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Dear Ethics Lawyer Goes Corporate: Q&A for Corporate Counsel

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A Great Ethics Quote

"Choices are made in brief seconds and paid for in the time that remains."

- Paolo Giordana, *The Solitude of Prime Numbers: A Novel*

The Plan for the Next Hour

- Who are these guys?
- A brief plug/invitation re “Dear Ethics Lawyer”
- Discussion of 15 (more or less) 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 – Duty/Option to Correct Opponent

I am counsel for a company threatened by suit. A lawyer's demand letter states that in the absence of settlement, she will file a lawsuit against our company on July 1, the last day of the statute of limitations. I know that she has made a counting mistake and that the limitations period actually runs a day earlier, on June 30. Am I obligated to correct her mistake, or can I simply let the time run? As a matter of professional courtesy, *may* I correct her mistake or does my duty to client mandate that I stay silent?

Note: This hypo may seem too-hypothetical. We use it right up front because it provides a vehicle for examining the full range of duties to opposing parties and to the client, as well as the scope of decision-making between lawyer and client.

Q.1 – Duty/Option to Correct Opponent

- What duties do we owe opposing parties under the Model Rules?
    - Truthfulness (4.1), fairness (3.4), respect (4.4)

Q.1 – Duty/Option to Correct Opponent

- **Rule 4.1: Truthfulness in Statements to Others**

  In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prevented by Rule 1.6.

Q.1 – Duty/Option to Correct Opponent

- **Rule 3.4 Fairness to Opposing Party and Counsel**

  A lawyer shall not:

  a) [obstruct access to evidence or later destroy or conceal]
  b) [falsify evidence or counsel someone else to]
  c) [knowingly disobey an obligation to a tribunal]
  d) [make frivolous discovery requests or fail to try to comply with proper request
  e) [in trial, allude to various improper things]
  f) [ask persons (with some exceptions) not to voluntarily give relevant info to another party]

Q.1 – Duty/Option to Correct Opponent

- **Rule 4.4 Respect for Rights of Third Persons**
  - a) in rep'g a client, lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden, or use methods that violate legal rights
  - b) If lawyer received inadvertent disclosure of info, must promptly notify sender.

Q.1 – Duty/Option to Correct Opponent

- **What duties do we owe our client?**
  - Diligence (1.3), competence (1.1), communication (1.4), confidentiality (1.6)
  - Rule 1.2 addresses scope of representation and allocation of authority between client and lawyer
    - Subsection (a): unless limits established under subsection (c), “lawyer shall abide by a client’s decisions concerning the objectives of the representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.”

Q.2 – Law Firm Pitches Company, Then Become Adverse

Six months ago, we interviewed small teams of lawyers from three firms to represent the company in a substantial litigation matter. In the course of those interviews we shared with them facts about how we operate and some of our people that we regarded as confidential in order for them to be able to pitch to us the strategy they would propose if hired, and estimate fees and costs. Now, one of the firms we did not choose in this process is counsel for an adverse party suing us in a different but similar case. It feels like they know too much from our prior interaction that could be used against us, although admittedly we did not hire them. May we consider a motion to disqualify them?

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Q.2 – Prospective Client as Adverse Party

- **Rule 1.18 Duties to a Prospective Client**
  - a) [person who consults with lawyer about forming a relationship is a "prospective client"
  - b) [lawyer shall not use or reveal information learned from prospective client]
  - c) "A lawyer... shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information...that could be significantly harmful to that person in the matter [with exceptions]
  - d) [provides for waivers or alternatively for other lawyers in firm to be adverse to prospective client even if disqualifying info is involved if lawyer who interacted with prospective client was screened]

Q. 3 - Discovery of a Completed Fraud

I represented my company in selling an industrial property. After the conclusion of the transaction, while reviewing records of the company for a different purpose, I discovered that the business representative (who received a bonus related to this event) made a misrepresentation concerning a material condition of the property that was sold. What may and should I do?

Q. 3 – Discovery of a Completed Fraud

- You may and should consult with appropriate representatives of your company client under the umbrella of privilege. *See* Rule 1.13. Attempt to obtain their permission for correction of the misrepresentation, noting consequences that could result.
- You may seek advice from outside counsel and/or ethics counsel.
- This is a case of a completed misrepresentation. Because you did not know it to be false when made, you have not engaged in unethical conduct. But do you have a duty to do something now? *The answer depends upon the version of the rules (particularly 1.6) in place in the applicable jurisdiction.*
- Model Rule 4.1(b) states that a lawyer shall not knowingly "fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6," but this does not address a completed fraud.

Q. 3 – Discovery of a Completed Fraud

- Rule 1.6 precludes disclosure of information "relating to the representation" without client consent, but the ABA current version of subsection (a)(3) states the lawyer "may" reveal information "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that ... has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services." In jurisdictions with this version of the rule, disclosure to the extent necessary to "rectify" or "mitigate" completed frauds furthered through the lawyer's services may be allowed, but may not be required.
- But several states have different or earlier versions of Rule 1.6 that do not allow disclosure except to prevent future or pending crimes or frauds, similar to the crime-fraud exception to attorney-client privilege, and in varying circumstances. *See, e.g.,* Mo. Rule 4-1.6; Ks. Rule 1.6.

