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Attorneys at Law

Five Important Ethical Issues Impacting In-House Counsel

Prepared for:

Corporate Counsel Roundtable

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Agenda

Ethical issues that impact in-house counsel:

1. Who is the Client?
2. The Attorney-Client Privilege
3. Duty of Confidentiality
4. Conflicts of Interest
5. External Communications

1. Who is the Client?

"Frankly, I don't remember why I called this meeting."

Who is the Client?

- Employees may think that in-house counsel represents them, at least professionally
- Similarly, owners and executives may treat in-house counsel as their own personal counsel
- Both are common misconceptions

The Company is the Client

- In-house counsel represents the company, not its personnel

"In representing an organization, a member [attorney] shall conform his or her representation to the concept that the **client is the organization itself**, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement." *California Rule of Professional Conduct* 3-600(A)

The Company is the Client

- In-house counsel owes duties to the company as the client
- In-house counsel sometimes may also represent directors, officers, and employees, but this can lead to bad results, as we will discuss
- An ethical dilemma arises when a constituent with interests adverse to the company seeks advice on a company legal matter

The Company is the Client

- In certain circumstances, in-house counsel has an obligation to explain who he or she represents:

  "In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, **a member shall explain the identity of the client for whom the member acts**, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing…." *California Rule of Professional Conduct* 3-600(D)

The Organization is the Client

- It is not uncommon for directors, officers, and employees to ask in-house counsel for legal advice
- Make clear that you represent the company and not them
- Failure to do so can lead to:
  - Waiver of company's attorney-client privilege
  - Disciplinary charges by the State Bar
  - Personal liability

2. The Attorney-Client Privilege

"But how could me speaking
at the Secret New Products Seminar
break our Confidentiality Agreement?"

The Attorney-Client Privilege

- The attorney-client privilege is recognized across the country, but its specific rules vary state-by-state
- In California, the privilege is in Evidence Code §§950
- In general, the attorney-client privilege protects from disclosure:
  - Confidential communications
  - Between an attorney and a client
  - Made in seeking or providing legal advice

The Attorney-Client Privilege

- The purpose of the attorney-client privilege is to:

> "[E]ncourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administrations of justice. The privilege recognizes that sound legal advice or advocacy … depends on the lawyer's being fully informed by the client." *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981)

The Attorney-Client Privilege

- Cal. Evidence §954 gives a client a privilege to refuse to disclose a confidential communication between client and lawyer if the privilege is claimed by:
  - The holder of the privilege;
  - A person authorized to claim the privilege by the holder of the privilege; or
  - The lawyer at the time of the confidential communication, but the person cannot claim the privilege if there is no holder of the privilege in existence or if the lawyer is otherwise instructed by a person authorized to permit disclosure

The Attorney-Client Privilege

- The attorney-client privilege protects only communications
- It does not protect:
  - The underlying facts
  - Historical documents
  - Lawyer-to-client communications not disclosing or based on client confidences
  - Communications motivated by business rather than legal concerns

The Attorney-Client Privilege

- The attorney-client privilege does not apply to non-legal work by an attorney, such as rendering business advice:

> "[T]he attorney-client privilege **does not attach** to an attorney's communications **when the client's dominant purpose in retaining the attorney was something other than to provide the client with a legal opinion or legal advice**." *Costco Wholesale Corp. v. Superior Court, 47 Cal. 4th 725, 735 (2009)*

The Attorney-Client Privilege

- But the fact that business issues are considered in the course of rendering legal advice does not negate the privilege:

> "[E]ven assuming that Aetna retained [attorney] Thornton for a purpose other than the rendition of legal advice, this **does not mean ipso facto that all communications between Aetna and Thornton would not be protected by the attorney-client privilege**." *Aetna Cas. & Surety Co. v. Superior Court, 153 Cal. App. 3d 467, 476 (1984)*

The Attorney-Client Privilege

- What this means for in-house counsel:

  - Communications between a company and its **outside counsel** almost always involve legal advice, so courts tend to apply the attorney-client privilege **broadly** to these communications

