

Dear Ethics Lawyer Goes Corporate (Part II): Q&A for Corporate Counsel

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The Plan for the Next Hour

- A brief plug/invitation re “Dear Ethics Lawyer”
- Discussion of questions in the “Dear Ethics Lawyer” style
 - Model Rules based, cases given as examples, but check applicable state law
 - Participation, interruptions, alternative hypotheticals, detours into side issues, disagreement, applause or derision -- all welcome
 - Questions and answers are recapped in written materials

Q.1 – Docs discovered when settlement pending – disclosure required?

Just after reaching a settlement agreement at mediation, but before the case is dismissed, our company discovered a cache of additional material documents, responsive to discovery requests, that were not timely produced earlier. The company does not wish to disclose them now, unless absolutely required, because of the settlement agreement. It is clear that company representatives did not know of the documents until the recent discovery and acted in good faith in its earlier production. May or must we make a disclosure to the court or opposing party?

Q.1 – Docs discovered when settlement pending – disclosure required?

- Depends on facts and circumstances
 - Rule 3.3 Candor to the Tribunal and its remedial measures requirement probably doesn't apply given company's lack of fraudulent intent
 - Other substantive or procedural law applicable?
 - Effect of Rule 3.4(a) – prohibits concealing doc with potential evidentiary value
 - Effect of Rule 3.4(d) – requires “reasonably diligent effort” to comply with discovery

Q.1 – Docs discovered when settlement pending – disclosure required?

- Questions:
 - Was there agreement to stay or suspend discovery pending settlement discussions or once settlement was reached? If not, can such an agreement be confirmed now without making any misrepresentations or concealments?
 - What is the status of the settlement? Is it final or more like a settlement in principle with terms still to be negotiated?
 - Practical suggestion: opinion from outside ethics counsel given facts and circumstances of your particular situation

Q. 2 – Legal Advice: Pass It On?

I am in-house counsel for a company, and field a steady stream of requests for legal advice from various business department heads. In looking at internal emails, I am finding that often the advice I provide is quoted or relayed to subordinates of those business department heads, usually without the presence (in-person or by email) of myself or any other lawyer. Does this waive the privilege protection for my advice?

Q. 2 – Legal Advice: Pass It On?

- Generally no waiver, if legal advice (or request for information to facilitate legal advice) is conveyed to those employees who have a "need to know it," or for many courts the communication at least "related generally to the employees' corporate duties." *E.g., F.T.C. v. GlaxoSmithKline*, 294 F.3d 141, 147-48 (D.C. Cir. 2002).
- Must meet other requirements for privilege protection, e.g., relate to legal not business, indicia of confidentiality, etc.

Q.3 – Oversharing?

I met my life partner in law school and am now happily married. We both practice law and we enjoy sharing with each other the experiences and challenges of our professional lives. Today, I began work on a particular type of matter that my spouse has handled before, so I'd like to explain the situation to them confidentially (we've agreed we would never share with others anything we discuss between us) and ask for their input on some aspects of it. Are there issues with this? What if we talk only in hypotheticals, without identifying parties or the specific matter?

Q.3 – Oversharing?

- Marital privilege to avoid privilege waiver?
- Exception to Rule 1.6?
- Who will ever know?

Q. 4 – Relationships

We live in a complicated world. I've been a lawyer for a while now, and most of my friends and acquaintances are lawyers who do more or less the same things I do (some in-house, some at law firms that end up representing or adverse to my company), and I'm dating (non-exclusively) another lawyer who also has a similar practice (in another company). In representing my client, I often find myself opposite a friend or acquaintance, and now have a transaction opposite the lawyer I have a dating relationship with. I'm struggling whether any of this needs to be disclosed to my client, requires a waiver, or is just flat out-of-bounds. I'd also like to know if other lawyers have an obligation to consider their relationships in dealing with me or our company.

Q. 4 – Relationships

- Comment 11 to Model Rule 1.7 addresses conflicts when lawyers "closely related by blood or marriage" represent different clients in the same or substantially related matters."
- ABA Formal Op. 494 (2020) provides ("1.7(a)(2) material limitation conflict) guidance when lawyer's relationship to opposing counsel is:
 - an **"intimate relationship"** (defined as, e.g., cohabiting, engagement to, or an "exclusive intimate relationship") – should be disclosed and waiver obtained (so long as lawyer reasonably believes competent/diligent rep'n
 - a **friendship** of various degree – close friendships (see indicia) treat same as intimate relationships, lesser friendships no issue
 - a mere **acquaintance** – no issue.

