

Ethics for In-House Counsel:

- (1) The Hybrid Role of In-House Counsel and Protecting Privilege*
- (2) Practicing In-House and the Unauthorized Practice of Law*

April 10, 2025

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The Hybrid Role of In-House Counsel and Protecting Privilege

Scope of Attorney and Client Privilege in Corporate Setting

- Generally controlled by subject of a given dispute. (FRE 501)
- Federal Common Law (*Upjohn vs. US*, etc.) generally governs federal claims.
- State law governs state claims.

CAVEAT: State may be more restrictive.

CAVEAT: Do not count on State Courts applying federal law.

ABA Model Rule 1.13 – Organization as Client

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
 - Who are the “duly authorized constituents”?
 - ABA comment 1: “Officers, directors, employees and shareholders are the constituents of the corporate organizational client.”
 - ABA comment 2: “When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6 .”
 - Rule 1.6 provides that a “lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).”

ABA Model Rule 1.13 – Organization as Client

- Attorney ordinarily has to accept decisions made by constituents of the organization, even if utility or prudence is doubtful or they entail serious risk. ABA Comment 3.
- Exception in Rule 1.13(b) (violation of legal obligation or law)

Tests for Attorney and Client Privilege

Major tests for determining who can assert attorney-client privilege in the corporate context.

- **The Control Group Test:** Seems to be the minority rule. Only corporate decisionmakers / making final decisions or whose advice/opinions form basis for final decision.
- **The Subject Matter Test / Need-to-Know Test:** More liberal test; Includes those employees where subject matter within scope of employee's corporate duties. Includes the need to know information possessed by employee or employee's need to know lawyer's advice.

***Upjohn Co. v. United States*, 449 U.S. 383 (1981)**

- “The control group test...frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation.” *Id. at* 392.
- In cases where employees communicate with in-house counsel at the direction of the corporation in order to secure legal advice, and where employees are aware that they are being questioned so that the corporation can obtain legal advice, such communications are protected by attorney–client privilege.

Chief Justice Burger says:

- 1. The attorney is authorized by management to inquire into the subject and must be seeking information to accomplish the following:
 - A. Evaluating whether an employee's conduct has bound or would bind the company;
 - B. Assessing legal consequences of that conduct;
 - C. Formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct.

Privilege and the former employee

- Normally, privilege does not attach to former employees as they are no longer agents of the company.
- Privilege remains as to former employees who were previously privy to privileged communications.
- Rule of Professional Conduct 4.2 allows ex parte communications with former employees but requires opposing counsel to stop short of invading privilege.
- What happens when opposing counsel invades the attorney and client privilege? It depends.

Who can waive

- Power to waive rests with corporate management and therefore exercised by corporate officers and directors.
- Consider what happens when management changes.
- The legal principles applicable to determine waiver are those of agency: express and implied authority, ratification.
- Disclosures are presumably authorized with the burden of proof on the proponent of privilege to demonstrate the disclosure was expressly unauthorized.

Legal versus business advice

- Is the attorney employed by a business component or counsel's office?
- What was the primary purpose of the attorney's presence, i.e., business or legal?
- Example: KPMG audits its auditors who had botched an audit.
Investigative documents forwarded to counsel not privileged because they involved consideration of what to do with the auditors, not legal advice.

Privilege extended to documents?

- Distributed on a need-to-know basis or to an employee authorized to speak or act on behalf of the corporation.

Hypo – Privilege Regarding Documents #1

- Sarah is in-house counsel at a software company. The management team and Legal Department have been working together to refine the company's patent strategy, in view of the company's plans to expand its portfolio. Sarah and her Legal colleagues, some of whom also have roles in the company's operations, have been collaborating across various departments, working on joint documents reflecting input from multiple stakeholders within the company.
- Are the joint documents protected by the attorney-client privilege? What considerations would help answer this question?
- Would the outcome change if the documents were also shared with certain outside consultants, not just internal company employees?

Hypo – Privilege Regarding Documents #1

- *See FTC v. Glaxo, SmithKline*, 294 F.3d 141 (D.C. Cir. 2002), holding that documents widely disseminated within a company were nonetheless protected by the attorney-client privilege. In terms of the “need to know” standard, the court assessed the company’s privilege log and the affidavit it submitted to have established that the company only circulated the documents in question to specifically named employees and contractors, most of whom were attorneys and managers, all of whom needed to provide input to the legal department and/or receive the legal advice and strategies formulated by counsel. The affidavit submitted by the Company also stated that each intended recipient was bound by corporate policy, or, in the case of the contractors, by a separate understanding, to keep confidential the contents of the documents.

Hypo – Privilege Regarding Documents #2

- Brett is in-house counsel at a medical device manufacturer, and he is the primary attorney who interfaces with the Sales team. Brett has been working to update the company's compliance training materials. As part of his updates, Brett has been soliciting feedback from others within the Legal Department, from the National Sales Manager, and from all Regional Managers across the nation so that his presentations can incorporate real-world scenarios.
- Are the presentations protected by attorney-client privilege? What type of information could Brett include in the presentations to have the strongest privilege claim?