  - **In-house counsel**, however, often wear more than one hat, so courts tend to look **more closely** to analyze whether their communications with the company were for the purpose of providing legal advice or business advice

The Attorney-Client Privilege

- To obtain the protection of the attorney-client privilege, the company must show that its communication with in-house counsel was:
  - Made primarily for the purpose of seeking or providing legal advice; and
  - Was kept confidential

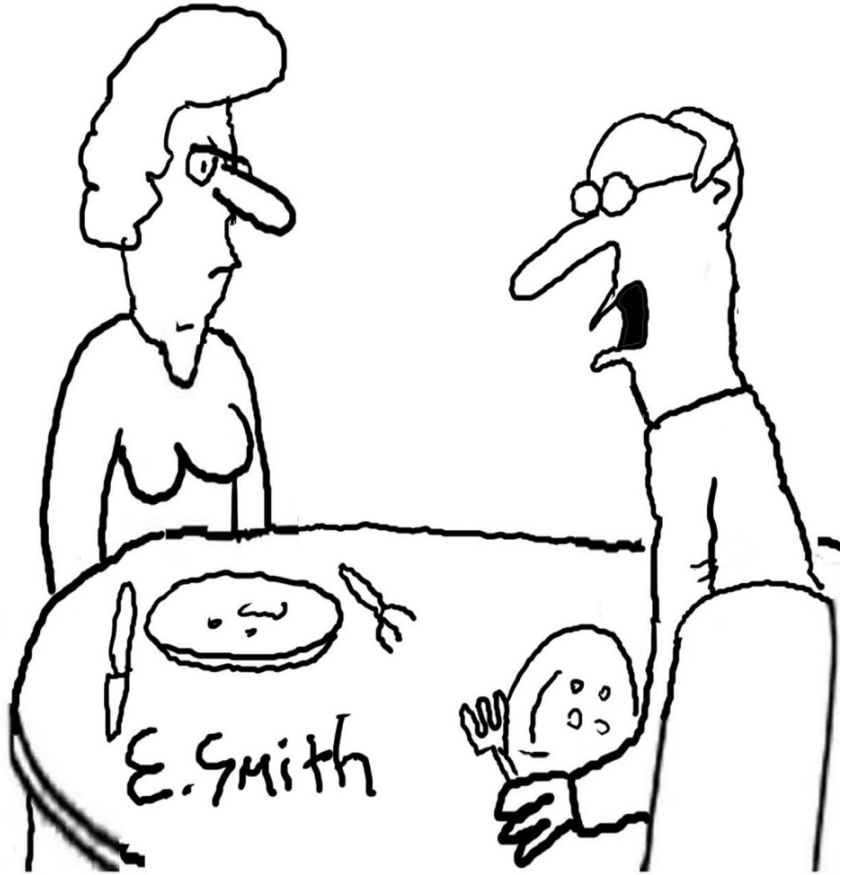
Best Practices to Protect the Privilege

- Avoid mixing business and legal advice in the same document
- Limit privileged communications to essential employees
- Mark each privileged and confidential document as “privileged and confidential”
- Do not mark non-privileged documents as privileged

Best Practices (continued)

- State in the document that it provides legal advice
- Educate company personnel about the privilege and how they can help maintain it – simply cc'ing in-house counsel on every email is not sufficient
- Consider engaging outside counsel to communicate the advice if you are concerned about a challenge to the privilege

Discussions with Employees



"Sorry, darling, the firm's corporate lawyers say I can't discuss my day."

Discussions with Employees

The ethical issues of employee discussions with in-house counsel:

- Some employees may believe that their communications with in-house counsel are protected by the attorney-client privilege from disclosure to company management
- To the contrary, nothing that a director, officer, or employee says to in-house counsel is privileged or protected from disclosure to company management

Discussions with Employees

- In fact, as company counsel who owes a duty of candor to your client, in-house counsel must disclose all adverse information to management (e.g., “Joe Jones admitted to me that he took money from the cash drawer”)

- What if an employee erroneously believes that he or she has a personal attorney-client relationship with the company’s in-house counsel?

