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Wed, 6/23 10:58PM 1:04:52

SUMMARY KEYWORDS

lawyers, client, decision, rule, sec, law, states, new york, liability, law firm, aba, commission, area, obligation, judge, conduct, called, disclose, courts, page

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My name is Evan Stewart. I'm a partner in New York City at a law firm named Cohen and Gresser. One of my expertise happens to be ethics. I've taught that subject at three different law schools for almost 30 years, I've written extensively, if you look at my law firm website, you'll see I've written about somewhere in excess of 300 articles, a lot of them on ethical, ethical issues facing lawyers. And similarly, I've given a lot of speeches across the country on ethical issues facing lawyers. And this is a particularly good time to be focusing on this subject, because the challenges facing warriors, especially in the corporate context, is really quite profound. And if anything is getting more complex, so let's turn to the second slide, and get to the first subject. So page two, which is entitled client confidentiality obligations. This is an area that's not very well understood. So I'm going to spend a little time emphasizing the importance of this. This is different than the attorney client privilege and work product doctrine. This relates to

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our

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ethical obligations of being protecting client conferences. And the law in this areas is a little confusing, to say the least. So one of the major reasons fairly confusing is the Securities and Exchange Commission, prompted by Sarbanes Oxley legislation, got involved in regulating the conduct of lawyers who, quote practice before the commission. And lawyers who have capital markets practices. And practicing before the commission is sort of a relatively arcane notion. But it's lawyers who interact with the screen to change commission, basically. But more broadly, capital markets, lawyers are a pretty large segment of the American legal population, because

that means you represent a public company. So these regulations of lawyer conduct by the Commission are pretty significant because they encompass a large swathes of the nation's lawyers. So when the when the SEC did this, in 2003, they said that lawyers may breach their client obligation of confidentiality, to disclose quote, material violations of securities law, breaches and material violations, not just a future conduct, or present conduct, but past conduct. And you're supposed to conditionally, you don't have to, but you may reveal these to the commission for current future or past conduct. In judging how lawyers deal with this obligation, which again, is a conditional obligation. The Commission wrote that it was going to look at what a reasonable lawyer should have done under the circumstances. In other words, not what you actually knew. But with the benefit of hindsight, what a reasonable lawyer would have done. Of course, when the SEC is looking at people's conduct, it's after some huge corporate train wreck, when everything, of course is very obvious that you should have done something to stop that. In judging this obligation. The SEC also said that lawyers who don't handle this correctly, are going to be subject to all of the panoply of sanctions that are available under the 1934 Securities Act, which are quite quite profound. One of the things that if people are watching us have ever heard people, other people talk about Sarbanes Oxley regulations, a lot of people talking about noisy withdrawal.

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That was proposed by the Commission initially, but they got a lot of pushback from people, including myself.

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And so that never actually became part of the final regulations. So there is no obligation under Sarbanes Oxley could noisily withdraw? That is just simply people who have told you that or think that there is some obligation to do that. That's just not right.

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So that's an important thing. To start us off. If you then look at slide three,

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the American Bar Association. In response to what Sarbanes Oxley an SEC did move to change It's model rule 1.6 to essentially bring it into line with

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the Sarbanes Oxley regulations. So pursuant to model rule 1.6. Lawyers may disclose where there's certain death or substantial bodily injury involved, where crime or fraud and substantial financial injury and the lawyer services are used

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to mitigate or rectify that second point, crime or fraud, substantial financial injury and lawyer services used to establish a claim or defense. And we'll come back to this in a minute, but they added

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those words for defense. And we'll have some significance here. And unlike the commission, they didn't impose a reasonable lawyer standard. They use what has been traditionally used the actual knowledge team and what you actually knew at the time,

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you were faced with this obligation to disclose conditionally this, we look at the slide for since the ABA model rule is, is applicable to no one it's an aspirational rule passed by essentially a trade association of lawyers, the ABA,

