ETHICAL AND PROFESSIONAL RESPONSIBILITY TRAPS WAITING FOR CORPORATE COUNSEL

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I. CLIENT CONFIDENTIALITY OBLIGATIONS

- Sarbanes-Oxley/SEC Regulation of Capital Markets Lawyers (Section 307) (2003)
  - **May** disclose "material violations" (past, current, future) to SEC
  - The "Reasonable Lawyer"
  - '34 Act Sanctions
  - No "Noisy Withdrawal"

I. CLIENT CONFIDENTIALITY OBLIGATIONS

- ABA Model Rule 1.6 (2003)
  - **May** Disclose:
    - Certain Death/Substantial Bodily Injury
    - Crime or Fraud/Substantial Financial Injury/Lawyer's Services Used
    - Mitigate/Rectify #2
    - Establish Claim or Defense
    - "Actual knowledge" standard

I. CLIENT CONFIDENTIALITY OBLIGATIONS

- Disparate States' Reactions
  - 5 Groupings:
    1) In toto (e.g., Delaware)*
    2) Tinkering
    3) Pre-2003 Standards
    4) Retain long-standing, idiosyncratic rules (e.g., Illinois)
    5) Abject rejection (e.g., Washington, California)
  - So, what have New York and New Jersey done?

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* But see Section 14 of the Del. Prof. Cond. Preamble (no disciplinary action when lawyers chooses *not* to exercise discretion).

I. CLIENT CONFIDENTIALITY OBLIGATIONS

- New York State (2009)
  - **May** disclose:
    - Certain Death/Substantial Bodily Injury
    - Prevent Client Crime
    - Establish Defense
  - **May** withdraw legal opinions (in 3 circumstances)
  - Carved out financial fraud
  - No change for past client conduct
  - No "reporting out" (Rule 1.13)
  - "Actual knowledge" standard

I. CLIENT CONFIDENTIALITY OBLIGATIONS

- New Jersey (current)
  - **Must** disclose:
    - "criminal, illegal or fraudulent act"/ "reasonably believes"/ death or substantial bodily harm or substantial financial harm
    - "criminal, illegal or fraudulent act"/ "reasonably believes"/ fraud on a tribunal
  - **May** disclose:
    - the foregoing to the person affected by the foregoing conduct
    - to rectify a client's "criminal, illegal or fraudulent act "in which the lawyer's services were used
    - to establish "a claim or defense"
  - "reasonable belief" is grounded on "some foundation in fact"
  - "reporting out" is expressly permitted (Rule 1.13(c))

I. CLIENT CONFIDENTIALITY OBLIGATIONS

- Open Issues
  - "Heads you win/tails I lose" – liability whipsaw
  - Multi-jurisdictional whipsaw (NY vs. NJ vs. __)
  - *SEC vs. New York* (pre-emption)
    - United State ex rel. Fair Lab. Practices Assocs. v. Quest Diagnostics, 2013 U.S. App. LEXIS 21709 (2d Cir. Oct. 25, 2013), aff'm, 2011 U.S. Dist. LEXIS 37014 (S.D.N.Y. April 5, 2011)
    - see also Hayes v. Page Perru, 26 F. Supp. 3d 1311 (N.D. Ga. 2014); 2015 BL 71863 (N.D. Ga. March 17, 2015), aff'd, No. 15-11506 (11th Cir. October 5, 2015) (not for publication)
    - SEC Cake (preempts) & eats it too (Steve Altman/ interfering with SEC investigations/permanent SEC bar/18 month NYS suspension – January 26, 2016)
    - But see: Wadler v. Bio-Rad Laboratories, 2016 WL 7369246 (C.D. Cal. Dec. 20, 2016) (SEC pre-emption position entitled to Chevron-like deference)
  - *SEC vs. Delaware* (no pre-emption issue)



Fail to disclose & wrong (SEC & Plaintiff's Lawyers)

Disclose & wrong (Clients & Shareholders)

II. COMMON INTEREST PRIVILEGE

- Delaware: see Del. Uniform R. of Evid. § 502 (b); 3 Com. Corp. v. Diamond II Holding, 2010 WL 3426, *2 (Del. Ch. March 20, 1986)(litigation and non-litigation)

