Ethics In The Workplace – How To Handle The Sensitive Investigation

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1. ELECTRONIC COMMUNICATIONS

- Employees' e-mails with their lawyers that are stored on company servers?

- Can you examine them?

1. ELECTRONIC COMMUNICATIONS

- **Facts:** Employer's policy state that while occasional personal use is permitted, all e-mails on company computers and systems are part of the company's business and client records, not private or personal to an employee. After claiming harassment, an employee is terminated and files an EEOC charge against the employer. Employer's in-house lawyers then review ex-employee's company-owned laptop and find helpful e-mails that were exchanged between the ex-employee and her lawyers, before she was terminated.

- **Questions: Ethical to review the e-mails? What would you do?**

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1. ELECTRONIC COMMUNICATIONS

- Aspirational Rule: ABA Model Rule 4.4(b): A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

1. ELECTRONIC COMMUNICATIONS

- *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650 (N.J. 2010): Actions of employer's attorney in examining and retaining e-mails between ex-employee and her lawyer that were sent and received through the employee's web-based personal e-mail account, using employer's computer, violated New Jersey's version of 4.4(b) and required remand to determine whether he should be disqualified or otherwise sanctioned.

- *Aventa Learning, Inc. v. K12, Inc.*, 830 F. Supp. 2d 1083, 1110 (W.D. Wash. 2011): Rejecting *Stengart* and holding that e-mails employ sent to lawyer through his web-based personal e-mail account, but using his employer's computer, resulted in waiver of attorney-client privilege under employer's broad policy.

- *Long v. Marubeni Am. Corp.*, 2006 WL 2998671 (S.D.N.Y. 2006): Holding that no attorney client privilege protection existed for e-mails exchanged over employer's e-mail system where employer had formal "no personal use policy," and rejecting plaintiffs' reliance on the inadvertent disclosure doctrine based on the employer's clear policy.

1. ELECTRONIC COMMUNICATIONS

Some Factors To Consider

- (1) Does the employer maintain a policy banning personal or other objectionable use?
- (2) Does the employer monitor the use of employee's computer or e-mail?
- (3) Do third parties have a right of access to the computer or e-mail?;
- (4) Did the employer notify the employee, or was the employee aware, of the use and monitoring policies?
- (5) Is the employer's policy, as applied, reasonable? Or, does it merely permit the employer to "rummage among information having no bearing upon its legitimate business interests."

  In re Asia Global, 322 B.R. 247, 257 (Bankr. S.D.N.Y. 2005); *In re Reserve Fund Sec. & Derivative Litig.*, 275 F.R.D. 154, 159-60 (S.D.N.Y. 2011) (describing *Asia Global* as "widely adopted" and listing myriad cases)

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1. ELECTRONIC COMMUNICATIONS

Best Practices

Ethical Best Practices

- Consider obtaining a formal opinion from outside counsel;
- Only proceed to substantively examine the e-mails if all five factors are satisfied beyond any reasonable dispute. Otherwise, as in *Stengart*, ethical risks abound;
- **Options?**

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1. ELECTRONIC COMMUNICATIONS

- One option: Preserve, but do not substantively examine the e-mails, and notify opposing counsel in writing, so that an agreement can be reached or a court can consider the issue before you have substantively examined the e-mails.

- Another option: Do not examine the e-mails, destroy all versions of them, and return them to the ex-employee's lawyer with a request that they preserve them so that if you are permitted to discover them through formal discovery, they will be available.