Q.5 – Remote Work

As a result of the pandemic, I've gotten very comfortable with remote work, and my business people do not seem to care where I am as long as I am responsive to them. We've recently purchased a vacation home in another state, and based on my experience, I'd like to spend substantial amounts of time working from that vacation home. I am not licensed to practice in that state, but I do not plan to serve any clients in that state. All of the company client relationships I currently serve are centered in states where I am licensed. Is this plan viable?

Q.5 – Remote Work

- ABA Formal Op. 495 (2020) opines as to circumstances in which lawyer may practice remotely from a state in which the lawyer is not licensed. Several state ops. concur
- **Caveat:** subject to state law to the contrary
- In general, OK if lawyer is "*invisible as a lawyer*" in the remote work state.
 - No work for remote state clients
 - No “holding out” in remote state
 - No website, ads, cards, etc. re remote state presence

Q. 6 – Joint Representation

I am in-house counsel for Railroad, and we have a dispute with Shipper, who has fallen on hard times and owes us significant money. The transportation law firm I would like to hire also represents Trucking Companies TA, TB, and TC, which Shipper also owes moneys to. They propose to jointly represent all four companies in pursuing an action against Shipper to collect on these amounts. They say this will be more efficient and also save fees and costs. But, are there ethics issues here?

Q. 6 – Joint Representation

- Possible conflicts between companies about size or validity of respective claims (or defenses to them)
- Issues or agreement between multiple clients as to what can be disclosed to each of them about the claims of the others
- Conflict if recoverable funds are potentially limited, need to work out a means by which recovered funds will be divided
- Confidentiality/privilege waiver issues concerning communications with multiple clients
- Need to examine relationships (particularly if any of the clients are larger clients of the law firm), whether there are any material limitation conflicts under Rule 1.7(a)(2)
- Consider possibility of an aggregate settlement and how that would be handled under Rule 1.8(g)
- Mechanism in engagement letter for what happens if a conflict between one or more of the clients? *See also Rule 1.7, Comments 29-33.*

Q.7 – Contact with other party as business rep not lawyer

I am in-house counsel in a growing company. I'm being asked to attend more and more meetings as business exec, not a lawyer. Not an issue for internal meetings as there is typically clear delineation between business questions versus legal advice. Recently, however, I was asked to attend an external meeting between an officer at my company and an officer of another company. My boss made it clear my attendance was to be as a business person and not as a lawyer because he wants to expand my business acumen/judgment. But, I am concerned because even though I'd be attending solely as a business person, my company role is as in-house counsel. The other company does not have in-house counsel and likely will not have legal representation at the meeting. Ethics issue with attending a meeting where the other party will not be represented?

Q.7 – Contact with other party as business rep not lawyer

- Rule 4.2 prohibits a lawyer, when "representing a client," from communicating about the subject of the representation with a person the lawyer knows to be represented by a lawyer in the matter, without the consent of the other lawyer or other authorization by law or court order.
- Threshold Q1: Do you know if the other side has counsel re the matter? If no, then no issue regardless of your capacity.
- Q2: Are you "representing a client" as lawyer? If not, there is case law to effect that ant-contact provision does not apply

Q.7 – Contact with other party as business rep not lawyer

- See, e.g., *HTC Corp. v. Tech. Props. Ltd.*, 715 F.Supp.2d 968 (N.D.Ca. 2010) (in patent infringement case, defendant's CEO, who was a lawyer could nonetheless contact other parties when acting strictly as business office, over the objection of their counsel); *In re Rock Rubber & Supply of Conn., Inc.*, 345 B.R.37 (Bankr. D. Conn. 2006) (Rule 4.2 not violated when Chapter 7 bankruptcy trustee, a lawyer, wrote bank he knew to be represented by counsel in capacity as trustee)
- Suggestion: avoid misunderstanding of your role – advise other party of your capacity before or at outset of meeting

Q.8 – Avoiding conflicts when hiring

We want to hire a terrific developing attorney into our law department, but that attorney currently works as an associate for a law firm that is on the opposite side of a still-pending case from our company. We don't think the attorney is not actively involved in the suit. Are there any circumstances under which we could hire that attorney? What if the attorney is actively involved on the other side of the suit?