- New York: see Ambac Assurance v. Countrywide Home Loans, 2016 WL 3188989 (N.Y. June 9, 2016) (litigation or reasonably anticipated litigation)

- New Jersey: see O'Boyle v. Borough of Longport, 94 A.3d 299 (N.J. 2014) ("actual or anticipated litigation") (although it cited the Restatement)

- Delaware is **right**; New York and New Jersey are **wrong** (flawed analysis/unsupporting precedents) (good for business in Delaware; bad for business in New York and New Jersey)

III. WHISTLEBLOWER RIGHTS OF IN-HOUSE COUNSEL

- Three-way judicial split
  - No cause of action (Illinois)
  - Sort-of cause of action (California)
    - can sue, but cannot use privileged communications
  - Cause of action (5th Circuit) (Wiley, 2005)
    - "offensive" language added to Model Rule 1.6 allows attorney to go forward without limitation (relied upon by Magistrate Judge in Wadler)

III. WHISTLEBLOWER RIGHTS OF IN-HOUSE COUNSEL

- Problem with #3
  - It is **wrong** (ethics rules vs. attorney-client privilege) (plus, ABA Model Rules = federal common law)
  - NYS does **not** allow "offensive" use in Rule 1.6
  - NJ **does** allow "offensive" use in Rule 1.6
  - Delaware **does** allow "offensive" use in Rule 1.6

III. WHISTLEBLOWER RIGHTS OF IN-HOUSE COUNSEL

- Recent Developments
  - *Karstetter v. King Cty. (*Wash. 2019*/* (yes, but . . . .)
  - *Trzaska v. L'Oréal* (3d Cir. 2017) (cause of action under NJ Whistleblower statutes -- no discussion re confidentiality or a/c)
  - *Greissman* (Kentucky 2017) (no cause of action)
  - *Pang* (Utah 2015) (no cause of action)
  - *Danon* (New York 2015) (no cause of action)
  - *Wadler* (N.D. Cal. 2015) (N.D. Cal. 2015) (lawyer whistle-blower claims under SOX not dismissed on Rule 12 motion)
  - Nebraska State Bar Op. 12-11 (lawyer can disclose client confidences only to the extent necessary to establish a defense)
  - *Kidwell* (Minnesota 2010) (no cause of action)
  - *Van Asdale* (Nevada 2011) (verdict for in-house lawyer under SOX)
  - *Heckman* (Kansas 2007) (cause of action)
  - *Crews* (Tenn. 2002) (cause of action)
  - *Alexander* (Fla. 2004) (cause of action)
  - *Quest Diagnostics* (SDNY 2011), aff'd, (2d Cir. 2013), (GC *qui tam* barred)
  - *Toyota* (9th Cir. 2012) (arbitration award against in-house lawyer affirmed)
  - *SOX/Dodd-Frank* (2011) (only if disclosures "are consistent" with ethics rules and SEC regs.)

III. WHISTLEBLOWER RIGHTS OF IN-HOUSE COUNSEL

- *DC Bar Opinion – 363* (in-house lawyers can only disclose in "defensive" cases)
- NYCLA Ethics Opinion – 746 (lawyers barred from Dodd-Frank whistleblowers remedies)
- *North Carolina Bar v. Peterson* (2002) (in-house lawyer disbarred)

IV. LIABILITY ISSUES FOR LAWYERS

- Bad News (Part One)! ☹
  - *Central Bank* (Sup. Ct. 1994)
  - *Stoneridge* (Sup. Ct. 1998)
  - *Janus* (Sup. Ct. 2011)
    - No Aider & Abettor Liability for Secondary Actors
    - Ps must show traditional elements of fraud/tort for 10b5 (e.g., Ds must speak; Ps must show reliance)