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the only significant issue here is what what are the states and states react to this, and the state in which each of you may be licensed, or in fact, are licensed. So essentially, there are five groupings of states on this subject. Some states adopted the ABA standard completely, Delaware's an example that some states tinkered with the language a little bit. And you just have to read what what state you're in to see when that's one of your states. Some states didn't change their pre 2003 standards like kept open, hadn't liked it. Some states have long standing idiosyncratic rules, very different, like Illinois. And some states just rejected this completely. Washington and California, two sub states. So two states, very close to one another, separated only by the Hudson River, what a New York and New Jersey do. Well, in 2009, it's New York completely overhauled its entire Code of Professional sponsibility. And in its rule 1.6. it and I'm now looking at slide five, they said that lawyers may disclose to prevent certain death or substantial bodily injury to prevent a client crime, or to establish a defense. They did not have the words claim or just defense. Now, interestingly, the New York state authorities went somewhat farther than the SEC. In allowing it's very certain narrow circumstances, lawyers to withdraw legal opinions, very narrow

circumstances. So unlike Sarbanes Oxley, unlike most other states, which don't have any noisy withdrawal options, New York actually does allow for some very narrow circumstances. Importantly, New York with full knowledge of what the SEC had done, carved out financial fraud from the definition of crime. So many states that many lawyers may think that fraud financial fraud is a crime. But New York for these purposes carved that out. And unlike Sarbanes Oxley, again, New York did not change its rule with respect to past client conduct, you are not in a position to disclose past client conduct. And, again, for many lawyers who've had some prior session on these issues, New York does not have a reporting out option. So in the corporate context and rule 1.13 if you go to the highest level

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of a company to try to get your views, known and followed, if you aren't satisfied with that result, you do not have an option to report out of the company. You just

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you just picked on your best in New York. Again unlike did not follow the The SEC approach stayed with the actual knowledge, not what a reasonable lawyer would do. But what was actually in your

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head.

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That on slide six, you can see that New Jersey has very different standard all together, you must disclose, under certain circumstances, you may disclose and other circumstances. It's all based upon this reasonable belief standard, which is grounded on quote, some foundation. In fact, that's a little loosey goosey language in my view, and unlike New York reporting out is expressly permitted. So that's one of the reasons I want to highlight New Jersey versus New York here you have two states right next to each other commercially, very intertwined. Lawyers going back and forth all the time. And the obligations here are very, very different. And most lawyers don't really understand that. So where does that leave us? Well, it leaves us with at least three issues. And that's highlighted on slide number seven.

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The first issue is what I call a liability whipsaw. For heads, you win tails I lose. So if you fail to

disclose, and you're wrong, then the SEC and the plaintiff's lawyers will come after you.

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If you disclose, and you're wrong, then clients and shareholders will sue. So this lovely liability whipsaw gives you a wonderful option of always being right. Which is a pretty high standard to achieve. I don't care how long you've been practicing law, being perfect all the time is pretty difficult. But that's one of the issues that's facing all of us when they face this situation of what do you do under these circumstances. And it's gonna get more complicated, because the second issue, which I highlighted just a minute ago, is, jurisdictions deal with this very differently. New York, versus New Jersey versus Delaware versus California, versus Texas versus Florida. It's all all quite different. And this would all be merely an academic issue. If your practice was only in one state, and you only had clients in one state. The fact of the matter is, virtually every lawyer with his or her salt has clients beyond the jurisdictional boundaries of his or her state in which they're have their law license. And so you need to understand that there's a liability whipsaw. Beyond the first one, I mentioned that this one's a multi jurisdictional whipsaw. Because if you're affecting commerce in a different state, giving legal advice in a different state, you very well may be subject to this obligation to disclose, which would be very different than that, which governs you in your home state. And you might run afoul of that situation, being thinking you're upholding the standards of your state, but violating the standards of a different state. So caveat, lawyer, when you go beyond your jurisdictional boundaries, need to know that this is a problem waiting for you. Then there's a third issue, which is particularly lovely, which is what happens when you are in a situation where you try to apply your state's standard. And it's in conflict with the SEC. And as I mentioned, when New York State changed its rules in 2009, and particularly 1.6. It didn't the changes implemented, implemented, which are quite different than the SEC is knowing full well with the SEC. And other states, in fact, challenge the SEC on this as well, California and Washington State being two others. So several years ago in this one decision that's cited on page seven, the quest diagnostics decision, I thought that this this question about who whose rules should you follow? was answered by the Second Circuit in a very learned decision by Judge brannis. Who's a very distinguished judge. There, there was a whistle blowing lawyer dealing with a different federal statute. But the issue came up about this preemption question. And what coprinus gratis said was only the law is very clear that only if Congress explicitly and emphasize or explicitly when it passed legislation did so with the intention to preempt state law. Only in those circumstances would state law be preempted. And as such, in that case, the New York license lawyer was fine, did not have a whistleblowing right. And not being not allowed to disclose client conferences, because under that federal statute, there was no congressional intent to preempt? Well, I thought that answer pretty much in that analysis answered this question. Because under legislative history of the Sarbanes Oxley legislation, there's absolutely zero evidence emphasize that zero, the Congress had any idea of or let alone intention of pre empting state licensing of lawyers, when it told the SEC to go ahead and do something in this area. And

that was about the only instruction that Congress gave the SEC. So in the Supreme Court precedent on preemption laws, very, very clear on this. That's touching grassman eminently clear.

