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A Day in the Life of Taylor Truth

Ethical Questions We Face in the Corporate World

Tuesday, October 2, 2018 | 12 Noon – 2 P.M.

Your Panelists



La Guardia Myers

- Senior Director of Real Estate
- Gannett | USA TODAY NETWORK
- Previously Chief Ethics Officer for a Fortune 500 Company



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Synopsis

- **BigCo** is a large and thriving company doing business across the United States and internationally – the company is growing in size and scrutiny. BigCo is heavily regulated by several state and federal agencies. BigCo has a sizeable legal department and leverages **Most Favored Firm (MFF)** as its primary outside law firm.
- **Taylor Truth** is BigCo's Deputy General Counsel. Taylor has unmatched ambition and is well-positioned (at least in Taylor's view) to be named General Counsel within the next 3 years. While BigCo is well-managed, like many in-house counsel, Taylor has a heavy workload.
- Here are some of the ethical quandaries that Taylor faced one day in October 2018

Scenario 1 – 7:30 AM

After her husband had to catch a last-minute flight to California to pitch a potential client, Taylor was tasked with dropping off her son at daycare on her way to work. At a stoplight, Taylor looks in her purse and realizes that she left her new iPhone X at the dry cleaner where she just picked up her clothes. Taylor spent yesterday working with John from BigCo's IT department to ensure that she had access to her work emails and files on her iPhone. Heaving a sigh at the inconvenience, Taylor suddenly sits straight up in a complete panic, realizing that she had promised John that she would password-protect her phone immediately and meant to do so, but had not quite gotten around to it. Taylor drives back to the cleaners, but she can't find her phone. A harried clerk assures her that no one turned it in.

Scenario 1 – Discussion Questions

Is Taylor's panic justified?

What should Taylor do?

Scenario 2 – 7:35 AM

Taylor searches her purse and breathes a sigh of relief — her phone was under some files all along. And she actually had set a passcode the day before. Just then, Taylor's son, Techie Toddler, begs to play his favorite game on Taylor's phone. Before Taylor can say, "Just five minutes," Techie Toddler grabs Taylor's iPhone, keys in the password, and starts playing with his favorite app. Taylor knows that one of the apps he likes requires access to photos on her phone.

Scenario 2 – Discussion Question

Are there any ethical issues with Taylor's son accessing her phone?

Scenario 3 – 8:00 AM

Taylor pulls into her office parking lot having successfully dropped off her son at daycare. She heads into the office, grabs her morning cup of coffee and signs into her computer. As she does every morning, Taylor scrolls her LinkedIn feed to catch up on news.

She notices a story that highlights an ethical dilemma that she now faces. Over the years, Taylor helped BigCo's CEO quietly settle sexual harassment claims brought by other BigCo employees. The first settlement took place when BigCo was a private company owned by CEO, but the rest occurred after BigCo went public.

CEO is a leader in BigCo's industry and key to the company. His contract with the BigCo Board has a morals clause. All of the settlements included nondisclosure provisions; Taylor made sure of it. None of the settlements exceeded 5 figures.

Scenario 3 – Discussion Questions

Does Taylor have an ethical duty to inform the BigCo Board about the settlements?

What if the CEO objects to Taylor's disclosing the settlements to the Board?

Does it make a difference if the settlements were paid by BigCo or the CEO?

Scenario 4 – 8:30 AM

Taylor turns to her top priority for the day: NewCo. Newco is a business venture BigCo is negotiating with a former employee that could be a game changer and is very high profile within BigCo. Taylor used to work closely with the former employee and knows him well.

Since leaving BigCo, the former employee hatched the idea for NewCo and secured backing by a powerful California-based VC firm. Before the VC firm became involved, the former employee hired a lawyer, Opposing Counsel, who had represented him in various personal matters, to assist. During the negotiations for this business venture, Taylor has had lots of communication, primarily emails, with Opposing Counsel.

Scenario 4 – 8:30 AM (Continued)

Taylor finds working with Opposing Counsel frustrating because Opposing Counsel, though certainly a good lawyer in his focus areas, lacks the experience in this area. Taylor wishes that she could communicate directly with the former employee or that the VC firm would bring in someone who focuses on these sorts of business transactions. If Taylor only had an opening to suggest to the former employee and the VC firm that they should supplement their legal support. . . .

Audience Question 1- May Taylor copy the former employee on emails to Opposing Counsel?

Yes, Taylor may copy the former employee.

No, Taylor may not copy the former employee.