    → **BUT** → *Lorenzo* (Sup. Ct. 2019)
  - D.C. Circuit:
    - **No** 10b-5(b) because D did not make the misrepresentation
    - **But**, scheme liability under 10b-5(a) & 10b-5(c) because D passed on another's misrepresentation
    - Judge Kavanaugh's dissent (Justice Kavanaugh's recusal)
  - U.S. Supreme Court (March 27, 2019) (6-2 - - **yes**, scheme liability)(dissemination) (how broad? Breyer vs. SEC)
  - Malouf v. SEC, 933 F.3d 1248 (10th Cir. 8/13/19)(liability for failing to correct another person's misrepresentation(s))

IV. LIABILITY ISSUES FOR LAWYERS

- Bad News (Part Two)! ☹

  - SEC (4/4/13): more 102(e) cases against lawyers ("only intentional bad acts"?)
  - *Enron* (should have known)
  - *General Re* (duties to other side in a transaction/in-house criminal liability)
  - *Ted Urban* (failure to supervise/SEC deadlock)
  - *Taglich Brothers* (initial mistake re website disclosure for research reports)
  - *Ira Weiss* (opinion on tax exempt bonds)
  - *David Drummond* (advice on required disclosure for opinions)
  - *John Isselman* (whistleblower on client misconduct untimely by one quarter)
  - *Edward Moore* (9/9/16 SEC fraud case against general counsel who purportedly mishandled a DOJ investigation)
  - *But: Glaxco/Lauren Stevens* (criminal prosecution of in-house lawyer nonsuited at trial)

V. CONFLICTS OF INTEREST/ADVANCE WAIVER

- Roger Cramton: Big Firm Lawyers "are some of the biggest risk-takers that I run into."
- Advance waivers (and/or "hot potatoes"):

Dodged a Bullet	D/Qued
Vinson & Elkins (Tex.)	Kirkland & Ellis (Pa.)
Jones Day (N.Y.)	Hogan Lovells (Cal.)
Schlam Stone Dolan (N.Y.)	Sheppard, Mulin, Richter & Hampton (Cal.)
Cravath Swaine & Moore (Del.)*	Holland & Knight (N.Y.)
Day Pitney (N.J.)	Dentons (Ohio) (Verein structure)
DLA Piper (Wisc.)	Patton Boggs (Cal.)
Foley & Lardner (Cal.)	Winston & Strawn (Utah)
	Winston & Strawn (N.Y.)
	Blank Rome (2nd Cir.)
	Duane Morris (Ga.)
	White & Case (England)
	Wilkie Farr (N.Y.)
	Jones Day (Fed. Cir.)
	King & Spalding (N.Y.)

Key Cases:

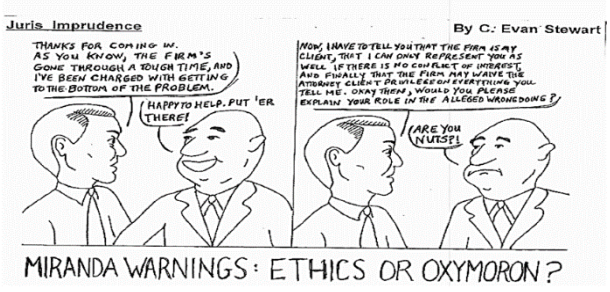
- Air Products & Chemicals, Inc. v. Airgas, Inc., 2010 Del. Ch. LEXIS 35, at *6 (Del. Ch. March 5, 2010)*
- Galderma Labs v. Actavis Mid Atlantic, 927 F. Supp. 2d 350 (N.D. Tex. 2013)
- Macy's Inc. v. J.C. Penney Corp., 107 A.D. 3d 616 (1st Dept. June 27, 2013)

- Key take away: in-house lawyers beware (representation letters; ABA Formal Opinion 95-390)

* But see Bleacher v. Bose, 2017 BL 152355 (Del. Super. Ct. May 5, 2017) (screening can not cure conflict issue(s))

VI. MULTIPLE REPRESENTATION TRAPS

- "Corporate Miranda" Warnings (Rule 1.13)



  - **Not** *Upjohn* warnings!
  - ABA: "When the lawyer knows… that the organization's interests are adverse…."
  - Delaware: Consistent with ABA
  - NJ: When the lawyer "believes" such an explanation is "necessary to avoid misunderstanding on [the individual's] part."
  - NYS: "When its appears that the organization's interests may differ…."