Rule 3-600(D)

"In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, **a member [attorney] shall explain the identity of the client for whom the member acts**, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing…." *California Rule of Professional Conduct 3-600(D)*

Rule 3-600(D) (continued)

"**The member [attorney] shall not mislead such a constituent** into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent."

Who Holds the Privilege?

- Current management has the authority to assert or waive the company's attorney-client privilege. *CFTC v. Weintraub*, 471 U.S. 343 (1985)

- If there is a change in control, new management may waive the privilege even if the prior management invoked it. *Weintraub*, 471 U.S. at 349

- Similarly, prior management can't waive the privilege once it is asserted by new management. *Venture Law Group v. Superior Court* 118 Cal. App. 4th 96 (2004)

3. The Duty of Confidentiality

"I assure you that everything you say to me will be held in the strictest confidence."

The Duty of Confidentiality

- California Rule of Professional Conduct 3-100 bars attorneys from disclosing confidential client information that is protected by Business and Professions Code section 6068, subdivision (e)(1)

- Section 6068 requires the attorney to "maintain inviolate the confidence, and **at every peril to himself** or herself to preserve the secrets, of his or her client."

The Duty of Confidentiality

The "protection of confidences and secrets is not a rule of mere professional conduct, but instead involves **public policies of paramount importance**…" *In re Jordan*, 12 Cal. 3d 575, 580 (1974)

- Contributes to trust that is the hallmark of the attorney-client relationship
- Client is encouraged to seek legal assistance and to communicate even embarrassing or damaging matter
- Counsel needs all information to represent clients effectively and, if necessary, to advise against conduct

Scope of the Duty of Confidentiality

The term "client secrets" includes both:

- **Confidential information** communicated between the lawyer and the client; and
- **Publicly available information** that the lawyer obtained during the professional relationship which the client has requested to be kept secret or the disclosure of which is likely to be embarrassing or detrimental to the client

Cal. State Bar Committee on Professional Responsibility and Conduct (COPRAC) Formal Opinion No. 2016-195

Revealing Client Secrets

Attorneys may reveal client secrets in only two situations:

- With the client's informed written consent; or
- If the attorney reasonably believes that disclosure is necessary to prevent a criminal act that may result in death or substantial bodily harm to an individual, but only if the attorney first makes a good faith effort to persuade the client not to commit the act and informs the client of the disclosure (Rule 3-100 (A)-(D))

Reporting Legal Violations

What about other crimes – may in-house counsel reveal that he or she has learned that the company intends to commit financial fraud?

- **No**. Unlike many other jurisdictions, **California does not** permit an attorney to reveal client confidences to prevent a non-lethal crime

- Perhaps the strictest rules in the United States. Other states have enacted broader exceptions to the rule, particularly in the face of the financial crises

Reporting Legal Violations

If company is or may be committing a violation of law, or acting in a manner which will likely cause substantial harm to the company, in-house counsel may (i) report the violations "up the ladder" within the organization, and (ii) even resign, but **may not reveal the client's secrets** (Rule 3-600(B)-(C))

Consider:

- A car company with potentially fraudulent emissions data?