Audience Question 2 - Does the answer change if Opposing Counsel copied his client on emails to Taylor?

Yes.

No.

Scenario 5 – 9:00 AM

As the new business venture with NewCo comes together, the CEO of BigCo walks into Taylor's office.

BigCo CEO: Taylor, I'm worried about NewCo's CFO. I think he might be stealing; he seems to have an extravagant lifestyle. How can we find out about him without hiring a PI? They're so sleazy.

Taylor: There is a lot of online information now about people through their social networking sites like Facebook. You would be surprised to see what folks put on the Internet. The CFO knows my name from the deal, but why don't I get my friend, a paralegal who formerly worked here, to sign up as a "friend" to the CFO and get access to his Facebook page. Then we wouldn't have to identify BigCo and can find out what he is up to.

BigCo CEO: Good idea; let's do it.

Scenario 5 – Discussion Questions

Is “friend-ing” a negotiation counterparty unethical?

Is social media research proper if the individual’s posts and pictures are all public?

If it is improper for an attorney to perform social media research or to “friend” the target of research, can the attorney instruct a paralegal to perform the research?

What if the paralegal uses his or her actual profile, but doesn’t disclose who she works for?

Are the rules different in a litigation context?

What about “friend-ing” a potential juror or witness in a litigation matter?

What about contacting an unrepresented party with a potential claim against your client through social media?

Scenario 6 – 9:45 AM

BigCo is involved in multiple lawsuits filed in various jurisdictions across the United States. Under a mandate to reduce legal costs by keeping as much work in-house as possible, Taylor is considering a new software system to help in-house lawyers with case management. This new software system would be accessed through Internet Explorer, and data would be stored on the vendor's system rather than on the internal BigCo system. BigCo would pay a monthly fee to use the system. BigCo would upload and store documents for each case, and the files would contain attorney-client communications, attorney work product, and other sensitive data. The case management tool would also allow BigCo to store document productions and deposition transcripts for each case and would generate deadline reminders pursuant to case management orders. Taylor pitches the new system to BigCo's General Counsel, who smiles, takes out his paper calendar and says, "Taylor, just track the cases in your calendar like I do."

Audience Question 3 - May Taylor use this service and still comply with her duty of confidentiality?

Yes, BigCo may use this service provided steps are taken to minimize risk.

No, the risk of inadvertent disclosure is too high given the BigCo's size.

Scenario 6 – Discussion Questions

What should Taylor do to minimize risks associated with using this software system?

Has General Counsel violated any ethical obligations in tracking his cases via paper calendar versus using a state-of-the-art electronic case tracker?

Scenario 7 – 10:30 AM

Just after deciding to proceed with the helpful software, Taylor fields a call from John in BigCo's IT department. After reminding Taylor that BigCo stores much of its data in the cloud, John frantically informs Taylor that BigCo can no longer access the cloud. Instead, all IT can see is a screen with a timer that is counting down from 24 hours. BigCo has received a ransom note offering to unencrypt that data for \$30,000 in Bitcoin. The ransom note states that if BigCo discloses the ransom request, the price goes up to \$100,000.

Scenario 7 – Discussion Questions

May Taylor advise BigCo to pay the ransom?

Would that answer change if confidential customer data had been taken?

What disclosure obligations, if any, does BigCo have?

Scenario 8 – 11:45 AM

As she heads out the door for an in-person meeting, Taylor sees an email from Chris, a mid-level BigCo executive and good friend of hers. Last night, Taylor emailed Chris some legal advice in response to a question. Chris has forwarded Taylor's legal advice to about 30 BigCo employees "to keep everyone in the loop."

Taylor sighs with frustration. Taylor regularly engages with Chris regarding legal and business advice. Chris often copies other employees on emails to Taylor and sometimes forwards information from Taylor to other employees. Chris usually copies Taylor on the forwarded emails. Chris's position is that the email remains privileged as long as Taylor is copied on it. Taylor knows that some of the advice that she gives Chris is business versus legal, but she is still concerned that Chris's practice could result in the waiver of BigCo's attorney-client privilege.

Audience Question 4 - Should Taylor be concerned?

Yes, Taylor should be concerned about the waiver of privilege.

No, Chris is spot-on that so long as counsel is cc'd, the attorney-client privilege is preserved.

Scenario 8 – Discussion Question

What should Taylor do?

Scenario 9 – 1:00 PM

As she heads back to her office from her lunch meeting, Taylor runs into Henry, an EVP who is in line for the presidency of BigCo. Henry asks Taylor to oversee the investigation into a sexual harassment complaint by an employee against Andrew, another EVP with whom Taylor sometimes works.

