

“Ethical Issues for Corporate Counsel” from ACC is an interactive session incorporating professionally produced video case studies and mediated discussion of eight ethical dilemmas commonly faced by in-house counsel.

Designed to provide practical guidance and training for corporate legal departments, the scenarios and structured discussion provide an effective platform for education and training to explore the grey areas of corporate practice.

Video vignettes serve as talking points for on-point discussion about corporate ethical issues that in-house counsel must be ready to address. Not if, but when the time comes, be prepared.

For more pricing, scheduling, or more information, send an email to education@acc.com.

(Suggested presentation times can be adjusted up or down as required or preferred.)

Scenario I: The Whistleblower

Suggested Presentation Time: 60 minutes

The Issue: In some companies, internal investigations are a dime a dozen; in others, they are once in a lifetime events. Either way, they may present the most “entity threatening” risk on a legal level to the company and the navigational issues for in-house lawyers are potentially the hardest in terms of both potential liability or pitfalls and in terms of visibility of the legal function’s role. This scenario examines the most potentially unmanageable and explosive aspect of the investigation: the need to get information from employees about what happened and who’s involved – often against their inclinations or interests.

Themes: Reconciling your obligations to the client when flesh-and-blood employees believe they are confiding in “their” lawyer and doing exactly what you’ve told them to do for years: Come to me when you’ve got a problem or see something that doesn’t look right and you won’t be punished for it.

Conducting employee interviews that balance the company’s need to get the facts and stop/punish wrongdoing and protect employee’s Constitutional rights. Collecting facts from the source – employees – in a manner that will allow you to use the results of the interview/investigation. Delivering the so-called *Upjohn* or Corporate *Miranda* warning.

How do you appropriately respond to an employee who turns hostile when it becomes clear that their reports or your conversation with them has possible bad personal consequences for them, and the employee threatens to go public (CNN or the government)?

Relevant Responsibilities or Rules: 1.4 Communications; 1.6 Confidentiality; 1.7 Conflict of Interest; 1.13 Organization as Client; 3.4 Fairness to Opposing Party and Counsel; SEC 307 Reporting up requirements (Codified at 13CFR, Part 202).

Scenario 2: Corporate Internal Investigations

Suggested Presentation Time: 30 minutes if done following Scenario 1: The Whistleblower (same cast with the scenario further unfolding); 45 minutes if done independently.

The Issue: Same as The Whistleblower, but now add the government, media and stakeholders all potentially getting wind of the situation as it's unfolding. Their very engagement can change the course or resolution of the underlying problem, regardless of the facts that eventually do unfold.

Themes: When a potential problem arises with the potential for significant magnitude and negative impact, how do you determine what "potential" means with sufficient clarity to allow you to make next steps judgments regarding remedial actions or necessary reporting?

At what point should you involve the government or notify internal constituencies, many of whom, once notified, will force sufficient attention onto this problem that it will no longer be an option to later say, "we found out the problem didn't exist or the allegations were unwarranted?" How sure must you be before you go to DefCon 4 and how do you get to that level of confidence and knowledge?

When will your role be seen as a facilitator of finding the truth and remedying the problem, and when will you be viewed as helping to or hoping to hide the ball – in real-time and in 20/20 hindsight (liability)?

What resources inside and outside the company can you deploy? Who needs to be notified (CCO, Audit Committee/Board, CEO/Chairman, Internal Controls, etc.)?

What are the appropriate and most reliable sources of knowledge in this process? Who should be involved in making these decisions and do they have personal conflicts that must be considered or that disqualify them?

Who should conduct the investigation: inside our outside counsel? Lawyers or non-lawyers?

Once the government is involved, what is your role vis-à-vis the management, the government and employees? Whom do you represent and what can you force others to do?

Relevant Responsibilities or Rules: *Rule 1.13 Organization as Client; Restatement Section 96 (Representing the Organization as Client); US Sentencing Guidelines Chap. 8.*

Note: This scene combines detailed concepts of law and general ethical principles. It was designed to appeal to more sophisticated audiences that might be bored by "standard" ethics programs. Since it involves questions of the appropriateness of exec comp, it is also best for an audience that includes several company counsel. CLOs at a department retreat may not wish to message that their department needs training in handling a CEO who's asking for questionable financial benefits.