Q.8 – Avoiding conflicts when hiring

- Attorney uninvolved with adverse matter
 - No real issue if not exposed to confidential information of adverse party. Rule 1.9(b)
- Attorney involved with adverse matter or exposed to confidential information.
 - Rule 1.10(a)(2) mechanism
 - Screening
 - Notice to former client with specific information
 - Certain periodic and end-or-screening certifications
 - Alternatively can handle with specific informed waiver 1.10(c)

Q.9 – Assisting client rep in communicating with rep'd party

I am counsel for a company in an effort to settle an employee's sexual harassment claim. The employee's lawyer, who seems to be on a vendetta, is blowing the matter all out of proportion and apparently does not want her client to settle short of a lawsuit that would boost her profile for other cases. The company suspects she is not adequately communicating with her client about its position and generous offer. My client contact has always had a good relationship with the employee and wants me to prepare a script she can use to approach the employee directly. May I do this?

Q.9 – Assisting client rep in communicating with rep'd party

- As counsel for co, you could not communicate with a rep'd party, w/o consent of opposing counsel. Rule 4.2
- Rule 8.4(b) also bars lawyer from violating rules “through the acts of another.”
- But, comment 4 to Rule 4.2 (added subsequent to the original version) now states that “[p]arties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.”

Q.9 – Assisting client rep in communicating with rep'd party

- So, where is the line in this situation between improperly communicating "through the acts of" the client v. "advising a client concerning a communication?"
 - ABA Ethics Op. 92-362 (1992): Rule 4.2 does not prohibit a lawyer in this situation from advising the lawyer's client on the client's ability to communicate directly with the opposing party about a settlement offer, or about the most efficacious method of doing so.
 - ABA Formal Ethics Op. 11-461(2011) surveyed mixed landscape of cases and ethics opinions, concluded that a lawyer may advise a client of the client's right to communicate with a represented party, and may assist the client in the substance of any proposed communication, even on the initiative of the lawyer, i.e., the communication does not have to be the idea of the client.

Q.9 – Assisting client rep in communicating with rep'd party

- But, cases are all over the Board – check law of relevant jurisdiction
 - Committee issuing ABA Op. 11-461 acknowledged numerous decisions and opinions in various states contrary to both of the ABA opinions, to the effect that counsel violates the rule by "encouraging or failing to discourage a client speaking directly to the other party" and/or that "a lawyer may not 'script' or 'mastermind' a client's communication with a represented person."

Q.10 – Corporate Family Conflicts

I am Associate General Counsel for Universal Shipping Company, a large transportation conglomerate. We have many subsidiaries, including some that are engaged in ancillary businesses and do not have "Universal" in their name. Today, I discovered that a law firm that is currently representing Universal Shipping in a transactional matter also represents a commercial party in a contract lawsuit against Smith Food Services, Inc., an ancillary business we acquired a few years ago as a wholly-owned subsidiary. Smith provides food and beverage service to airlines and railroads, and we left its management in place, so it functions as a free-standing subsidiary. Does the law firm have a conflict?

Q.10 – Corporate Family Conflicts

- ABA Op. 95-390 (1995)
- Cmt. 34 to Model Rule 1.7: "A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a)."
- But Cmt. 34: conflict can exist if (1) facts suggest affiliates should be treated as one; (2) lawyer and client have agreed to do so (e.g., OCG's); or (3) "material limitation" conflict

Q.10 – Corporate Family Conflicts

- Factors that suggest affiliates should be treated as one. *E.g.*, *Gartner* case.
- Factors that may create “material limitation” conflict under Rule 1.7(a)(2)

Q.11 – Answering legal questions for unrepresented opposing parties

I am an attorney for a company desiring to complete a relatively small real estate transaction with an individual to facilitate a development. The individual, who is not represented, shows up at closing to sign the document, but first asks a legal question about an effect of the document, a question concerning which I know the answer. Can I tell her the answer under any circumstances without creating a conflict of interest?

Q.11 – Answering legal questions for unrepresented opposing parties

- What's the issue?
 - Avoid accidentally taking on the unrepresented party as a client giving her legal advice in a context that would lead her to believe you are advising her. That would create instant conflict
 - 3 ways to create attorney-client relationship:
 - Express agreement
 - Legal advice in context leading recipient to believe you are rep'g them
 - Receipt of confidential info in context leading recipient to believe you are rep'g them

Q.11 – Answering legal questions for unrepresented opposing parties

- So how to avoid issues?
 - Just clarify your capacity, i.e., that you are conveying an answer on behalf of your client, not the other party, so that there is no reasonable expectation you are advising them
 - Advise them that they can and should get their own counsel if they wish

Q.12 – Inadvertent receipt of confidential info

I just rec'd an email from an opposing lawyer on a deal. It looks like he inadvertently hit "reply" rather than "forward," as it is talking to a business person at his client. Before I realized it was not meant for me, I read his recommendation that the client accept our offer, given problems with the validity of certain patents on assets involved. I'm confused – at one time there was an ABA opinion that I think said I couldn't keep or use this. Is that still the rule? Am I supposed to destroy or delete? Do I tell him I rec'd it? Can/should I pass the info along to my client – it's pretty material?

