

## **Professional Discipline of In-House Counsel: Who Complains, What are the Areas of Ethical Exposure and What Happens?**

### **Guest and Dorsey Panelists**

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### **Program Materials**

PowerPoint Presentation

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## Guest and Dorsey Speakers



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Ameriprise Financial, Inc.



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## Ethics Complaints Against In-House Counsel

**Who files ethics complaints?**

**What are they about?**

**How serious is the discipline?**

## Who files ethics complaints against In-House Counsel and what are they about?

- **Employees** – most often arising out of employment disputes or internal investigations. Content of Corporate Miranda Warnings.
- **Opposing parties** (usually those unrepresented) – unhappy with the outcome of a transaction or litigation. In smaller companies they may involve conflict of interest alleged by minority members/shareholders.
- **Opposing Counsel** – these typically involve communications with a represented party or allegations of Unauthorized Practice of Law by in-house counsel.

## How Serious is the Discipline?

- **Professional Discipline** against in-house counsel is rare.
- **When it happens, it is usually private discipline** (e.g., admonition) for violations involving communication with represented or unrepresented persons.
- **Serious discipline** is usually reserved for cases where the conduct is willful – affirmative misrepresentation or fraud, practicing with a suspended license, or criminal behavior.

## Some Hypothetical Cases.

### **Current employee with discrimination complaint who is represented by counsel**

- **Employee has performance issues, and complaints about other employees. Complains to HR Director.**
- **Employee also has made a Qui Tam complaint.**
- **HR asks for counsel's assistance in drafting response to employee. in-house counsel advises HR about the response which is sent directly to employee.**
- **Employee files ethics complaint against in-house counsel alleging in-house counsel ghostwrote the letter and therefor communicated directly with the employee regarding matters for which the employee was represented.**

## Rule 4.2, Rules of Professional Conduct

- **Comment** - *Parties 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.*
- Is ghostwriting advising or is it an improper direct communication by the lawyer to a represented client without consent? This is one of the issues that was investigated in the ethics complaint.
- **ABA Informal Opinion 461** - lawyer can suggest that client directly communicate with opposing represent; lawyer can advise client concerning the communication; and lawyer can draft a document (e.g., settlement) for the client to deliver to the represented adversary.

## Not All State Ethics Authorities Agree with the ABA

- **Minnesota** - agrees lawyer can suggest client directly contact adversary; prohibits lawyer from scripting the communication for the client; and prohibits drafting documents for delivery.
- **New York Rule 4.2**: “a lawyer may cause a client to communicate with a represented person ... and may counsel the client with respect to those communications, *provided the lawyer gives reasonable advance notice to the represented person’s counsel that such communications will be taking place.*”
- Although New York agrees with the ABA position and condones the lawyer drafting documents for delivery to the adversary, it imposes the additional notice to opposing counsel requirement.

## How Do You Respond when HR asks for Assistance with the Response?

- Ghostwrite?
- Outline the Response?
- Advise HR generally about the issues?
- Tell HR you cannot help with the content of the response.
- What if you don't know the forum (state) is which the dispute might be litigated?

## Investigations and Corporate Miranda Warnings

## **In-House Counsel asked to conduct internal investigation – with likely result to fire management employee for harassment**

- **In-house counsel meets with unrepresented employee who is alleged victim of harassment. In-house counsel tells employee he has been asked by the company to conduct “an independent investigation.”**
- **Manager is fired. Employee later hires lawyer to bring harassment claim against company. In-house counsel is involved in responding to the claim.**
- **Employee files ethics complaint alleging in-house counsel “misrepresented himself” as an independent investigator.**

## **Rule 1.13 (e) – Corporate Miranda Warning**

- (e) In dealing with an organization’s directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.
- How far must Counsel go when the investigation could have dual purposes – firing manager and obtaining information for use in defense of an employee claim?
- What if the employee wants her own counsel present for the investigation interview?