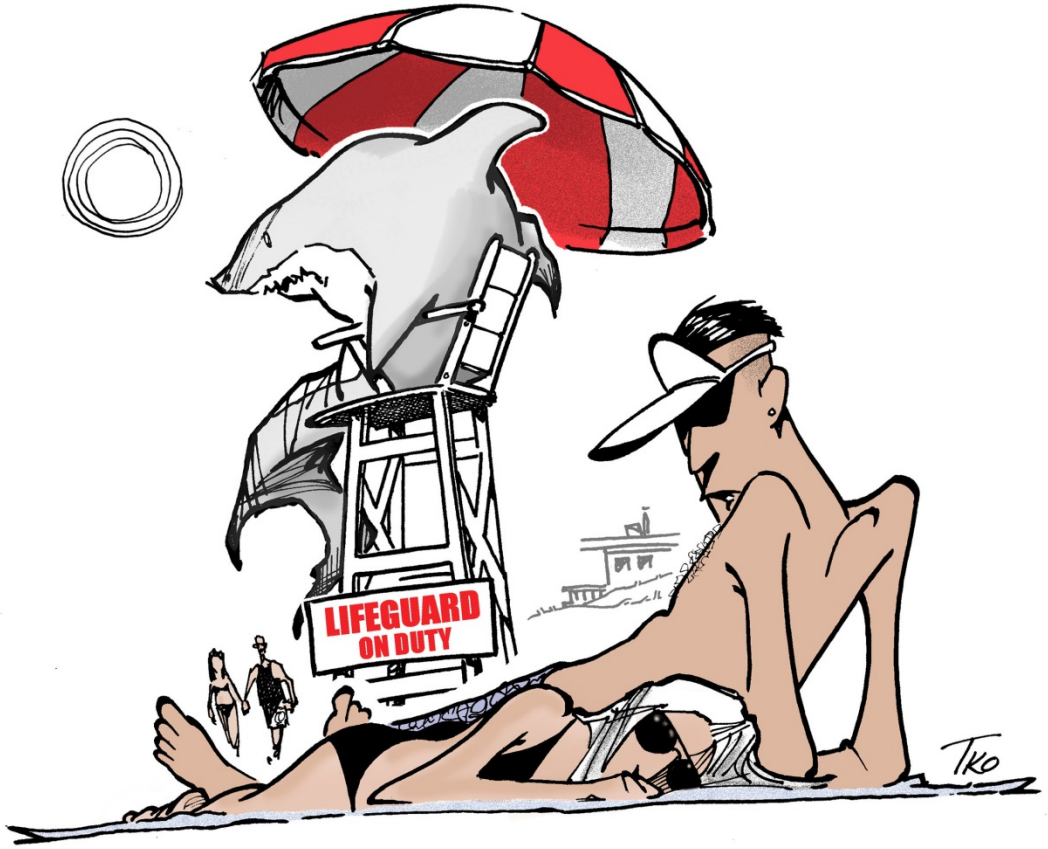
- Dimitrious Biller, Former National Managing Counsel of Toyota's Rollover Program

Protecting Client Secrets

Best practices to avoid inadvertent disclosure of client secrets:

- Be wary of confidential discussions in public places – elevators, restaurants, airplanes, etc.
- Be careful when talking on your cell phone in public – we all tend to speak more loudly on the phone
- As a general rule, if asked by the press, do not comment about the company's legal matters

4. Conflicts of Interest



"So, I'm the only one who sees a conflict of interest here?"

Conflicts of Interest

California Rules of Professional Conduct 3-310(C) states that an attorney shall not, without the informed written consent of each client:

- Represent more than one client in a matter in which the interests of the client potentially conflict;

  or

- Represent more than one client in a matter in which the interests of the client actually conflict

Conflicts of Interest

- Rule 3-310 is implicated if in-house counsel jointly represents both the company and a director, officer, or employee in a legal matter, such as a wrongful termination suit

- Joint representations are problematic for in-house counsel

Conflicts of Interest

- Even if the company and the employee both give informed written consent to the joint representation, in-house counsel may have to withdraw from representing both clients (not just the employee) if an unresolvable conflict arises between them later on

- Better course is to limit the scope of the representation to the company and engage separate outside counsel for employee (and company) as necessary

Yanez v. Plummer, 221 Cal. App. 4th 180 (2013)

- In-house counsel (Plummer) represented an employee (Yanez) at his deposition in a lawsuit against company brought by another employee (Garcia)
- In follow-up questions at the deposition, Plummer obtained testimony from Yanez that contradicted his earlier witness statement

Yanez v. Plummer (continued)

