as long as there is no conflict of interest. The individual should be informed that if a conflict arises during the litigation that they will need to retain their own counsel.

Practice Tip: When conflicts are identified the attorney must determine if one of the carve out exceptions are applicable (ABA Model Rule 1.17(b)). Additionally, in some instances the company may choose to pay for the counsel retained to represent the employee.

Scenario 4: After your law school graduation, you landed your dream job at Dewey Cheatem and Howe. While you enjoyed those big paychecks, you quickly grew disenchanted with the long hours of accounting for your time in 6 minute increments. Your favorite client is Daniel Rockwell, Chief Operating Officer at Rocky's Rock Company. After seeing your firm's bill for yet another contract dispute, Daniel asks you to come in-house and you become the company's first General Counsel. Rocky's Rock Company was founded by Richard Rockwell in 1950.

Daniel has two sons, Daniel, Jr. and David, who have each been given 25% of the Company's shares. While Daniel is Chief Operating Officer, David is Vice President of Special Projects. Both sons earn the same salary. However, David spends very little time working while Daniel has been instrumental in the growth of the Company and has basically been in charge as his father has slowed down due to his age and declining health. Meanwhile, David flits from one all-consuming interest to another. Last year, he took six weeks off to eat, pray & love. Two years ago, he had to go to rehab for a porn addiction. This year, he espouses conspiracy theories and believes we are all being watched by "Big Brother" at all times. Whenever Daniel tries to talk to his father about the inequity in the arrangement, his dad shuts him right down. "I built this company to support all of my family equally. I am not going to play favorites. Give David time, he will settle down when he grows up." (Daniel is 45)

When the father passes away, his shares are bequeathed equally to the two sons. While, Daniel Sr. was alive, Daniel begrudgingly tolerated his brother's "so-called involvement" in the business, but he has apparently become emboldened by his father's death. At the post-funeral breakfast, Daniel approaches you and says, "Now that Dad is gone, I finally can get rid of my nutcase brother. Let's not waste a minute. I want him cut out NOW. I am sure we can get him declared incompetent and I can get his share of the company. Start working on the paperwork tomorrow."

What is your best course of action?

Considerations:

Can you play a role in the proposed action? Whom do you represent?

Could you file a petition to have David declared incompetent if there was not a conflict?

Rule 3.1 Meritorious Claims and Contentions

What if you left the company and went back to Dewey Cheatem & Howe? Would the answer be different?

Rule 1.9 Duties to Former Clients

Would your answer change if you had been given shares in the Company as part of your compensation package?

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

What if David WANTED to sell his interest to Daniel?

Rule 1.13 Organization as Client

Rule 1.8 Conflict of Interest: Current Clients Specific Rules

Scenario 5: You are an in-house lawyer employed by Halcion Days, a privately held company domiciled in Delaware, and you are responsible for monitoring the company’s employee hotline for reporting violations of the company’s business conduct guide. The hotline is managed by an independent, third-party operator.

An employee anonymously reports through the hotline the suspected use of marijuana by a company executive at the headquarters of the company. The employee stated that he/she was smoking a cigarette in the designated smoking area outside of the headquarters building and that he/she observed the executive smoking from a distance and smelled the aroma of marijuana. The executive is the son of the CEO. You conduct an investigation and the executive admits that he was smoking marijuana that he had purchased during a business trip to the company’s plant in Colorado. The executive asks you if he has violated any local laws and to “keep the matter quiet” within the company. He also confides in you that he has been addicted to controlled substances for some time, has been using them while performing company duties, and that his addiction was the result of childhood abuse by his father.

1. Do you need to respond to the whistle blower through the hotline?

In-house lawyers get short changed when it comes to guidance under the American Bar Association’s Model Rules of Professional Conduct (the “Model Rules”).¹ Most of the rules are written for lawyers in private practice and only a small fraction of the rules address in-house counsel, but in-house counsel must comply with all of the rules in any event. In this case, monitoring the hotline could simply be a business function. However, once the lawyer commences an investigation into potentially illegal conduct or conduct which violates the company’s business conduct guide, the lawyer is functioning in a legal capacity and the rules of professional conduct apply. The lawyer should respond to the

¹ The Model Rules have been adopted in some form in most, but not all, states. In addition, many of the states that have based their professional responsibility rules on the Model Rules have made material changes to various provisions of the Model Rules. You should comply with the rules of responsibility in the state in which you practice law. See Rule 5.5(a) on the Unauthorized Practice of Law (“A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction...”) and Rule 5.5(d), the Corporate Counsel Exception. An in-house lawyer may be subject to the rules of professional conduct in various jurisdictions depending on where the lawyer is licensed, where the lawyer’s primary office is located, or where legal advice is provided. It is advisable for the in-house lawyer to be licensed in the jurisdiction in which his/her office is located and to only provide legal advice outside of that jurisdiction if he/she is also licensed in that jurisdiction or if such advice is based on the advice of a lawyer licensed in that jurisdiction. See Comment [16] to Rule 5.5.

whistle blower as set out in the business conduct guide, but in doing so the lawyer cannot reveal any confidential information obtained for his/her client, the company (See Model Rule 1.13). The lawyer must be competent with respect to the subject matter of the investigation (See Model Rule 1.1).

2. Does it matter that the marijuana was legally purchased in Colorado?

No. Possession of marijuana is not legal in the State of Delaware and marijuana remains a controlled substance under federal law. Presumably, the company's business conduct guide also prohibits the use or possession of controlled substances on company property. Furthermore, the lawyer must take steps to bring the matter to the attention of a "higher authority" within the company, because the employee is either violating a law of a legal obligation to the company (See Rule 1.13(b) – Organization as Client and Rule 1.6 – Confidentiality).