Hypo – Privilege Regarding Documents #2

- *See Orion Corp. v. Sun Pharm. Indus. LTD*, 2010 WL 686545 (D. N.J. Feb. 22, 2010), holding that company's broad classifications of the 112 recipients of the presentations as management did not convince the court that dissemination was limited to individuals who needed to know the information contained in those presentations.

Hypo – Employee Termination

- Jason is in-house counsel at a food distribution company and regularly advises the company about employment issues, including sitting on the committee that reviews any complaints of misconduct and decides whether to discipline an employee for their behavior. One complaint recently came before the committee about employee Gerry having violated the company's Code of Conduct. After reviewing the evidence, the committee decided to terminate Gerry, who is now suing the company for wrongful termination.
- Are the committee's communications and materials generated during the course of the review protected by the attorney-client privilege?

Hypo – Employee Termination

- *See Neuder v. Patel Pac. Northwest Nat. Labs*, 194 F. R. D. 289 (D.D.C. 2000), holding that although legal review was one purpose for holding the committee meeting to determine whether to terminate the employee, it was incidental to the primary business purpose and in-house counsel's presence did not render the communications privileged.

Hypo – Board Involvement

- Jennifer is General Counsel for an automobile manufacturer. Recently, there was a products liability suit filed against the company, alleging defects that could have significant safety implications for children in the second-row seats. The company's Board of Directors has thus needed to evaluate its response to the lawsuit and bad press from not only a legal perspective, but also from a public relations standpoint, and from a business standpoint to determine whether any immediate adjustments need to be made for cars coming online for production. Jennifer has been included in all communications and provided input across the several different aspects of the response.
- Are the Board's communications privileged due to Jennifer's presence? Is her input privileged? Should different aspects of the response (e.g., legal strategy vs. PR strategy) be treated differently for purposes of the privilege analysis?

Hypo – Board and Committee Materials

- *See In re Ford Motor Co.*, 110 F.3d 954 (3d Cir. 1997), allowing an assertion of the privilege as to communications at a policy and strategy committee meeting that included both legal and business decisions. In doing so, the court of appeals reversed the trial court's conclusion that business rather than legal concerns had been the primary concern of their committee. Even if the decision was driven, as the district court seemed to assume, principally by profit and loss, economics, marketing, public relations, or the like, it was also infused with legal concerns and was reached only after securing legal advice. Expert studies presented to the committee were also work product that were protected, as they would reveal the defense strategy.

What Concerns You?

- Are there other scenarios that you encounter regularly during your work as in-house counsel that you need to be particularly mindful for when the lines become blurred as to your legal role vs. some other role you have in the organization?
- Do you employ any specific practices for when you are acting in your capacity as legal counsel vs. when you are acting in another, business-related capacity? Should you label your emails differently when you are acting as legal counsel, to note those communications are privileged? Is that practical?

Practicing In-House and the Unauthorized Practice of Law

ABA Model Rule 5.5 – Unauthorized Practice of Law; Multijurisdictional Practice of Law

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so. . . .
- (d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:
 - (1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or
 - (2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

ABA Model Rule 5.5 – Unauthorized Practice of Law; Multijurisdictional Practice of Law (cont.)

- (e) For purposes of paragraph (d):
 - (1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority; or,
 - (2) the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this Rule by, in the exercise of its discretion, [the highest court of this jurisdiction].

Hypo – UPL

- Nicholas took the California bar after graduating from law school and has been in private practice in San Francisco for the last 10 years. As part of moving his family back to New England, Nicholas recently accepted a position as in-house counsel at a regional manufacturing company that has locations in Massachusetts, New Hampshire, and Connecticut. Nicholas will be living in southern New Hampshire and will be primarily working out of the company's headquarters in Nashua, but part of his role will also require him to travel to the company's Massachusetts and Connecticut locations at least monthly.
- Can Nicholas practice law for his new employer under his California bar license? Does Nicholas need to take the bar and become admitted in any new state(s)? Is there anything else that Nicholas needs to do in order to provide legal advice to his employer?

Variations Across NH, MA, and CT – In-House Counsel’s Ability to Practice?

- While all three states permit in-house counsel admitted in other jurisdictions to practice for their employer within the state, Massachusetts and Connecticut require registration with their respective bar authorities, whereas New Hampshire does not impose such a requirement.
 - *Compare NH RPC 5.5 with Mass. RPC 5.5 and Conn. RPC 5.5*
- Additionally, New Hampshire explicitly allows lawyers licensed elsewhere to be physically present in the state without a New Hampshire license, provided they do not practice New Hampshire law.
- See handout for further details.

Variations Across NH, MA, and CT – Does In-House Counsel Have to Register?

- Massachusetts and Connecticut require formal registration for in-house counsel, with Connecticut imposing more extensive requirements, including annual CLE and additional fees. New Hampshire offers more leniency, not requiring registration for in-house counsel licensed elsewhere and not practicing New Hampshire law.
 - *Compare NH RPC 5.5 with Mass. RPC 5.5 and Conn. RPC 5.5*
- See handout for further details.

Concluding Remarks