2. IDENTIFYING THE CORPORATE "CLIENT"

- In house lawyers typically assume multiple roles (both legal & business advisory roles)

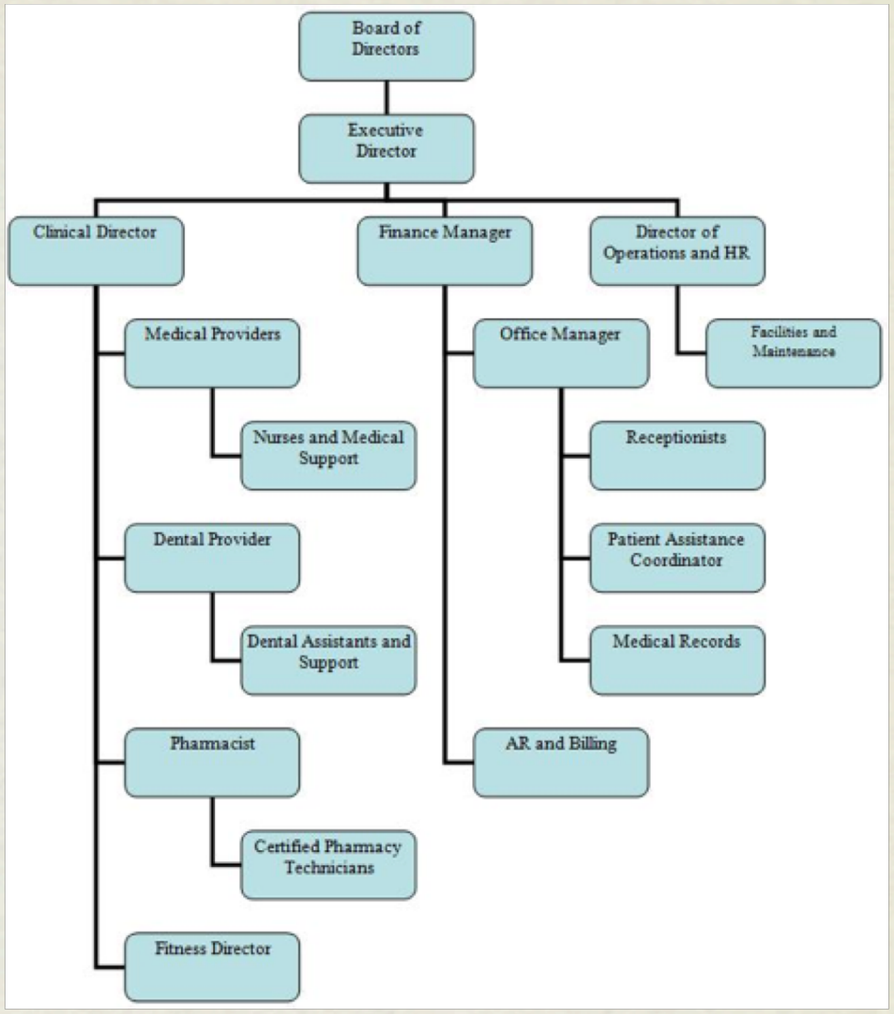
- The blending of managerial and legal duties makes confidentiality issues much more difficult

2. IDENTIFYING THE CORPORATE "CLIENT"

- ABA Model Rule 1.13 - an in house lawyer represents the organization - not the directors, officers, employees, shareholders or other constituents

- It is common for directors and others to presume that the in-house lawyer also represents them personally

- This risk is heightened in litigation



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FORMER STANFORD LAWYER SUED

Mary Flood
Houston Chronicle
March 28, 2009

Stanford Financial Group executive Laura Pendergest-Holt filed a $20 million legal malpractice lawsuit Friday against a lawyer she said caused her wrongfully to be accused of a crime.

Pendergest-Holt, chief investment officer of Stanford Financial, sued Thomas Sjoblom, who practices in New York and Washington, accusing him of legal malpractice and breach of fiduciary duty.

"He essentially dropped her in the grease," said Pendergest-Holt's Houston lawyer, **Tony Buzbee**.

The lawsuit names Sjoblom and his law firm, Proskauer Rose. Neither he nor the firm's spokes- men returned calls late Friday.

Pendergest-Holt faces a federal felony charge alleging she obstructed a Securities and Exchange Commission investigation into her employer by withholding information about her knowledge of company assets and her preparation for interviews by investigators.

