



Ethics for In-House Counsel



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Scope of this seminar:

- **Attorney-Client Privilege**
- **Employee Interviews**
- **Transactional Negotiations**
- **Best Practices**
- **Avoiding “nightmares”**

❖ ATTORNEY-CLIENT PRIVILEGE

The Attorney-Client Privilege

- “Privilege unquestionably extends to corporations which must act through their agents, including their officers and employers.”

Two tests for determining which employee's communications with in-house counsel are privileged:

- Second Circuit: Supreme Court's “subject matter” test
- Third Circuit: The “control group” test

Mixed Purpose Communications

- In-house counsel author communications often contain both legal advice and business advice
- Split among courts on this issue

Mixed Purpose Communications

- Primary purpose test---everything is privileged
- Significant purpose test---was obtaining legal advice a “significant purpose” of the communication?

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

Key Points from Upjohn:

- Communications between counsel and employees (at any level) for the purpose of obtaining legal advice are covered by the attorney-client privilege.
- The privilege applies to communications to in-house counsel, as well as outside counsel.

Key Points from Upjohn:

▪ **LIMITATION:**

- Privilege extends only to the communications between counsel and employees
- Does not cover the facts communicated

Upjohn Warnings - Elements

- You represent the company and do not represent the employee personally.
- You are conducting the interview in order to gather facts so that you can provide legal advice.
- The communications between the employee and you are protected by the attorney–client privilege.

Upjohn Warnings - Elements

- However, the privilege belongs exclusively to the company, not the employee:
 - The company may decide on its own to waive the privilege.
 - The company may disclose what the employee said to others, including government agencies, at its sole discretion.
- The employee must keep the communications with you confidential and not disclose them to anyone else.



EMPLOYEE INTERVIEWS

Issues Arising from Employee Interviews

- Is an investigation conducted by in-house counsel covered by the attorney-client privilege?
- Is the privilege undermined because government rules or company policy require an investigation?
- Are interviews conducted by non-attorneys protected?
- Is it necessary to advise employees expressly that the purpose of the interview was to obtain legal advice?

Suggested practices:

- Provide Upjohn warnings to the employee at the outset of the interview.
- Advise the employee orally but read from or use a written statement as the model.
- Offer to answer any questions the employee has about the ground rules.
- Create a record that you provided the warnings.

Nightmares You Want to Avoid

- U.S. v. Ruehle, 583 F.3d 600 (9th Cir. 2009)
- CFO denied ever receiving Upjohn warning.
- CFO filed ethics complaint with California State Bar because counsel disclosed his statements to the government.
- U.S. District Court ruled that CFO had good faith belief he was personally represented.
- Court of Appeals reversed.

Further Steps to Protect the Privilege

- All documents should be marked attorney-client communication/attorney work product.
- Employee writings should be directed to counsel and/or memorialized as having been made or sent at direction of counsel.
- Maintain control over dissemination of documents.
- Assume that attorney work product may eventually be disclosed and draft carefully.

❖ TRANSACTIONAL NEGOTIATIONS

Transactional Negotiation Ethics

RPC 4.1(a)–

- No exceptions for transactional negotiations!
- In the course of representing a client, a lawyer shall not knowingly:
 - make a false statement of material fact or law to a third person; or
 - fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by RPC 1.6.

Transactional Negotiation Ethics

RPC 8.4(c):

- Lawyer may not engage in “dishonesty, fraud, deceit or misrepresentation.”

What does this mean?

DO NOT LIE TO THE OTHER SIDE OF THE TRANSACTION!

Transactional Negotiation Ethics

PUFFERY

vs.

Lying

Where do we draw the line?

- Estimates of price or value placed on the subject of the negotiation
- A party's intentions as to an acceptable price or outcome
- A party's willingness to compromise
- A party's goals
- An undisclosed principal (except when nondisclosure constitutes a fraud).

Transactional Negotiation Ethics

SILENCE IS GOLDEN!

But . . .

A material omission may be construed as a lie

Transactional Negotiation Ethics

- What happens if my client is the one lying?

It's complicated.

- On the one hand, confidentiality
- On the other hand:
 - you cannot participate in the client's fraud or crime
 - you cannot lie
 - you must protect the interests of your client/employer

Transactional Negotiation Ethics

■ What to Do

- Talk to client/business person responsible
- Go up the chain (if necessary), eventually to the highest decision maker (e.g., Board of Directors)
- Resign (hopefully not necessary)

■ In House Sensitivities

- Engage outside counsel

Transactional Negotiation Ethics

Publicly-Traded Companies

- 17 C.F.R. Part 205
- Requires, under certain circumstances, mandatory climb up the corporate ladder

Transactional Negotiation Ethics

- Marked Drafts of Agreements (“Redlines”)
 - Strongly advisable to provide opposing counsel with both marked and clean copies of agreements while in draft stage, no matter how small the change.
 - Use document comparison software



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QUESTIONS?



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