- After the deposition, the company fired Yanez for dishonesty due to those contradictions
- After he was fired, Yanez sued Plummer directly for malpractice, breach of fiduciary duty, and fraud
- Plummer obtained summary judgment on the ground that he was not involved in the termination decision

Yanez v. Plummer (continued)

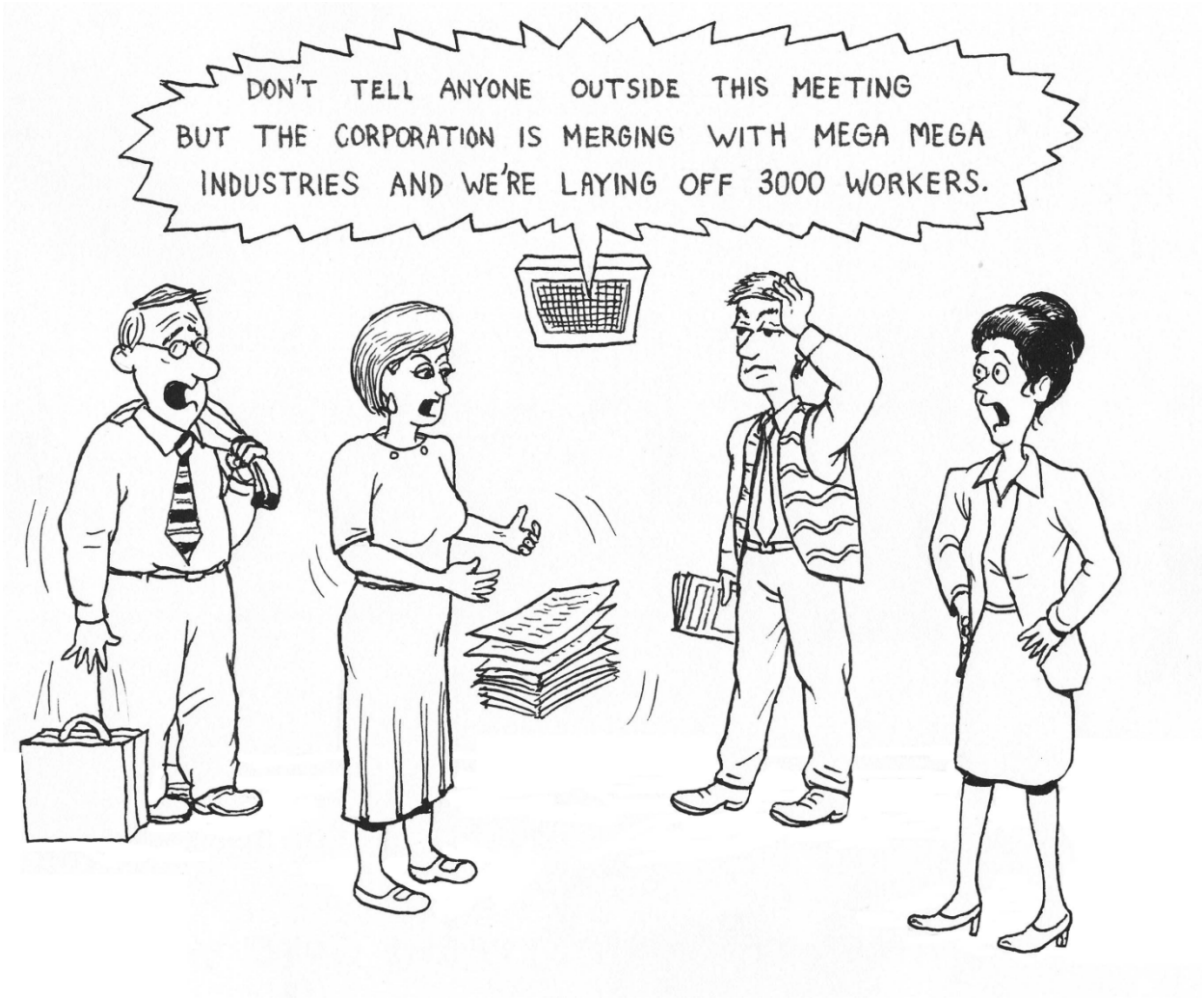
On appeal, the Yanez Court reversed, holding that:

- Plummer played a substantial role in the termination: but for his deposition testimony, Yanez likely would not have been terminated;
- Plummer violated Rule 3-310 by representing Yanez and the company without informed written consent;
- Plummer's violation constituted "evidence of malpractice liability and breach of fiduciary duty"

Avoiding Conflicts

- In *Yanez*, the in-house counsel told the employee the represented him only at his deposition, but a "limited scope" is irrelevant
- In-house counsel should not represent anyone other than the company in any capacity without complying with Rule 3-310
- In-house counsel should not offer legal advice to any individual at the company, which could be construed as creating an attorney-client relationship

5. External Communications



External Communications

- Employees may ask in-house counsel to join a call with another company to negotiate a contract

- Before doing so, consider Rule 2-100:

> "**While representing a client**, a member [attorney] shall not communicate directly or indirectly about the subject of the representation with a party the member **knows** to be **represented by another lawyer** in the matter, unless the member has the consent of the other lawyer…."

External Communications

Rule 2-100 defines the term “party” to include:

- An officer, director, or managing agent of a corporation or association;
- A partner or managing partner of a partnership; or
- An employee of a corporation, or member of an association, but only if that person may legally bind the organization

External Communications

What Rule 2-100 means for in-house counsel:

- If you know another company is represented by counsel in the matter (whether in-house or outside counsel), you cannot speak to that party about the subject of the representation without the other counsel's consent
- However, just because another company has a lawyer, even in-house counsel, does not mean it is represented "in the matter" you are discussing

External Communications

What Rule 2-100 means for in-house counsel (continued):

- Similarly, an employee is not necessarily a "party" within the meaning of the rule
- In-house counsel should analyze each issue on a case-by-case basis

Takeaways

Takeaways

- The company is your client
- The attorney-client privilege does not protect all of your communications
- You cannot reveal client secrets, even to prevent most crimes
- You are bound by conflict of interest rules
- Be cognizant of what you say, where you say it, and to whom

Ethics Resources

- The California Rules of Professional Conduct
- The State Bar Act (Bus. & Prof. Code §§ 6600 et seq.)
- Both are available on the State Bar website
- Local bar association ethics committee materials
- Cal. State Bar Ethics Hotline (800-238-4427)

If you have any questions, we are happy to help

Questions

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Speaker

Jeremy G. Suiter is chair of Stradling's Business Litigation practice group.

Jeremy is a business and commercial litigator who regularly represents companies and individuals in trial, arbitration, and appellate proceedings. His practice focuses on a wide range of litigation involving businesses, including breach of contract, fraud, trade secret and unfair competition disputes. He also handles internal business litigation, including shareholder disputes, partnership disputes and business valuation cases.

Before joining Stradling, Jeremy was a litigator with Latham & Watkins LLP. He also served in federal clerkships to the Honorable Mary Beck Briscoe, U.S. Court of Appeals for the Tenth Circuit, and the Honorable Richard W. Vollmer Jr., U.S. District Court, Southern District of Alabama.

Speaker

Joshua Geffon is a strategic partner to entrepreneurs, executives and in-house legal teams, collaborating with innovative companies throughout their life-cycles, from nascent stage startups to billion dollar public corporations.

Joshua regularly advises emerging growth companies, conducts mergers and acquisitions for middle market and public corporations, and provides counsel and advice to boards of directors and senior management on corporate governance, intellectual property and technology transactions. Joshua's experience includes a significant number of purchase and sales transactions.

Joshua is the incoming co-chair of the ABA Venture Capital Transactions Subcommittee and is a member of the ABA Mergers and Acquisitions and Legal Opinions Committees.

Joshua has been a Finalist for Corporate Counsel of the Year as identified by the Los Angeles Business Journal in 2015, and recognized as a Rising Star by Southern California Super Lawyers in 2014, 2013 and 2012.

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