Q.12 - Inadvertent receipt of confidential info

- Issue formerly covered by ABA Formal Ethics Op. 92-369 (1992), superceded by Rule 4.4(b)
- Rule 4.4(b) now requires the lawyer to promptly notify the sender, leaving what happens next to law outside the Model Rules. Comment 3 to the Rule does allow the lawyer to return the document or delete an electronically stored document as "a matter of professional judgment ordinarily reserved to the lawyer" where the lawyer is not otherwise required by applicable law to do something else.

Q.12 - Inadvertent receipt of confidential info

- In litigated matters, check procedural codes or court pretrial orders such as those that provide for “clawback” of inadvertent disclosures. *E.g.*, FRCP 26(b).
- Some states also have modified their versions of Rule 4.4.
- Under standard version of Rule 4.4(b) if nothing else applies, onus is on disclosing party to seek protection, once notice is given by recipient.

Q.13 – Counsel asked to advise on matter affecting both company and officers

In-house counsel for corporation, asked by its president and substantial shareholder Mr. P to work up a memo that would lay out the tax ramifications of a proposed compensation and benefits package for all corporate officers, and make recommendations about it. Because part of the motivation in considering the new package is the recruitment and retention of corporate officers, he asks that the memo address ramifications to both the corp and to affected individuals, including himself, who would be subject to the new package. He provides relevant tax information (as will other existing corporate officers). What are the ethical considerations?

Q.13 – Counsel asked to advise on matter affecting both company and officers

- Clarify who is the client (with P and other officers) per Rule 1.13(f)
- If client is only the company, solves conflict problems, but consider effect of that determination on any privilege as to personal info shared by officers
- If joint client status is anticipated:
 - Consider possibility of conflicts, including “material limitation” conflict under Rule 1.7(a)(2). Conflict could result from favoring co v. officers or vice versa or favoring officers with certain characteristics
 - Get informed consents about any conflict issues confirmed in writing by all (P cannot provide consent for co – most likely would need to come from Board – Rule 1.13(g)). Confirm what info is to be shared. Confirm what happens if later conflict arises.

Q.14 – Advance Waivers

Our law department has a go-to outside law firm for our corporate M&A work. Because of their expertise and knowledge of our business we'd like to use them in an upcoming substantial transaction in which we would make an unsolicited offer to purchase a controlling share of stock in Company B. We approached the law firm about the matter, and they disclosed that their office in another city has a small and unrelated property tax appeal for Company B that is not completed, but that their engagement letter with Company B has an advance waiver that on its face would allow the firm to be adverse to Company B in unrelated non-litigation matters. I'd like to use the firm, but don't want to have to make a change later if for some reason the waiver does not hold up. How comfortable can I be?

Q.14 – Advance Waivers

- Advance waivers are a variety of standard Rule 1.7 conflict waiver
- An advance waiver is effective if it meets the test of Model Rule 1.7(b): (1) the lawyer reasonably believes that competent and diligent representation can be provided to both client; (2) the representation is not prohibited by law; (3) the adversity is not in the same litigation or proceeding before a tribunal; and (4) each affected client has given informed consent.

Q.14 – Advance Waivers

- Issue commonly is whether adequate informed consent has occurred, *i.e.*, did the client understand at the time of the agreement what future adversity might occur.
- Level of sophistication of client important
- Ineffective advance waiver does not preclude effective waiver now
- Advance waivers (or any waivers) can also be revoked, effective immediately
 - But some fairness considerations have been applied in cases

Q.15 – Advising 3d Party Witnesses

I am counsel for a company in litigation. May I tell an unrepresented third party witness that they are not obligated to speak to opposing counsel about the matter? May I ask one of our business people to reach out to third-party witnesses with which she has an ongoing relationship to ask them not to speak to opposing counsel about the matter?

Q.15 – Advising 3d Party Witnesses

- Model Rule 3.4(f) prohibits a lawyer from asking a third party witness not to speak to opposing counsel about a matter.
- Rule 4.3 describes obligations to third parties: not projecting that the lawyer is disinterested, correcting any misunderstanding about the lawyer's role, and not giving legal advice, except advising them to secure counsel if the third party's interests are possibly in conflict with those of the lawyer's client.
- State ethics opinions: most say ok to tell witness they are not *required* to speak to counsel. *E.g.*, D.C. Ethics Op. 360 (2011).

Thank You!

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