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So I thought that this would answer that question, too. And I thought to the right, the right. Conclusion, unfortunately, a couple years later, in this second decision, the ladder versus biorad, laboratories of federal magistrate judge in California came up with the exact opposite conclusion. They're finding that the SEC, did preamp, the field, and thus obligated, allowed lawyers to whistle blow and divulge client conferences to promote a whistleblower Sue. I think this opinion by the judge is quite wrong. He based his decision on essentially the on two things, one of which I'll come back to in a minute. But the first thing was the SEC filing amicus brief, in which they said, We believe that we preempt the field. And so our opinion should be given deference. And the judge essentially bought that argument. But that's not right, as a matter of law on the doctrine of preemption. That's something that sounds more like the chevron doctrine that in courts are supposed to defer to administrative agencies and how they interpret their own rules. That's completely different than preemption about whether a federal law preempts state law, completely different concept. So I think that that decision is just wrong. It's wrong for another reason, I can go a minute. But now you have, in fact, two conflicting decisions, one in New York and one in California. And so this is a potential liability trap waiting for lawyers who think what, if I follow what New York or California tells me to do? I'll be fine. That's not what the SEC believes. And now they have a federal, again, magistrate judge. Cook agrees with them. So these are three really important areas that lawyers need to be very careful about, and not just make assumptions that if you do what your state law tells you to do, everything will be fine. That's simply not right. So quickly, moving on to number eight, page eight. I just want to quickly highlight the this common interest privilege. Lawyers may think that the law here is clear. The law is not clear. So some states like Delaware believe that there's a common interest privilege in the litigation and non litigation area. But the New York Court of Appeals several years ago, or a couple of years ago, rejected that view, and said that it's only in the context of litigation or reasonably anticipated litigation. And other jurisdictions are not so clear about what the laws, again, I've cited to you. New Jersey case, which is sort of kind of like New York, but just only sort of Kinda. So you should not just blithely assume that every state and thus, you can enter into common interest, privileges with third parties in the non litigation context, and all that will be protected. I think Delaware is right, as I mentioned on slide eight, for, both for public policy reasons, and for business, good business reasons. But but so good for Delaware, not good for New York and not good for New Jersey. But what you should be aware of that. Next on page nine, comes up the issue about whistleblower rights for lawyers, I mentioned briefly simple sub lower cases in that preemption field. This is where that biorad case also the second shoe of why it's wrong, shows up.

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But essentially, there are three the three way jurisdictional split on how courts approach whistleblower rights for lawyers. In Illinois, for example, there is no cause of action.

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pretty famous case there, absolutely rejected that. And that's the law. There are a number of states mainly in reaction to that famous case, and they'll die, which is called gambro. v. Baladi. gambro, thought that was too harsh a result. So some states like California, and some others, have allowed lawyers to sue, but only if they don't use privileged communications, which is sort of giving with one hand and taking away with the other. Because if you can't use privilege communications, as a lawyer, it's pretty hard to prove your case. So some other states went with states, some other courts went with a different approach, most particularly the Fifth Circuit in this wily case. They said that language that was added by the ABA in 2003, claim or hat must mean something. We saw the the Fifth Circuit said the claim or language added in 2003 in the ABA constituted relief, that should allow the lawyers to breach their confidentiality obligations. And this decision by the Wiley court was the other principal reason that underlay the magistrate judge's decision and whatever. But as you look at page 10, we see the problem with that third approach is it's wrong. First, there's a difference between, as I mentioned before, at the outset, the difference between the ethics rules and the attorney client privilege. Just the fact that they've changed the ethics rules doesn't allow you to violate privileged communications. that's a that's a privilege. It's owned by the client, not by the lawyer. So there's a fundamental misunderstanding by not uncommon by lawyers and judges that equate the two and they're just not the same at all. And again, our client obligations, our ethical duties we have, but the privileges and evidentiary concept that's owned by the client, not by us. So they're very, they're similar. They sound similar, but they're different, especially in that regard. The other reason was decisions wrong is the judge in the court in wily and thus, the judge in biorad, also said that the ABA model rule is is is the federal common law constitutes federal common law, let's simply 100% wrong. The ABA model rules are not evidence of anything, let alone federal common law. So these decisions, this line of decisions is completely wrong. That doesn't mean that lawyers haven't invoked it. In some cases, like in the biorad case, quite successfully to get a lot of money, but it's simply wrong. So be very careful and going forward, utilizing those decisions because they're fundamentally based upon at least two premises that are simply wrong. Also, remember that as I outlined a minute ago, New York does not allow offensive use