## The Small Company Dilemma

Don't lose sight of who is the client.

## Bookkeeper Theft from Small Company

- Audits disclose bookkeeper has embezzled funds from small company.
- In-house counsel makes demand to bookkeeper for return of funds.
- Bookkeeper responds that CEO has also been embezzling funds.
- In-house counsel asks for proof/evidence of theft. Bookkeeper produces no evidence the company's auditors did not discover any CEO theft.
- Bookkeeper retains counsel who presents in-house counsel with emails evidencing outrageous sexual harassment of by CEO. Offers to have client obtain a family loan to repay embezzled funds and release any claim for sexual harassment if company agrees not to report matter to criminal authorities.
- In-house counsel confronts CEO about harassing emails.

## The Rest of the Story....

- **CEO convinces in-house counsel the settlement offer is good for the company – funds are returned, company avoids sexual harassment suit. CEO also prevails upon in-house counsel not to tell the Board about the harassing emails.**
- **Board agrees to settle the matter with broad release that does not inform board about the harassment allegations.**
- **Two years later auditors find evidence of CEO theft. During the Board's investigation, it finds the sexually harassing emails and also communications relating the settlement.**
- **Board files ethics complaint against in-house counsel.**

## Remember Who You Do, and Who You Don't Represent

### **RULE 1.13: ORGANIZATION AS CLIENT**

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

## And Your Obligations When Corporate Constituents Engage in Organization Damaging Behavior

- (b) If a lawyer for an organization knows that an officer...is engaged in action ... that is a violation of a legal obligation to the organization ... and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.
- Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

## In-House Counsel Discipline Cases

## In-House Counsel: Letting Your License Lapse and Practicing Beyond the License Limitations

### In-House Counsel Failure to Pay License Fee

- **DeBacker was the former general counsel for Dana Corporation in Ohio. He was not licensed in Ohio but permitted to work as in-house counsel under Ohio rules that required payment of an annual registration fee and an active license elsewhere.**
- **DeBacker failed to pay his annual registration fees in Kansas and Oklahoma where he was licensed.**
- **DeBacker was named in a Corporate Counsel magazine article as one of several GCs who were not actively licensed. After the article, he attempted to reinstate his Oklahoma license.**

***DeBacker was denied reinstatement and suspended from the practice of law in Oklahoma for one year.***

- DeBacker also had to pay all past due registration fees and the costs of the Oklahoma reinstatement proceeding denying his reinstatement.
- Rule 8.5 (a), Rules of Professional Conduct states “A lawyer admitted in [Oklahoma] is subject to the disciplinary authority of [Oklahoma], regardless of where the lawyer’s conduct occurred.
- Even though DeBacker’s unauthorized practice was in Ohio, he was still subject to the discipline authority of Oklahoma.
- *In re DeBacker*, 184 P.3d 506 (Okla. 2008)

***In re Altschuler, 879 N.W.2d 929 (Mem.) (Minn. 2016)***

- Altschuler was admitted to Minnesota with a limited in-house counsel license.
- A Minnesota in-house counsel license by its terms expires when the lawyer leaves the corporate employer for which the in-house counsel license was issued.
- Altschuler left her corporate employer and began working in a private law firm. Eighteen months later she applied for full admission to Minnesota.
- Altschuler was issued a public reprimand for engaging in the unauthorized practice of law with the private law firm after her in-house counsel license expired upon her departure from her prior corporate employer.

