



**Business Litigation 2010:**  
Unlocking Successful Strategies  
for Wisconsin Companies

## Ethics Bear Traps for In-House Counsel

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 **Business Litigation 2010:** Unlocking Successful Strategies for Wisconsin Companies

## Unique Problems Faced by In-House Counsel

- “The general counsel has one foot planted firmly in the shifting, treacherous terrain of the law, and the other planted just as firmly in the oozing swamp of business.”



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## What's the Problem?

- One client
- Employee of the client
- Interpersonal relationships
- Access to information
- Multiple hats



## The Rub

- Whether an attorney is acting in legal capacity (as attorney) or in business capacity, the Rules of Professional Conduct apply to guide (and restrict) the in-house counsel's conduct.





## Hiring and Compensation

- Getting hired and getting promoted involves a business transaction with a client.
- SCR 20:1.8 Conflict of interest: prohibited transactions



## Hiring and Compensation

- A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
  - (1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable . . . and transmitted in writing. . . ;
  - (2) The client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
  - (3) The client gives informed consent, in a writing signed by the client . . . .



## Compensation



- SCR 20:1.5 Fees
- “A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.”
- The compensation a lawyer receives must be “reasonable,” including any non-monetary compensation, incentives or options.



## Compensation

- Fee (salary) may be reasonable at the time, but rule also prohibits the “collection” of an unreasonable fee.
- Appreciation of stock or stock options may be viewed as unreasonable when options vest and “fee” is collected.



## Compensation



- **Best Practice** - Have written employment agreement, including provision that corporation was fully advised to have another lawyer review the transaction. Specifically reference nature of stock options, and perhaps even justify in terms of factors under Rule 20:1.5.



## Independence



- In-house counsel's compensation may impact his/her independence in providing advice to corporation.
- SCR 20:1.7 Conflicts of interest current clients
- "A concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited by . . . a *personal interest of the lawyer.*"



## Independence

- If in-house counsel's advice would be different based upon his/her own personal situation, then attorney must either
  - Divest themselves of the benefit creating the conflict or
  - Not participate in the decision-making process



## Unauthorized Practice of Law

- In-house counsel must be authorized to practice law in the state in which the lawyer has office and, if different, in state where counsel advises company client.
- SCR 20:5.5 Unauthorized practice of law; multijurisdictional practice of law
- Not simply a “Shingle License”





## Unauthorized Practice of Law

- SCR 10.03 Membership
- employed as a lawyer in Wisconsin . . . exclusively by a corporation . . . shall register as in-house counsel
  - A completed application;
  - A nonrefundable fee of two hundred and fifty dollars (\$250);
  - Documents proving admission to practice law; and
  - An affidavit from the employing entity attesting to the lawyer's employment by the entity and the capacity in which the lawyer is so employed.



## Traps

- Must be licensed and in good standing in another jurisdiction.
- Must obtain *pro hac vice* admission to appear in court or in deposition.
- Cannot represent clients other than company (other than for representation related to work for company).





## Who is the Client?



- SCR 20:1.13 Organization as client
- “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”
- Problem - Corporations can act only through their agents (employees, officers, directors). Thus, an in-house lawyer never deals directly with her client *per se*, but only with the agents of the client.



## Corporate “Miranda” Warning

- Rule 1.13(f) creates a duty for the lawyer representing the organization to explain that the lawyer represents the organization, not the individual constituents, especially when it is clear that the organization’s interest is at odds with the interest of the constituent.







## Duly Authorized Representatives?

- When constituents of the organization make decisions for it, the corporate counsel must ordinarily accept them even if their utility or prudence is doubtful.
- If action of constituent is violation of law and likely to harm corporation, however, attorney must attempt to prevent action by going “up the ladder”.



## Up the Ladder?

- When?
  - seriousness of the violation and its consequences,
  - the responsibility in the organization and the apparent motivation of the person involved,
  - the policies of the organization concerning such matters,
  - and any other relevant considerations.