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did not add that language claim or New Jersey, however, it does allow defensive use language. Delaware does allow it as well. So, again, states have very different reactions to all of this, as you'll see on slides, 11 and 12,

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which I've highlighted some recent developments. Within these three different ways of looking at the world, courts are all over the place. So when you're, if you're thinking about undertaking a whistleblowing claim,

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on the ground that it's a good way to make a big, big hit against a client or former client, be aware that the law is extraordinarily different, depending on where you are. So we'll just leave it at that and instance of making some more time. Go on. If you look at slide 13. This one I give, give this part of my talk to legal groups. I used to call this page. Good news. You'll see now It's entitled bad news, part one. And that's because the Supreme Court recently changed

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the law.

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So the Supreme Court on three different occasions in central bank in 1994, in stone Ridge in 1998. And Janice in 2011, had rejected three times the concept of aider and abettor liability for so called secondary actors, people like lawyers or accountants. Rather, the Supreme Court said, if you want to bring cases against people, like lawyers or accountants, based upon the actions of their clients, you must show the traditional elements of fraud or tort or a 10 b five claim. In other words, the the defendants, in this case, a lawyer must actually speak. And the plaintiffs must show reliance upon the acts or, or statements of the secondary actor. And that's even in other words, I had to say that three times I thought, well, three times should get the message across that that's what the law is, after all, the Supreme Court assessment, the laws, but then there came a case called Lorenzo, which was decided last year, where a case was brought in administrative law proceeding by the SEC, in front of an SEC judge. And the SEC found that a man who had not made the mistake in the past them on so called disseminated them was guilty of 10 b five fraud. This was taken up to the DC circuit. And the DC circuit. I won't say split the baby but did something sort of unusual. They agreed with the notion that the man was not guilty of 10 B, five B. B because the defendant did not make the representative misrepresentations. Those were made by his boss. But rejecting case law and decisions by the Supreme Court, specifically stone ridge. They said there is liability under 10 b five a and 10 b five c because he passed on his boss's misrepresentations. This is what's called scheme liability. And other courts have said you can't be scheme liability unless there's something other than the passing 100 of what somebody else did. That's getting around

this whole notion of eight or better liability. Interestingly, this was a two to one decision to just center on this was then judge Cavanaugh, and he was quite vociferous to dissent. Now he did he say that the factual record did not support primary liability under 10. Beef, any provision attendee, but also that this is an absolute change of the law and a rejection of three prior Supreme Court decisions. But he was outvoted two to one. This was taken up by the Supreme Court. And interestingly, Judge Cavanaugh at that point was no justice Cavanaugh, he recused himself. So this meant that the justices who were on the court for these prior decisions, had they voted, as they had in the prior cases that this case would have been afforded for decision. But two justices, Roberts and Alito, for reasons that are still unclear to me change their prior votes and change their prior positions. And lined up with the dissent from the Janis case which was written by Judge prior so judge briars dissent in the 2011 case, became the became the majority opinion on a 62 boat, saying yes, there was scheme liability under the two other provisions of 10 B, A and C. For when not not when you make a statement, but when you pass on someone else's statement or misstatement. Just as Briar in his view, in his opinion, poo pooed the notion that this was some big change

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in in the expansion of liability, and it would broaden the net of people would be brought into this.