## **In re Meyers, (Georgia 12/11/17)**

**Assisting or Facilitating the Company Client's Representative (who was a lawyer in Defrauding the Company)**

## **Meyers: A practicing lawyer for 34 years without any record of discipline.**

- **John F. Meyers was billing partner for a J.M. Huber subsidiary which employed DiTano as its in-house counsel.**
- **DiTano told Meyers that the Company permitted in-house counsel lawyers to perform legal work outside the Company as long as it was not done on Company time and did not cause conflicts.**
- **Meyers agreed to perform some of that work for DiTano—who, according to the 2013 lawsuit, had formed his own law practice without J.M. the Company's knowledge. Meyers was at the Seyfarth Shaw firm sent bills to Meyers' law firm.**

## **The Seyfarth invoices to DiTano's law firm do not get paid.**

- **When the Seyfarth invoices did not get paid, DiTano instructed Meyers to invoice the Company and change the time entry descriptions to make it difficult for the Company to discern the work was not performed for the Company.**
- **Meyers denied conspiring with DiTano to defraud the Company and claimed that DiTano told him the Seyfarth billed work would ultimately benefit the Company.**
- **After the Company discovered the fraud, Seyfarth reimbursed the Company for all services not provided to the Company. Meyers reimbursed Seyfarth for the amount refunded and written off.**

## **Disbarment and Suspension**

- **DiTano was disbarred but then appeared as a witness in the lawyer discipline proceeding against Meyers.**
- **Although the Georgia lawyer discipline board recommended disbarment, Meyers was suspended for two-years.**
- **The court cited the restitution made by Meyers as a mitigating factor warranting a sanction less than disbarment.**
- **By the time Meyers was suspended, he had left Seyfarth and joined the Barnes & Thornburg law firm.**

## Red Flags

- My employer (and the firm's client) allows me to pursue personal business for which I can use your services.
- Many times this is ok, but sometimes not. Confirm with the Company client that related legal services for the employee are not prohibited. Example: Company IP employee (and firm contact) wants to use law firm to prosecute patents or trademarks in the same technology or business area as the Company/Employer.
- Changing Clients and time descriptions on bills is almost always going to be a problem.

## Not Discipline but instead Disqualification

*Dynamic 3D Geosolutions v. Schlumberger*, 2015 U.S. Dist. Lexis 67353 (W. D. Tex).



## Opposing Your Former In-House Counsel Employer

- **Charlotte was IP Counsel for Schlumco for several years rising to the position of Deputy General Counsel.**
- **At Schlumco, Charlotte worked on licensing a product called Petrel.**
- **In 2013 Charlotte left Schlumco and became Associate GC of Acacia.**
- **As Acacia's lawyer Charlotte met with the owners of the "319 Patent" in order to assess whether the patent should be acquired for assertion against other companies. Also present was Acacia's licensing VP.**
- **After acquiring the patent, Charlotte reviewed the 319 Patent in anticipation of litigation. She and the VP later hired the Collins Edmond law firm to advise Acacia about the 319 Patent.**

## More Facts

- **The Collins Edmonds firm made recommendations to Charlotte and the VP to acquire the patent and sue several companies, including Schlumco. Charlotte approved the recommendations.**
- **Acacia then sued Schlumco alleging Petrel infringed the 319 Patent. Some of Petrel's alleged infringing features existed while Charlotte was at Schlumco.**
- **Schlumco then moved to disqualify Charlotte, all in-house counsel at Acacia, and the Collins Edmonds law firm.**

## A Complete Wipeout for Acacia and Its Lawyers

- **Charlotte, Acacia's in-house counsel department and the Collins Edmonds law firm are all disqualified and the case is dismissed without prejudice.**
- **Texas Rule of Professional Conduct 1.09**
- (a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client ... if it is the same or a substantially related matter.
- (b) ... [W]hen lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).

## The Court finds

- **Charlotte's work at Schlumco on Petrel was substantially related to the 319 Patent Infringement suit because she worked to license Petrel and the infringing features of Petrel existed during this time.**
- **Although Acacia claimed Charlotte had been screened, the court found she had met with the Acacia VP and participated in the decision to acquire the 319 Patent and authorize the infringement suits. Therefore, it was presumed confidential information was shared with the in house lawyers.**
- **There were multiple communications between Charlotte, the VP, and other in house lawyers with the Collins Edmonds lawyers.**

## Thank you for attending!

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