## Up the Ladder?



- Mandatory or permissive?
  - May ask constituent to reconsider.
  - If continues in ways, must talk to next higher authority.
  - May go to higher authority even if not mandated to do so, if sufficiently important in best interests of company.
  - Must minimize risk of revealing confidential information outside of company.
  - If dissatisfied with resolution, lawyer may resign.



## Up the Ladder?

- **Best Practice** – Adopt a compliance plan for all employees to assist in identifying potential wrongdoing, and which specifically covers in-house counsel.





## Disclosing Wrongdoing

- When lawyer must or may disclose confidential client information to outside world is a different issue.
- SCR 20:1.6 Confidentiality



## Mandatory Disclosure

- A lawyer **shall** reveal information relating to the representation of a client
- to the extent the lawyer **reasonably believes** necessary
- **to prevent** the client from committing a **criminal or fraudulent act**
- that the lawyer reasonably believes is likely to result
  - In death or substantial bodily harm or
  - In substantial injury to the financial interest or property of another.



## Permissive Disclosure

- A lawyer **may** reveal information relating to the representation of a client
- to the extent the lawyer **reasonably believes** necessary:
  - **To prevent** reasonably likely **death or substantial bodily harm** [no crime or fraud predicate]; or
  - To prevent, **mitigate or rectify** substantial injury to the financial interests or property of another
    - That is reasonably certain to result or has **resulted from the client's commission of a crime or fraud** in furtherance of which the **client has used the lawyer's services.**



## Difference

- 1.6(c) *permits* disclosure to prevent death or substantial bodily harm; 1.6(b) *requires* disclosure in such circumstances if it involves criminal or fraudulent act by client.





## Difference



- 1.6(c) *permits* disclosure to prevent, mitigate or rectify substantial injury to the financial interests or property of another from the client's commission of a crime or fraud involving the use of the lawyer's services.
- 1.6(b) *requires* disclosure only to prevent such financial injury (not to mitigate or rectify it) tied to client's commission of a crime or fraud.



## Disclosing Wrongdoing

- **Best Practice** – If you are unclear on what to do and the stakes are significant, obtain advice on your responsibilities.
  - Hire independent counsel
  - WisBar Ethics Hotline - (608) 250-6168 or (800) 444-9404, ext. 6168, Monday through Friday, 9 a.m. to 5 p.m.





## Affiliates and Constituents

- Representation of affiliated companies and constituents may create problems.
- SCR 20:1.8 Conflict of interest: prohibited transactions



## Affiliates and Constituents

- SCR 20:1.8 - A lawyer shall not accept compensation for representing a client from one other than the client unless:
  - the client gives informed consent
  - there is no interference with the lawyer's independence
  - information relating to representation is protected under SCR 20:1.6.
- SCR 20:1.7 & 20:1.9



## Affiliates and Constituents

- **Best Practice-** Think about whether taking on concurrent representation will jeopardize representation of company.
- If ok, formalize the representation in a written agreement, signed by company and other client, and being clear to address confidentiality issues and payment issues, and which permits continued representation of company in the event of a conflict preventing continued concurrent representation. Once representation is completed, send writing ending representation.



# Lunch



## Dual Role of In-House Counsel

- In-house counsel wear many hats.
- Legal counselor vs. Business advisor



## Scope of Privilege

- Scope and nature of privilege impacted by in-house counsel's dual role.
- Communications in which counsel acts in business capacity, as opposed to legal capacity providing strictly legal advice to corporation, are likely not privileged.
- Hybrid roles?
- Mixed communications?
- Minutes of BOD meetings? Other meetings?





## Scope of Privilege

- **Best Practice** - Corporate counsel should limit her role in the organization to serving as legal advisor to the organization.
- Non-business functions should be undertaken only when rendering of the legal advice will not be compromised.
- Clearly mark privileged all communications (and only those communications) relating to the provision of legal advice.