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He cited no evidence to support that, I think he's quite wrong. And the day that this opinion came down, the SEC certainly disagreed that it was a narrow decision. They said that they viewed this as a very positive and wonderful development, when they've been pushing for for 30 plus years. And they plan to aggressively try to expand the reach of this viability net, in as many cases as they could. And this was not just an academic comment by the Commission, because shortly thereafter, in this case, cited model of versus the SEC in the 10th circuit, they got the 10th circuit to really agree to an aggressive expansion of this liability. So the scheme liability there was for failing to correct another person's misrepresentation, not that you'd passed on the other person's misrepresentation. But you failed to correct another person's misrepresentation. This strike, this strikes me as a very profound change in the law. Very dangerous for among other people, lawyers, especially lawyers who work on disclosure statements, the commission. So if if you have any knowledge that there's anything that is wrong, you know, in a 10k, or q or or any thing for information, you have some potential liability that's quite significant, by the Commission's own view of the scheme liability concept. So this is an area that I found that many lawyers are not aware of this decision hasn't been flagged for them. But people need to be aware of this and need to know that the SEC views this as a very powerful tool to drag in people who were not subject to liability before. One part of the bad news about liability issues for lawyers. Let's look at slide 14, for part two of bad news. Another weapon the SEC has to use against lawyers. So it's what we've just

talked about, are these so called 102 weeks cases, where they bring administrative proceedings against lawyers for conduct they find acceptable. And the commission several years ago said, we only intend to bring these cases against lawyers for intentional bad acts, nothing for nothing else. So let's see whether that's true or not. Well, I've listed for you a litany of cases that have nothing to do with intentional bad acts. But let me just quickly highlight two first is Enron, which, of course, was what caused all the Sarbanes Oxley stuff in the first place. And I actually use this in my law school classes for a couple of years. Before this actually became an actual case, as a hypothetical, but it turns out that the two most senior in house lawyers at Enron were subject to an SEC enforcement based upon the notion that They should have stopped the CFO of that company from all the filings of false sec documents. Their defense, of course, and not surprisingly, was we didn't know that Mr. scalings, the CFO had hidden this from us and quite successfully, the FCC is response that was we don't care. Because what a reasonable lawyer should have done in those circumstances is is is our standard, not what you actually knew. They Brett bravely vowed to fight this until they ultimately a couple years later questioned finances or desire to get on with their lives or whatever. Ultimately, they gave up and just got hammered by the Commission for failing to do something they didn't know what was happening at the time. So that's one example. My other favorite example is the discipline case, getting spent two thirds of the way down on page 14, where the in house lawyer actually didn't blow the whistle on his client, and inform the SEC of improper accounting practices. But according to the SEC, he did it one

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quarter too late. So there's a real nice, gotcha example for you where the lawyer did exactly what he was supposed to do when he felt he was in possession of the information to inform on his client. But he didn't do it quickly enough. So lots of lots of lovely things waiting out there for lawyers who interact with the screen exchange. Next thing I want to highlight very quickly on page 15, the area of conflicts of interests, dance waiver. This is an area where my former law school dean Roger Crampton said big firm lawyers some of the biggest risk takers that I run into close quote, boy, is he right. This is particularly egregious in the area of advanced waivers, where lawyers try to tell clients with very little specificity, that at some point in the future, you may not be an important enough client for us to really be concerned about, because a better clients come along, in conflict with you and you agreed to let us represent them in conflict. When when this concept advanced waivers was first put in, in public display by the ABA, most people did not believe that these advanced wherever, unfortunately, but increasingly, firms have sought to enforce them. And increasingly, some courts but not all upwards, have agreed to that, that are taking place. But just to give you an example, I've listed firms that have quote, dodged the bullet and firms that have been disqualified. So the law on this in this area of disqualification is all over the place. And some of the biggest firms in the country have either just barely squeaked by, or have been caught, and suffered severe consequences. So you can see the names for yourselves. I just want to highlight one particular case and the short time I have for you. And, and and talking

about why it's again, so it's the Macy's versus JC Penney, where the two companies were very unhappy with one another about the rights to Martha Stewart's line of goods and services. And it turns out that the law firm representing Macy's, suing JC Penney was also JC Penney's lawyer, and had been for years. And when JC Penney moved to disqualify that firm, very well known from they defended themselves on the ground that they had had the most expensive advance waiver provision possible to which JC Penney reported, that's all nice, but we never signed the representation. My response to that was, you didn't have to because there was a negative consent provision in the letter that said, even if you don't sign this, you agree to be bound by it if you continue to utilize our services as your employer's data that was a very interesting and creative argument, negative consent signature. I always thought that there could be a binding contract there had to be signed document by both parties. But the first department the which is the intermediate Appellate Division court in New York City, agreed with that argument and said that, no, the fact that JC Penney continued on that conduct was acquiescence by the terms of the negative consent and representation letter, even though they've never signed it. So lots of strange law that's been developed in this area by lawyers aggressively pushing out to represent as many different conflicting clients as possible in pursuit of money. This is an area that's particularly fraught with some danger, not just for the law firms involved. But for the in house lawyers, because one of the key things that a lot of courts look at,