Q.4 – Negotiation Ethics

I am a business lawyer negotiating with an opponent over the price to acquire a non-public company. May I state that the business is only worth $10 per share, although I have an expert evaluation opinion at $15 per share? May I state that $12 per share is "all I will offer" if my client in fact has given me authority to go up to $15 per share?

Q.4 – Negotiation Ethics

- **Model Rule 4.1**: In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person....
- The rule talks about “statements of fact”
- Comment 2 to Rule 4.1 states that "[u]nder generally accepted conventions in negotiation, certain types of statements are ordinarily not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category...."

Q.4 Negotiation Ethics

- But, where is the line between estimate of value or price and statement of fact of price or value?
- Or statement of intention re settlement v. statement of fact about position?
- Some examples of “over-the-line”: falsely constructed damage model, negotiating for client now dead, etc.
- Suggestions: characterize positions as opinions or repeat expert opinions, state intentions not limits of authority

Q.5 – Hazards of Joint Co/Employee Representation

I am an in-house labor & employment counsel for a company. The company and one of its Vice-Presidents were named as defendants in a new lawsuit. I immediately went down to the VP's office and asked him what this was about. He asked whether I was asking in my capacity as counsel for the company and him so that our conversation would be privileged, and without thinking too much I said, "yes, of course." Surprisingly, P then immediately confessed to me that he made a sexual advance on the claimant, but said that I cannot tell anyone else in the company, especially the President, because it could affect his job status, and that we should settle the case quickly. What now? Do I have an issue?

Q.5 – Hazards of Joint Co/Employee Representation

- 1.7 concurrent conflict? Conflicting interests of employer and employee? Ability to disclose what VP has told you?
- Consequences? What now?
- How could this have been avoided?

Q.6 – PR Consultant as Part of Lit. Team

My company has been sued in very high profile litigation that not only concerns potential liability for a large amount, but that could affect our perception and relationships in the marketplace. We are forming a task force of in-house and external counsel to work with management to defend the case, and would like to hire a crisis/PR consultant to help advise the team on how legal strategy may be received by the court and potential jurors, as well as how it will be perceived among our customers and how best to manage the company's messaging. But, by including a consultant of this type, do we risk waiving privilege on communications among task force members?

Q.6 – PR Consultant as Part of Lit. Team

- Gen rule: 3d parties waive A/C privilege. Ordinary work product protection waived only if presence of 3d party makes it easier for adversary to acquire info.
- 2 exceptions relating to consultants:
  - *Kovel:* necessary for translation or to facilitate communication
  - *Bieter*: 3d party so integral to client that serves as functional equivalent of client
- Applied to PR consultants in limited circumstances

Q.6 – PR Consultant as Part of Lit. Team

- Application to PR consultants
  - *In re Grand Jury*– PR firm necessary to implement legal strategy to influence prosecutors in charging decision
  - *Viacom* (*Copper market antitrust case)* PR firm integrated into client, had authority to act for client, “functional equivalent”
- Contra
  - *Anderson v Sea World* – crisis management firm performed PR function, not necessary to drive legal strategy
  - *LG Electronics* – PR firm had no decision-making authority, not “functional equivalent”
- But work product protection available even when A/C privilege is not, if other elements are met

Q.7 – Instructing Corporate Employees in Litigation

I am counsel for a corporate client in litigation. May I instruct or ask the company's employees not to speak to opposing counsel about the case? May I instruct or ask the company's former employees not to speak to opposing counsel about the matter?

Q.7 – Instructing Corporate Employees in Lit

- Rule 3.4(f) states that a lawyer shall not request "a person other than a client to refrain from voluntarily giving relevant information to another person," unless (1) the person is a relative, or an employee or agent of a client; and (2) the lawyer reasonably believes the person's interests will not be adversely affected by refraining from giving such information.
- Rule 4.2 defines who the opposing lawyer can communicate with. It bars the opposing lawyer (without consent) from speaking with persons "the lawyer knows to be represented . . . in the matter." Includes any "constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter, or whose act or omission in connection with the matter may be imputed to the organization for the purpose of civil or criminal liability." Rule 4.2, Cmt. 7. It does not include former employees.

Q.8 – 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.8 – Oversharing?

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

Q. 9 – 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. 9 – 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.10 – Advising 3d Party Witnesses

I represent a company in litigation during discovery. 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 the she has an ongoing relationship to ask them not to speak to opposing counsel about the matter?

Q.10 – 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).

Q. 11 – 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. 11 – 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. 12 – 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. 12 – 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.13 – 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.13 – 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.13 – 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.14 – Remote Work

As a result of the pandemic, I've gotten very comfortable with remote work, and my business client representatives 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 open an office there or to seek or 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.14 – 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.15 – 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.15 – 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.15 – 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

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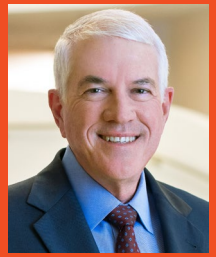

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