Henry mentions that one of the individuals the complainant identified as a witness informed HR that she doesn't want to participate in the investigation and, if she is forced to do so, intends to bring her own attorney with her to any interview.

Taylor doesn't tell Henry this, but a few years ago, one of her good friends at BigCo told her that Andrew made inappropriate sexual comments to her and sent her multiple unwelcome text messages. Taylor's good friend begged Taylor not to tell anyone about it, and they devised a way for the friend to extract herself from Andrew's attention.

Audience Question 5 - Should Taylor attend the interview of the employee who said she will bring her own attorney to the interview with HR?

Yes

No

Audience Question 6 - Should Taylor decline the assignment to oversee the investigation based on her experience helping her friend deal with Andrew?

Yes

No

Audience Question 7 - The complaining employee files a lawsuit. As part of the legal proceeding, the interview notes containing facts from those involved in the alleged incidents are sought from the complaining employee's counsel. Must they be produced?

No, interviews are protected by the attorney-client privilege.

Yes, Taylor and the BigCo lawyers had an adversarial relationship with the employees being questioned, so no privilege.

No, the investigation was part of a legal lawsuit investigation and protected by work product.

Partly yes, because the interview notes of that individual must be produced to the individual being interviewed.

Audience Question 8 - Assuming Taylor attended the interview, once the complaining employee files suit, can Taylor defend BigCo in the litigation?

Yes

No

Scenario 10 – 1:45 PM

After talking with Henry, Taylor tries to catch up on her to-do list. Among other things, Taylor turns to the newly received due-diligence request relating to a divestiture of one of BigCo's underperforming subsidiaries. Buyer's lawyer requests copies of letters that BigCo has from its external counsel, Most Favored Firm (MFF), analyzing the risks in five major lawsuits.

Audience Question 9 - Is there any risk to BigCo in the production of these letters?

Not if Buyer buys the company because Buyer will retain the privilege.

Yes, privilege is destroyed by disclosure to a third-party Buyer regardless of who buys the BigCo subsidiary.

No risk if the governing state has a common-interest exception to privilege waiver.

None of the above. The risk depends on whether it is an asset or stock sale.

Scenario 11 – 3:30 PM

Rushing to head out to another meeting across town regarding the NewCo deal, Taylor remembers that she never responded to Carl, the EVP of Sales regarding a question he had. Taylor quickly sends the following email to Carl:

“You asked my advice on whether we are obligated to deliver goods in the future under our sales contract with NoPayCo. I understand that NoPayCo has failed to pay for the last two shipments and has not responded to our letters sent over a month ago demanding payment.

“I have attached a D&B report showing NoPayCo is past due on obligations to many of its suppliers. Our sales contract says we may terminate if NoPayCo fails to pay shipments after 30 days’ notice. In my opinion, you need not make further shipments.”

Audience Question 10 - Is this email protected by the attorney-client privilege?

Yes, in its entirety, including the D&B report.

Partly, you must disclose the D&B report.

Partly, you must disclose (1) the D&B report, (2) the second sentence of the first paragraph, since it may not have come from the client, and (3) the second sentence of the second paragraph.

Only the D&B report is protected.

Scenario 12 – 5:40 p.m.

Realizing she will likely be late to pick up her son from daycare (which closes at 6 p.m.), Taylor is packing up for the day when she receives a call from Gus in Sales:

“Taylor, I have two sales managers who gave notice of their intention to quit. They say that the laptop computers in their offices are personal computers that they’ve used from time to time in the business and that these computers have copies of many emails and other materials generated on BigCo computers. They don’t object to our downloading that material, but they insist that we may not delete anything. They want to download it all before we review it to ensure that we don’t delete anything. What do you think?”

“In addition, they want to download the sales manual of their former employer, which they brought with them on flash drives when they started working here, and have since copied and downloaded to their office computers. Although proprietary to their former employer, they say they have been using it while they were here. They want to take it to their new jobs.”

Scenario 12 – Question

What issues should Taylor consider?

Any Questions?

Thank you!