3. By asking for legal advice, has the executive established an attorney-client relationship with you and do you owe him a duty of confidentiality? The executive barrages you with emails about the status of the matter. Are these messages protected by the Attorney-Client Privilege?

No. A lawyer employed by an organization represents the organization acting through its duly authorized constituents, e.g., its officers, directors, and employees (See Rule 1.13(a)). If the lawyer knows or should know that the company's interests are adverse to the interests of the executive, the lawyer must explain to the executive that the lawyer's client is the company (See Comment [10] to Rule 1.13). The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (6). Dealing with the executive is the same as dealing with an "Unrepresented Person" (see Rule 4.3). The lawyer may not give any legal advice to the executive other than the advice that he should secure counsel. The lawyer must reveal his loyalty to the company and ensure that the executive understands that the protections of confidentiality and privilege may not be available to him. The messages will not be protected if the lawyer complies with the requirements of Rule 4.3.

4. Can you inform the CEO?

Yes, as part of taking steps to bring the matter to the attention of a “higher authority” within the company, because the employee is either violating a law of a legal obligation to the company (See Rule 1.13(b) – Organization as Client and Rule 1.6 – Confidentiality), so long as the disclosure does not operate to the detriment of the company (See Rule 1.3 – Diligence).

5. The CEO asks you to drop the matter and to keep it confidential. Who is your client – the CEO, the Board of Directors, the company’s owners?

The company is your client. A lawyer employed by an organization represents the organization acting through its duly authorized constituents, e.g., its officers, directors, and employees (See Rule 1.13(a)). The lawyer must take steps to bring the matter to the attention of an even “higher authority” within the company (See Rule 1.13(b) – Organization as Client and Rule 1.6 – Confidentiality). Also see Comment [5] to Rule 1.13 - When it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

6. Can you represent the executive?

No. See the answer to Question 3, above. Also see Rule 1.7 – Conflicts of Interest. The lawyer may not represent the executive because the interests of the company and the executive are adverse or because there is a risk that the lawyer’s representation would be materially limited by the lawyer’s duty to the company.

7. Do you have a duty to inform the Board, or at a minimum the Board’s Audit Committee? Does it matter if the CEO and/or the executive sit on the Board?

Yes. See Comment [5] to Rule 1.13 - When it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation. At a minimum, the lawyer should inform the

Chairperson of the Board, unless the CEO is the Chairperson, in which case you should inform the Audit Committee and/or the independent directors of the Board.

8. Can you be fired for ignoring the CEO's request and taking the matter to the Board?

*Possibly. Although the CEO's request could require the lawyer to violate his/her code of professional conduct, dismissal due to the lawyer's refusal to violate the code may be upheld on the basis that the lawyer's fiduciary duties to the company prohibit a cause of action for retaliatory discharge. However, some courts have concluded otherwise. "At will" employment states present additional complications to this analysis. See *Retaliatory Discharge of In-House Counsel: A Cause of Action – Ethical Obligations v. Fiduciary Duties*, DePaul Law Review, Vol. 45, Issue 3, 1996.*

9. Can you report the matter to the local police?

No. See Rule 1.6 – Confidentiality. A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services."

10. Are there any D&O insurance policy implications? Do you need to put the company's carrier on notice?

No. Neither the conduct of the executive, nor that of the CEO, were done within the scope of the performance of their respective duties.

11. Would any of your answers to the foregoing change if Halcion Days was a publicly-traded company on the NYSE? Would you have any SEC reporting obligations?

Possibly, depending on the materiality of the financial consequences to the company. However, the lawyer must still comply with the Rule 1.6 Duty of Confidentiality.

Scenario 6: You are General Counsel of Pretty Pictures, a privately held franchise photography studio company. The Company has grown significantly since its formation 2 years ago, and now has 50 employees. The company's entrepreneurial founder is Tom Tukas, a charismatic former model who thought he could make more money on the other side of the camera. While Tom is married and has children, his extramarital flings are well known. One day Barbara Bombshell, the head of Human Resources comes to you and confides that, "ever since we broke off our affair, Tom has been criticizing my work. For the first time ever, I just got a "below targets on my performance review. While we were involved, he promoted me and gave me a big raise." I was a willing party to our relationship. It was exciting and fun and made coming to work a lot more interesting. When my husband found out, he said he would leave me if I didn't break it off. Tom did not take it well at all. Now, I am afraid that I will lose my job." Sexual harassment has been all over the news since the Harvey Weinstein story first broke. You know you can't just ignore it, but it's Tom company. What do you do?

Whom do you represent in this scenario?

Rule 1.13 Organization as Client

What must you do in that representation?

Rule 1.1 Competence

Rule 1.3 Diligence

To whom should you report your findings?

Rule 1.13(a), (b) and (c) Organization as Client

What if Tom never got around to appointing a Board of Directors?

Rule 1.3 Diligence

What is your role if litigation arises?

Rule 1 Scope of Representation

Rule 3.7 Lawyer as Witness

Is your investigation report privileged?

Can you be called as a witness in the resulting litigation?

Rule 3.7 Lawyer As Witness

What if, instead of this scenario, your Chief Information Officer came to you with evidence that Tukas was using his work computer to download child pornography?

Rule 1.6 Confidentiality of Information

Rule 1.13 (b) Organization as Client