Sjoblom accompanied Pendergest-Holt to a Feb. 10 meeting with the SEC that is central to the criminal charge. He was also at earlier meetings in Miami to discuss company assets before she spoke to the SEC.

Her lawsuit, filed in Dallas federal court, alleges that Sjoblom caused Pendergest-Holt to speak to the SEC without informing her of her Fifth Amendment rights against self-incrimination, that she was not required to testify, that she had no attorney-client privilege with him and that the interests of her employer were adverse to her interests.

She alleges that Sjoblom was acting for Stanford Financial Group Chairman R. Allen Stanford and his companies and did not represent her individual interests.

Sjoblom has since withdrawn from representing Stanford.

- Stanford Financial Group
- Executive sues lawyer and his law firm for malpractice
- Alleges that lawyer caused her to be wrongfully accused of a crime

2. IDENTIFYING THE CORPORATE "CLIENT"

Informing Employees of In House Lawyer Obligations

- ABA Model Rule 1.13 (d) - when the lawyer knows or reasonably should know that the organization's interests are adverse to those constituents with whom the lawyer is dealing (such as directors, officer, etc.), the lawyer must explain the identity of the client.

- *United States v. International Bhd. of Teamsters*, 119 F.3d 210 (2d Cir. 1997) (attorneys in all cases required to clarify whom they represent, and to highlight potential conflicts of interest).

2. IDENTIFYING THE CORPORATE "CLIENT"

Corporate Investigation Advice

- Although not required, it is advisable to warn the constituents of your role:

- "I am conducting this interview as the attorney representing [the organization]. Although what you say may be considered a confidential communication between the company and its attorney, I do not represent you personally and cannot promise to keep anything you tell me from appropriate company officials."

2. IDENTIFYING THE CORPORATE "CLIENT"

Corporate Investigation Advice (cont'd)

- A warning is especially important when the employee has a potential claim against the organization, or when the employee may have committed a wrong against the organization.

- *In re Grand Jury Subpoena*, 415 F.3d 333 (4th Cir. 2005) (grand jury subpoenaed internal investigation interviews; company voluntarily waived attorney/client privilege; the employees moved to quash; court held that the waiver was proper because employees were informed that the company "could" represent them - and did not say that they "did" represent them).

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2. IDENTIFYING THE CORPORATE "CLIENT"

Joint Representation of Organization and Constituents

- ABA Model Rule 1.13 - An in house lawyer may also represent a director, employee, member, or shareholder, provided the provisions regarding dual representation are followed. (*See Rule 1.7 - Conflicts of Interest*).

- If informed consent is required, consent must be obtained by the appropriate official in the organization other than the person to be represented, or the shareholders. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08 and cmt. 8 (1989)

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2. IDENTIFYING THE CORPORATE "CLIENT"

Business Advice is generally not protected:

- In general, to be privileged, it must be shown that the communication was given in a professional legal capacity **for the purpose of giving legal services** rather than providing general business advice.

- *Wal-Mart Stoes, Inc. v. Vidalakis*, 2007 WL 491569 (W.D. Ark. Dec. 28, 2007) (motion to quash subpoena directed to general counsel of Wal-Mart Realty on attorney-client privilege grounds denied because it appeared that some of her actions were clearly taken in her role as real estate manager rather than as counsel).

3. INTERNAL INVESTIGATIONS

- Lawyers commonly conduct corporate investigations

- In such cases, lawyers should be considered about waiver of privilege and discovery of investigation materials

- In employment cases, this typically comes into play in sexual harassment cases, when employers want to show that they acted promptly and reasonably to establish the affirmative defense provided by the U.S. Supreme Court

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3. INTERNAL INVESTIGATIONS

Waiving the privilege

- Question: What's wrong with that? Why can't the company waive the privilege?

- It can, but companies cannot use the privilege as a sword and a shield.

- Accordingly, courts have held that plaintiffs are able to "uncover the foundation for [company's] assertions of good faith."