Appendix

Relevant Virginia Rules of Professional Conduct

Rule 1.2 – Scope of Representation

Rule 1.6 – Confidentiality of Information

Rule 1.7 – Conflict of Interest: General Rule

Rule 1.13 – Organization as Client

Rule 1.15 – Safekeeping Property

Rule 3.7 – Lawyer as Witness

Rule 4.1 – Truthfulness in Statements to Others

Rule 4.2 – Communications with Persons Represented by Counsel



La Guardia Myers

La Guardia Myers is Senior Director, Real Estate for Gannett Co. Inc. In her role, La Guardia is responsible for real estate strategy, including acquisitions and dispositions, valuations, project management, and asset management. She is currently working across Gannett's portfolio to transform the workplace environment to ensure it is fully enabled to support the company's growth.

Previously, La Guardia served as Staff Vice President of Real Estate and Chief Ethics Officer for General Dynamics Corporation Inc. Before joining General Dynamics, she was in private practice in Morris County, New Jersey, where she focused on real estate and commercial litigation.

In the area of ethics and compliance, La Guardia has presented for several organizations, including the Ethics & Compliance Officer Association, Defense Industry Initiative, and the College of Charleston School of Business and School of Humanities.

In addition to her professional roles, La Guardia is committed to volunteer work for nonprofit organizations and remains an active mentor to young people in her community. Her volunteer work includes the Boys and Girls Club of Greater Washington, and N Street Village.



Melanie Condron

Melanie Condron is Senior Legal Counsel responsible for the ethics and compliance program at Accenture Federal Services. Her team solves for complex regulatory challenges that include OCI/PCI, revolving door, anticorruption, competition law, data privacy, combatting human trafficking, and whistleblower rights. Before joining Accenture's federal practice, she specialized in government contracts work at IBM, where she focused on transactional-related issues including FAR, DFAR, special agency clause consulting, and contract structuring.

Melanie is a member of the state bar of Ohio and registered as Corporate Counsel in Virginia. She is admitted to practice before the Supreme Court of the United States. She serves as Chair to the Association of Corporate Counsel's Ethics and Compliance Network, where she regularly presents on current hot topics. She received her Bachelor of Arts from the University of Cincinnati and her Juris Doctor from the University of Dayton Law School. Outside of the profession, Melanie is a wife and mother, an avid runner, and a longtime volunteer at the Alexandria Animal Shelter.



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Jeniffer M. De Jesus Roberts is a partner in Alston & Bird's Government Contracts practice. She helps C-suite and other top executives at Fortune 500 biotechnology, health care, global management consulting, technology, and outsourcing companies with matters involving ethics and compliance, litigation, investigations, M&A, and corporate and business transactions issues. From conducting M&A due diligence and post-merger integration efforts to advising on government contracting opportunities and administration to reviewing, designing, and enhancing global compliance and ethics programs to leading internal investigations and government investigations defense, Jeniffer offers end-to-end services that allow new and established government contractors to operate effectively within the myriad domestic and international regulatory restrictions.

Her near-decade of experience as a senior in-house counsel for two large public companies gives her an informed perspective when advising clients. Business leaders benefit from her keen ability to obtain consensus and to identify, manage, and reduce risk on a variety of critical compliance issues affecting companies who do business with the government.

Jeniffer is very active in her community and serves as pro bono general counsel to FAIR Girls, a nonprofit organization focused on preventing the exploitation of girls worldwide through empowerment and education. She is also on the Board of Directors of the Akilah Foundation, a nonprofit organization working on a global level (starting with Africa) to educate women and girls so that they become future leaders who can solve the world's most pressing challenges through a lens of opportunity and sustainability. In her spare time, Jeniffer loves to travel and explore far-away places with her husband and two boys.



Katherine Veeder

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Katherine Veeder is a senior associate in Alston & Bird's Government Contracts practice. She provides clients with end-to-end services in all areas of government contracts law. She provides compliance counseling on contractual, statutory, and regulatory requirements, and also conducts risk assessments and compliance reviews and assists with the development and enhancement of ethics and compliance programs.

For clients in need of transactional assistance, Katherine advises on, negotiates, and drafts contracts, subcontracts, teaming agreements, nondisclosure agreements, and consultant agreements. She also conducts due diligence reviews for, and advises clients on, proposed acquisitions and sales of government contractors. When disputes arise, Katherine handles protests before the Government Accountability Office (GAO), U.S. Court of Federal Claims, and Small Business Administration. She performs internal investigations and defends clients in government investigations, and she also advises and represents clients on suspension and debarment matters.

Katherine is committed to pro bono work and is a key member of the pro bono legal team for FAIR Girls, a nonprofit organization focused on preventing the exploitation of girls worldwide through empowerment and education. When she is not working, Katherine is spending time with her husband and newborn baby girl.