Scenario 3: Paying the Boss

Suggested Presentation Time: 30 minutes

The Issue: Increasing attention to executive comp, combined with a concern about corporate priorities and management self-serving their interests over the company's long term interests makes this a hot topic and very difficult to navigate. There is no "good ending" to an allegation of inappropriate executive compensation, internally or externally, so understanding how to work with board and managers on appropriate financial treatment is a great skill set for the times.

Themes: When should something one of your senior managers says alert you to a problem that the manager may have a personal stake in something they're working on at the corporate level, and how should you respond?

In particular, how do you navigate sensitive compensation issues that can pit your requirement to advise and staff the "legalities" of the compensation process against your bosses' personal interest in getting paid?

What are the relevant issues between you and board leaders who decide compensation and who rely on your recommendations, analysis and judgment for something as personally "staked" as compensation?

Additional themes of compensation law and increasing scrutiny around such policies.

Relevant Responsibilities or Rules: *Rules 1.13 Organization as Client; 2.1 Lawyer as Advisor.*

Scenario 4: Inside Outsourcing – Popular!

Suggested Presentation Time: 60 minutes total or 30 minutes individual. (This scene has two parts examining different facets of the same issue.)

The Issue: In-house counsel are looking for creative and technology-facilitated means to lower the cost of outside legal help and increase their focus on creative staffing solutions for their work. Many are looking at services provided by non-traditional providers – through outsourcing or off-shoring – that task matters to "non-lawyers" (whether because they aren't lawyers or whether because they're lawyers who are not locally admitted) that at one time would have certainly gone through their regular outside counsel. Some outside counsel are similarly assessing how to get their client's work done for less and looking to outsource elements of what they provide to the client, as well. Are their ethical or professional concerns that should be weighed and planned for about outsourcing and off-shoring work to non-lawyers, given that ultimately, the in-house lawyer is responsible for assuring the client's legal needs and professional obligations and standards are met?

Themes: What is the unauthorized practice of law? Can supervisory lawyers working on a matter hire non-locally-admitted counsel or non-lawyers to do some of their work, and if so, what are the professional issues and how are they best navigated?

When assessing the best staffing to meet legal needs, especially when looking for alternatives to high-priced firms, what professional or ethical issues may arise that you should protect your client by anticipating and contracting to handle?

What do we presume about those we hire to assist us and what is it dangerous to presume (professionally, as well as substantively?) What is or is not “unique” about what a lawyer contributes to a matter? What is fungible and outsource-able?

What is a professional firm retained to provide you with “legal services” responsible for and liable for? Do those standards vary for professionals regulated in other jurisdictions? What are you, as the supervisor responsible for outsourcing, liable for?

Relevant Responsibilities or Rules: *Rules 1.1 Competence; Rule 1.2 Scope of Representation; Rule 1.4 Communication; Rule 1.6 Confidentiality; Rule 1.7 Conflicts (Current); Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers; Rule 5.3 Responsibilities Regarding Non-Lawyer Assistants; Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law.*

Scenario 5: All in the Family?

Suggested Presentation Time: 30 minutes

The Issue: Many companies are part of corporate families, and often in-house counsel only work for some or one of the larger family members. It is common for those in-house lawyers to be called upon, or even independently see the need, to provide counseling across company “boundaries” in order to assure group processes, brand integrity, supplier chains and compliance programs. Recent cases have made very clear the possible traps that can snare such lawyers professionally when the interests of two related entities that used to be harmonious now sour or move toward conflicting interests, with one company’s lawyer in the middle.

Themes: Who’s the client? Does the entity that you’re counseling in addition to your client understand its position vis-à-vis your obligations to your employer? Can those expectations be managed?

How can inside counsel ethically represent corporate affiliates (parents, subs, holding companies, joint ventures, etc – the corporate family)? If so, under what terms and with what concerns or protections?

If interests diverge between corporate family members, whose lawyer are you? What happens to privilege/confidentiality?