3. INTERNAL INVESTIGATIONS

- "[The company] cannot stand on the attorney-client privilege or the work product doctrine to preclude a thorough examination of its adequacy."

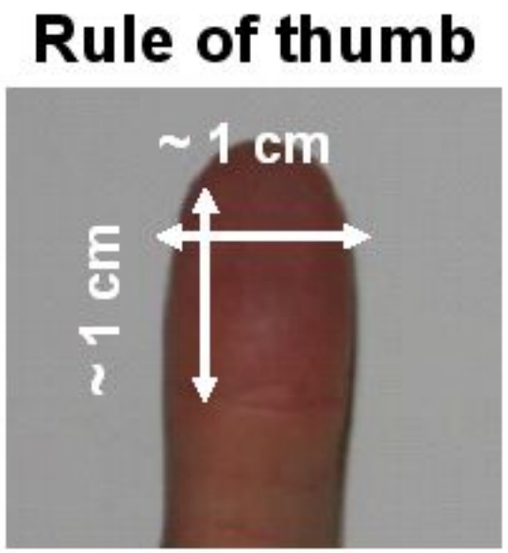
- "The defendant cannot have it both ways. If it chooses [its] course, it does so with the understanding that the attorney-client privilege and work product doctrine are thereby waived."

- *Wellpoint Health Networks, Inc. v. Super. Ct.*, 59 Cal. App. 4th 110, 128 (1997).

3. INTERNAL INVESTIGATIONS

- Some courts have held that attorney-client privilege does not apply where the attorney was acting solely in the role of an investigator rather than as an attorney.

3. INTERNAL INVESTIGATIONS



- A good rule of thumb is to reasonably segregate the attorney's advice and other privileged communications

- This places you in a good position to avoid waiver unless a substantial portion of the attorney-client communication has been disclosed to third parties.

3. INTERNAL INVESTIGATIONS

Former Employees

- The majority of courts have determined that the privilege applies to former employees where the communication's purpose is to give legal advice to the employer.

- *In re Coordinated Pretrial Proceedings*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981) ("Former employees, as well as current employees, may possess the relevant information needed by corporate counsel to advise the client with respect to actual or potential difficulties [and thus] the attorney-client privilege is served by the certainty that conversations between the attorney and client will remain privileged after the employee leaves").

3. INTERNAL INVESTIGATIONS

Best Practices to Avoid Waiver

- A person within the organization with authority should, in writing, ask the in house counsel for legal advice.

- Once the privilege is invoked, nonlawyer corporate managers should report to the in house lawyer or legal department.

- From time to time, note that the matter is proceeding pursuant to the review of legal advice

4. UNLAWFUL ACTIVITY

Hypothetical

- *Ethically responding to the unthinkable* - Wrongdoing within the corporation and the obligations of in-house counsel

- *Facts* - A corporation is engaged in litigation, and its COO has informed in-house counsel that she may just "lose" documents relevant to the dispute that are subject to a court discovery order. The in-house counsel already has copies of the documents in her possession. The COO has asked in-house counsel not to produce the documents in response to the order. When she said she had to, the COO asked her to reconsider her decision and noted that the "Company has had a lot of lay-offs recently, and the legal department looks like it may need some headcount reduction -- like maybe by one."

- *Question* - Ethically, what should in-house counsel do? What would you do?

4. UNLAWFUL ACTIVITY

Aspirational Rule: ABA Model Rule 1.13:

1. The attorney represents his/her client, and his/her client is the organization. Not the COO

2. If the in-house counsel knows that an officer or employee intends to violate a legal obligation to the organization, or commit a violation of law that might be imputed to the organization … that lawyer shall proceed as reasonably necessary in the best interest of the organization.

3. Furthermore, the Rule states that when there is a "violation of legal obligation to the organization" or a "violation of law which reasonably might be imputed to the organization" the attorney must take action.