VI. MULTIPLE REPRESENTATION TRAPS

- Three examples
  - *U.S. v. Ruehle*, 583 F.3d 600 (9th Cir. 2009)
  - *Penn State General Counsel (2011 – February, 2020)*
  - *Rivera v. Lutheran Medical Center*, 866 N.Y.S. 2d 520 (N.Y. Sup. Ct. Kings Cty. 2008), *aff'd,* 899 N.Y.S. 2d 859 (2d Dep't 2010)
    - Rule 7.3 ("anti-solicitation" rule/*must* be a family member, close personal friend, current or prior client)
    - NYCLA Formal Opinion 737 ("dissemblance" okay)
    - NYCLA Formal Opinion 747 ("primary purpose" of the initial meeting is to interview; thereafter, okay to represent individual so long as the "primary purpose" is not to "secure legal fees")
    - *But see Wells Fargo, N.A. v. LaSalle Bank Nat'l Ass'n,* 2010 WL 1558554 (W.D. Okla. April 19, 2010)
    - New Jersey's Rule 7.3 is much more reasonable

VI. MULTIPLE REPRESENTATION TRAPS

- Ex-Employees/Attorney-Client Privilege
  - Upjohn v. United States, 449 U.S. 383, 394 n.3 (1981) (corporate privilege not extended to ex-employees) (But see C.J. Burger's concurrence: 449 U.S. at 403)
  - Extension of Upjohn, consistent of Burger's concurrence – see, e.g., Peralta v. Cendant Corp., 190 F.R.D. 38 (D. Conn. 1999) (regarding conduct within scope of employment)
  - Restatement (Third) of the Law Governing Lawyers, Section 127, comment e (2000) (privilege for ex-employee so long as she has a "continuing legal obligation…to forward the information to the organization's lawyer") (see Skew v. Freedom of Info. Comm'n, 714 A.2d 664 (Conn. 1998))
  - Newman v. Highland School District No. 203, 2016 WL 6126472 (Wash. Oct. 20, 2016) (D/Q not ordered, but future representation barred and discovery allowed because ex-employees not covered by the privilege)
    - Curious ruling re future representation – based upon misunderstanding of/hostility to multiple representation (e.g., Rivera)

VII. THE DANGERS OF DOCUMENTS

- Document Retention/Destruction

  - Ethical Issues for Lawyers
    - New York State Rule 3.4(a) (a "legal obligation to reveal")
    - ABA Model Rule 3.4(a) ("unlawfully alter"/something that has "potential evidentiary value") (Delaware follows ABA)
    - D.C. Rule 3.4(a) ("reasonably should know"/"in any pending or imminent proceeding")
      - NYS (more wiggle room) vs. ABA/Delaware ("unlawfully" (?)/ "potential" (?)) vs. DC (better practice)

  - Consequences for Lawyers
    - Nancy Temple (ENRON/Arthur Andersen)
    - Morgan Stanley (Ron Perelman/Kirkland & Ellis)
    - Qualcomm (patent dispute with Broadcom/19 Qualcom lawyers!)

VII. THE DANGERS OF DOCUMENTS

- Inadvertent Waiver
  - The "reforms": Fed. R. Civ. P. 26(b)(5) and Fed. R. Evid. 502(b) ("reasonable steps" (i) to prevent and (ii) to rectify)
  - Inverse/perverse incentives
    - False sense of security
    - Disparate results Compare Rhodes Industries, Inc. v. Building Materials Corp. of America, 254 F.R.D. 216 (E.D. Pa. 2008) with Sitterson v. Evergreen School District of 114, 196 P.3d 735 (Wash. Ct. App. 2008) with Mt. Hanley Ins. Co. v. Felman Prod. Inc., 2010 WL 1990555 (S.D. W. Va. May 18, 2010) with Edelen v. Campbell Soup Co., 265 F.R.D. 676 (N.D. Ga. 2010). And the claw-back safe haven provided by F.R.E. 502(d) has not appeared to have had much effect in obviating the risks of the "reasonableness" standard. See irth Sols., LLC v. Windstream Communications, LLC, 2018 BL 26885 (S.D. Ohio Jan. 26, 2018); Spicker v. Quest Cherokee, 2009 WL 2168892 (D. Kan. 2009); see also J. Rosans, "6 Years In, Why Haven't FRE 502(d) Orders Caught On?" Law360 (July 24, 2014).