ATTORNEY-CLIENT  
PRIVILEGE



## Scope of Privilege

- Recent EU Opinion –. *Akzo Nobel Chemicals, et al. v. Commission*, C-550/07 P (2010)
- corporate client's communications with its in-house counsel were not privileged because in-house lawyers are not independent from their clients.





## Dealing with Third Parties

- SCR 20:4.1 Truthfulness in statements to others
- May not knowingly make false statement of material fact
- Includes failure 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 SCR 20:1.6.



## Ethics of Negotiation

- A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.
- Failure to inform of material fact?
  - Aneurysm?
  - Extra insurance policy?
  - Failure to inform about defense (pre-existing art?)





## Ethics of Negotiation

- **Best Practice** – In-house counsel should always remember that he is first and foremost a lawyer held to higher standards.
- Never lie. When in doubt, do the right thing. 😊



## Person Represented by Counsel

- SCR 20:4.2 Communication with person represented by counsel
- “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”



## Person Represented by Counsel

- Must know that person is represented by counsel on that matter.
- Communication must relate to subject of representation.
- Doesn't matter if third person is a lawyer.
- Doesn't matter if third person consents. Consent cannot be given by party, but must come from lawyer.



## Person Represented by Counsel

- **Best Practice** - If intention is for in-house counsel to be involved directly in business negotiations with other side, get consent in writing early on permitting counsel to contact party directly.





## Dealing with Unrepresented Person



- SCR 20:4.3 Dealing with unrepresented person
- A lawyer shall inform such person of the lawyer's role in the matter.
- The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel



## Respecting the Rights of Third Parties

- SCR 20:4.4 Respect for rights of 3rd persons
- A lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a 3rd person,
- Or use methods of obtaining evidence that violate the legal rights of such a person.



## Harass or Delay

- Delays to gain leverage in negotiations?
- Hiring private investigators?



## Respecting the Rights of Third Parties

- “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.”





## Comment to Rule

- “Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived.”



## Inadvertent Disclosures

- **Best Practice** – If you know document was sent inadvertently, notify the sender.
- Do not return the document until you investigated the situation and assessed the rules of waiver in the applicable jurisdiction.
- If unclear what to do, potentially seek declaratory relief from court.



## Sitting on Board of Directors

- ABA Formal Opinion 98-410
- Not *per se* ethically impermissible
- Must exercise caution because of potential conflicts of interest and the protection of confidences and the attorney-client privilege



## Director Conflicts

- May be called upon to advise corporation on the actions of the directors
- Impact on corporation from having to resign from board in the event of conflict.
- Advise board of risks of conflicts and consequences of resignation or recusal.
- Advise board that in some circumstances, matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege.





## Director Conflicts

- **Best Practice** – Think of potential conflicts and determine whether appropriate to serve on board.
- If so, inform board of potential for conflicts, giving explanation and examples, and basis for decision to serve.
- Apprise all participants at meetings regarding scope and nature of attorney client privilege, and designate portions of minutes relating to provision of legal advice privileged.



## Resignation/Withdrawal

- Employee of a corporation can quit with requisite notice
- An in-house counsel, however, is a lawyer, and quitting in effect is a withdrawal from the representation of a client.





## Resignation/Withdrawal

- SCR 20:1.16 Declining or terminating representation
- “Withdrawal can be accomplished without material adverse effect on the interests of the client”
- But what if resignation would have material adverse effect?
- Rule would not apply to prevent a resignation, but could be applied to extend notice period if loss of in-house counsel would create undue hardship on corporation



## Resignation/Withdrawal

- Breaches of employment covenant (e.g. confidentiality, non-compete) not just a contractual matter
- May result in ethics charge.
- Rule 20:1.9 likely would prevent in-house counsel from representing competing companies
  - Substantially relate?
  - Adverse to company?