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4. UNLAWFUL ACTIVITY

<u>What About If I Don't Know For Sure?</u>

- Under the procedures set out in Model Rule 1.13(b)-(e), the in-house counsel must possess actual knowledge of wrongdoing. However, Model Rule 1.13 provides that such knowledge can be inferred from circumstances, and the attorney cannot ignore obvious violations.

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4. UNLAWFUL ACTIVITY

<u>Ethical Best Practices</u>

(1) Confront the COO. Simply ask the COO to reconsider her decision.

(2) Advise and recommend that a separate legal opinion from an outside law firm on the matter be sought for presentation to appropriate authority in the organization.

(3) If the issue is not resolved, the in-house counsel must report the violation "up the corporate ladder" until she reaches the Board of Directors where, ultimately, if the issue is not resolved, she may have to resign.

(4) In referring the matter to higher authority, the lawyer may, as necessary, advise the board that the lawyer's ethical obligations would likely require withdrawal from representing the corporation, and appropriate disclosure to the court, if she learns that the COO carries out the threat and the misconduct is not otherwise rectified.

4. UNLAWFUL ACTIVITY

What about the documents?

- If the in-house lawyer reasonably believes after counseling and remonstrating with the client that the COO has not retracted her threat, the lawyer should preserve any pertinent documents, or copies thereof, in her possession until the matter of discovery compliance is resolved. The in-house lawyer should decline to return the documents to the COO or the corporation. Doing so with the knowledge of the COO's intentions could be considered assisting the client in destroying or concealing a document having potential evidentiary value in violation of other ethical rules.

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8. UNLAWFUL ACTIVITY

What about my job? Must I resign?

- The in-house lawyer may continue the representation of the corporation notwithstanding the COO's threat to destroy documents. A lawyer shall withdraw if the representation will result in violation of the Rules of Professional Conduct or other law. Faced with the COO's threatened misconduct, however, continued representation of the corporation is consistent with the lawyer's previously discussed obligations under Model Rule 1.13(b). Such representation will not result in violation of the Rules or other law, but fulfills the lawyer's ethical duties and may forestall a violation of law by the client.

5. CONFLICTS ARISING FROM LAW FIRM "BEAUTY CONTESTS"

- If potential client obtains consultation and advice as part of the process, that may form an attorney-client relationship, thus disqualifying the firm from being adverse to the potential client in some future litigation.

- Even if an attorney-client relationship is not formed, if the potential client discloses confidential information to the attorney, then that attorney has an obligation of confidentiality with respect to the subject of the consultation. *See, e.g., B.F. Goodrich Co. v. Formosa Plastics Corp.*, 638 F. Supp. 1050 (S.D. Tex. 1986) ("The fact that the attorney-client relationship had not yet been established does not mean that the Arnold firm owed no duty whatever to Goodrich. . . . [A] lawyer must preserve the confidences and secrets of one who has sought to employ him.'"). This too could trigger disqualification of some future matters.

5. CONFLICTS ARISING FROM LAW FIRM "BEAUTY CONTESTS"

<u>Therefore, lawyers may be well advised to:</u>

- Inform the prospective client in writing that no information they provide will be treated as confidential unless and until a formal retention agreement is executed.

- Obtain a waiver of future conflicts in the even his or her firm does not win the contest.

See Kenneth D. Agran, *The Treacherous Path to the Diamond-Studded Tiara: Ethical Dilemmas in Legal Beauty Contests*, 9 Geo. J. Legal Ethics 1307 (Summer 1996) (providing exhaustive analysis of cases involving legal beauty contests and suggesting firm best practices to avoid ethical problems).

Bonus Trap

- Litigation holds.
  - The Texas Take on Litigation Holds, Spoliation, Sanctions, *etc.*: *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010) (Rosenthal, J.).
  - But, even there, there are risks: *Menendez v. Halliburton, Inc.*, No. 09-002, 2011 WL 4439090, at *8 (ARB Sept. 13, 2011).

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