Relevant Responsibilities or Rules: *Rule 1.7 Conflicts (Current); Rule 1.9 Duties to Former Clients; Rule 1.13 Organization as Client; Decision of Judge Ambrose in Teleglobe/BCE case.*

Scenario 6: To Catch a Thief – Popular!

Suggested Presentation Time: 45 minutes

The Issue: Lawyers are not trained investigators and yet are often charged with the most difficult and sensitive investigations, including uncovering facts that are not readily evident or easily discoverable. What tactics may lawyers employ? What tactics may those whom lawyers task with investigations employ? What balance will be struck between the company’s need to get complete information not readily available in a conveniently labeled file drawer quickly, and the company’s reputational concerns if the methodology employed to uncover facts, even if legal, is less than savory?

Themes: When investigating a potential fraud or some kind of alleged employee thievery, what are the bounds of what you can and cannot do to investigate the issue? Are you responsible for the tactics of an outside investigator?

If others are participating in your investigation, can they investigate in any manner that is considered allowed/legal, even if it would not be appropriate for a lawyer to do under the professional rules?

What are your duties to inform others of potential fraud and when and how do you appropriately and responsibly navigate them?

Relevant Responsibilities or Rules: Rule 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer; Rule 4.1 Truthfulness in Statements to Others; Rule 5.3 Responsibilities Regarding Non-Lawyer Assistants; Rule 8.4 Misconduct.

Scenario 7: Book It

Suggested Presentation Time: 15-30 minutes

The Issue: Many companies are concerned that in their rush to make the numbers or their quarterlies, both “creative” and well-intentioned executives will create transactions that are largely purposed to mask the realities of the current financials or show them in a better light, with the result that the true financial position is not transparent or properly reported. Since lawyers are often not trained in finance issues and have a hard time spotting complex accounting schemes, even when working on elements of the transactions (evidence, Enron), how can in-house counsel both spot these problems and then deal with the ethics of reporting what are often “legal, but stupid” concerns up the ladder. You may be accused replacing your client’s business judgment with your own.

Themes: When something seems fishy, when do you intervene and how? When is a lawyer to engage in policing or refereeing financial policy in a manner that suggests that their business judgment should trump the business manager’s judgment (as in, it may not be illegal but it’s not advisable?)

Do you go over executives’ heads (if so, to whom?) on such issues if there is no apparent illegality involved, but you suspect the issue could have reputational or business ethics impact?

For what could you be held to 20/20 hindsight professional responsibility that never even crossed your radar as a liability “event”?

Relevant Responsibilities or Rules: Model Rules 1.2(d); 1.13.

Scenario 8: Globalaw

Suggested Presentation Time: 60 minutes total or 30 minutes individual. (This scene multiple parts that can be watched independently or sequentially.)

The Issue: Many companies have facilities and operations in multiple national jurisdictions, which can create concerns for lawyers and their outside firms practicing across borders: concerns on conflicts of law and professional standards, bar regulation issues, unauthorized practice, privilege protection, retention standards for firms across country and regulatory lines, and much more. The related issue is whether law departments will wish to adopt “universal” standards of practice applicable everywhere, or prefer to have different jurisdictions set locally appropriate standards that do not easily allow for navigation of multinational teams and issues.

Themes: When a problem arises that involved interests and parties in more than one jurisdiction, who should be the lead and why? Who should not? What concerns are there in having lawyers and non-lawyers engaged in resolving the matter?

When more than one jurisdiction regulates lawyers and the resolution of the matter, whose professional rules and standards apply and what is the potential ramification of the result?

Many non-US jurisdictions do not consider in-house counsel to be lawyers or to carry “regular” lawyer privileges accorded to outside counsel. This means that their governments likewise will not recognize in-house counsel’s work as legally relevant or confidential/privileged. How do you reconcile multiple jurisdictional issues and navigate these concerns? What is the result for department wide knowledge management and online systems that carry and share confidential conversations, documents and information?

Relevant Responsibilities or Rules: Model Rules 5.5 and 8.5, plus the relevant rules and regulations of the non-US jurisdictions involved.