VII. THE DANGERS OF DOCUMENTS

- Return of Materials Disclosed By Mistake
  - ABA Model Rule 4.4(b) (notify only)
  - ABA Formal Opinion 06-440 (can review/need not abide instructions)
  - New York State Rule 4.4(b) (same) [Delaware Rule 4.4(b) (same)]
  - "Simple Clarity"?
    - State by state variation (ABA website)
    - Comment 2 to Rule 4.4(b) (judicial sanctions)
    - Comment 3 to Rule 4.4(b) (refrain/return/both)
    - Different court standards (federal & state)
    - Fed. R. Civ. P. 26(b)(5)(B) (return or destroy/not disclose)
    - But see NY CPLR §§ 4503 & 3103(c)
    - NY City Bar Opinion 2019-03 (may use materials in certain limited circumstances)
    - NY City Bar Opinion 2012-01 (withdraw prior opinion re additional duties)
    - Federal judges' individual rules
  - Washington (Fuss v. Brandewiede (Ct. Appls. September 14, 2015) (no automatic D/Q for access to privileged information)
  - New Jersey (Sanchez v. Maquet (App. Div. May 23, 2019) (D/Q for use of privileged information); Jablow v. Wager (App. Div. April 18, 2015)) (D/Q for use of privileged information)

VII. THE DANGERS OF DOCUMENTS

- Virginia (Harleysville v. Holding Funeral Home (W.D. Va. Feb. 2, 2017) (a/c waived & violation of Rule 4.4(b), plaintiff not "reasonable" in preventing disclosure; D/Q of defense counsel not ordered, only motion costs); but see (Oct. 2, 2017) (district court partially overturned; *no* a/c waiver; *but* ethical violation; no D/Q, but evidentiary sanctions)
- Iowa (Op. 15-02 (January 28, 2015)) (must 1) stop reading, 2) notify opponent, 3) either return or seek judicial guidance)
- McDermott Will & Emery LLP v. Superior Court of Orange County, No. G053623 (Cal. Ct. App. 4th Dist. April 18, 2017) (Gibson Dunn D/Qed for exploiting inadvertently disclosed email)
- Texas (State Bar Professional Ethics Comm., Op. 664 (Oct. 2, 2016) (attorney who receives opponent's privileged materials as a result of theft does *not* have to notify her opponent)
- California (Bona Fide Conglomerate, Inc. v. United States Dist. Court for S. Cal., 2018 BL 105006 (9th Cir. March 27, 2018)(law firm D/Q which refused to return secret recordings of defendant's general counsel)

VIII. HOW NOT TO DO A CORPORATE INTERNAL INVESTIGATION

- In re Kellogg Brown & Root
  - 756 F.3d 754 (D.C. Cir. June 27, 2014), rev'g 2014 WL 1016784 (D.D.C. March 6, 2014)
  - 796 F.3d 137 (D.C. Cir. August 11, 2015), rev'g 2014 WL 7212881 (D.D.C. December 17, 2014)
    - Non-Lawyers
    - But for/"primarily" test
    - No 5 C's
    - Non-Upjohn
    - Privilege ≠ work product
    - "Magical words"
    - Interlocutory appeals
    - Internal lawyer ≠ 30b6 deposition waivers
    - Witness prep / Rule 612 waiver
    - Sword & Shield Advocacy
    - Kovel
    - The Della Street Rule
  - Take aways
    - **never** send non-lawyers to do what lawyers should do
    - **never** handle a 30b6 witnesses this way
    - courts can be very difficult places to litigate A/C & AWP issues
    - the Chamber of Commerce has influence in the DC Circuit

    See C.E. Stewart, "The D.C. Circuit: Wrong and Wronger," NY Business Law Journal (Winter 2015)

IX. MULTI-JURISDICTIONAL TRAPS

- 5.5 (safe harbors for in-house lawyers; NYS's specific rule: 22 NYCCR 522)(NJ: 1:27-2)
  8.5 (choice of law for jurisdiction/rules & forum)
  - Non uniformity vis-à-vis these two rules (e.g., New Jersey)
  - Delaware is one of 10 states that allows temporary practice by non-U.S. lawyers (DL RPC 5.5 (a))
  - In re Tonwe, 929 A. 2d 774 (Del. 2007) (disbarring non-Delaware lawyer/rejecting "predominant effect" and "reasonable belief" claim)/requested reciprocal disbarment by attorney's resident state (granted)); Sample v. Morgan, 935 A. 2d 1046 (Del. Ch. 2007) (personal jurisdiction over non-Delaware attorney who aided and abetted Delaware corporation's breach of fiduciary duty (giving advice on Delaware law)/ long-arm statute satisfied); In re Member of the Bar, 2006 WL 3169511 (Del. Nov. 1, 2006) ("predominant effect" is where injury occurs, *not* where attorney's conduct took place).
- ABA 20/20 commission (kick the can)
  - Screening of laterals
  - Conflicts in large/multi-jurisdictional law firms
  - Client conduct/fraud → different standards applied to larger/multi-jurisdictional law firms
- Threatening criminal/regulatory action
  - ABA/27 jurisdictions -- no problem (e.g., Delaware: affirmative good)
  - 6 jurisdictions -- no (e.g., California Rule 5-100 (a))
  - 18 jurisdictions – no, where it is a "threat" which is "solely" designed to gain an advantage in litigation (e.g., New York Rule 3.4 (e)) (see NYC Bar Ass'n Op. 2017-3 (6/20/17))
- Restrictive Settlements
  - Rule 5.6 (e (2) -- no
  - Many lawyers do it anyway
  - Some states, even if unethical, settlement themselves are enforceable (e.g., NYS, Texas, Florida) (O'Reilly 2004 settlement agreement)

X. IT COULD BE WORSE! (WE COULD BE IN EUROPE)

- *Azko Nobel Chemicals v. European Commission* (Sept. 14, 2010) (no in-house privilege)
- *Prezes Urzędu Komunikacji Elektronicznej v. European Commission* (Sept. 6, 2012) (in-house may not appear)
- *R. v. Momodou and Limani* [2005] EWCA Crim. 177; *Ultraframe (UK) Ltd. v. Fielding & Others* [2005] EWHC 1638 (Ch.) (no "scripting witnesses")
  - *See also* the ethical rules of Germany, Belgium, Italy, France, Switzerland, etc.
- The RBS Rights Issue Litigation, [2016] EWHC 3161 (Ch)
  - Wilmer Hale followed U.S. protocols for investigation
  - civil litigation in England/interview notes held to be discoverable
  - no "legal advice privilege" because interviewed employees were not "clients" (not within control group) (Three Rivers)
  - Wilmer Hale interview notes ≠ "work papers privilege" refused to apply Upjohn

X. IT COULD BE WORSE! (WE COULD BE IN EUROPE) (continued)

- The Director of the Serious Fraud Office v. Euasion Natural Resources Corporation, (2017) EWAC 1017 (QB)
  - Deckhert investigation into ENRC activities in Kazakhstan and Africa; updated SFO officials on investigation
  - after Deckhert fired, SFO launched a criminal investigation
  - SFO sought Deckhert interview materials
  - trial court rejected "litigation privilege" claim because SFO litigation was "a mere possibility" vs "a real likelihood"
  - no "legal advice privilege" (citing RBS Rights, Three Rivers)
  - on appeal, the Court of Appeal ruled that the Deckhert materials were protected by "litigation privilege" (adversarial process was reasonably contemplated with the initiation of an internal investigation) [Court of Appeal was also sympathetic "legal advice privilege" arguments, but must defer to the Supreme Court to reverse itself on Three Rivers.]

- Take Aways
  - the Court of Appeal's decision in ENRC is helpful (vis-à-vis the "litigation privilege"), but English standards on the "legal advice privilege" and "work papers privilege" are in direct conflict with American standards (see Upjohn); hence, counsel needs to be very careful how an investigation is structured, *where* it takes place, and *who* controls the work papers generated.