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in whether to enforce these advanced waiver provisions or not, is the level of experience and, and, and sophistication of the in house lawyers who reviewed and approved this representation matters. So this is an area where in house lawyers can five or 10 years after the initial representation, have some consequences to their careers, if they did not adequately flag and or address this subject. The minute this decision came down, one of my most important clients usually just didn't even look at representation letters, they just never signed them. And I immediately shut down and told him well, that that practice has to change based upon this decision, because that's not the answer here, just ignoring them. Especially if you're a very sophisticated operation, which is fine. Most of us getting clients, companies. So this is an area where in house lawyers can really get caught up here if they don't handle this correctly. Move on to another area of fun for lawyers. On slide 16, multiple representation traps. You'll see here a cartoon that I published a couple years ago, talks about the corporate miranda warnings. This is a warning, often is mistakenly called an Upjohn warning that's completely wrong, because Upjohn is the seminal decision on attorney client privilege. privileges are related, somewhat sounding like concept to client confidentiality. But this obligation to give a warning to your clients comes out of your ethical obligations. So it's not an upcharge. But this is what I call the corporate Miranda warning. And this is a warning that when you're dealing with individuals within a company context, you'd have to tell them before you actually have a substantive discussion about whatever conduct indoor alleged wrongdoing, it's that issue, you have to tell them that you, you

the individual I'm talking to, you're not really my client, my clients, the company, anything you tell me is going to be subject to the company's attorney client privilege, which the company at any point in time may make a decision to divulge that information to the SEC, the Justice Department to whomever. And then after you've given them the warning, you're supposed to then encourage them to be very forthcoming and candid with you, which is, again, somewhat of an oxymoron. But that's your ethical obligation to give this warning. And if you don't do this, you can get really hot water. One of the challenges here is, when do you give this and you'll see that I've given you three different examples

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of

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when when to give this differs from different jurisdictions. New York is probably I think, the best standard, because it's the earliest give this which I think it always should default to the earliest time is when it appears that the organization's interest may differ from that of the individuals. So that's, that's probably the safest place to apply this, when should I give this warning. But if you don't do it, you end up in heaps of trouble. The rule case in the Ninth Circuit, classic example, where a law firm got sanctioned for

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failing to handle this correctly and get very serious, and they didn't document that they give them the warning and so

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they got referred to the bar authorities. Penn State's General Counsel went through nine years. for professional scrutiny, not the type that you want about her representing proceeding to represent some individuals in a serious matter, as opposed to representing the university. Rivera decision is one of my particular crazy decisions in this area, because they're a very large law firm with sanction me for doing what law firms do all the time, which is they were representing a hospital in a sexual discrimination harassment policy. In the course of so doing, they identified four individuals to current employees, two former employees, who were pretty important people to the case. They went to talk to them and said, we're happy to represent you. There's no conflict, represent the hospital, a new your interests fully aligned with the hospital. And we're happy to represent you if you'd like free of charge. Not surprisingly, the force and that's that'd be great. And the company then proceeded along that line. plaintiffs lawyers even sought to disqualify the

law firm on the ground, there was conflict of interest. The court in the Supreme Court and Kings County, New York, rejected that argument. That's ridiculous. The law firm was right in saying there was no conflict. But the law firm was guilty of the anti solicitation violating the anti solicitation and so had to be disqualified and have have that law firm referred to the bar authorities. What's the anti solicitation rule? Well, New York State 7.3. The rule is that you can't directly solicit anybody unless they're to become a client unless they're a family member or close personal friend, a current client or a prior client, which means that if you just got out of law school, you better hope that Uncle Harry is a very litigious fellow. Because otherwise you're not going to have any clients. Is that really what the any solicitation rule means? No. But the any solicitation will means you're not supposed to show up in a widow's house after a plane goes down and hand out your business card. That's what the solicitation was, was very clear about that. But that's what the judge hung his hat on. I thought for sure when this got up to the Appellate Division, the intermediate appellate court, New York, that this would be just thrown out. It was summarily affirmed. And in one paragraph pinion, this is the law of New York. Even though every lawyer I know that every big firm in Manhattan and other places regularly engages in the exact same practice with respect to individuals in representing multiple representation, as the law firm did in the Rivera kids. absolutely crazy. decision. The New York County lawyers who issued over the past couple of years, a number of crazy decisions, one of which is referenced here. 747. But he said it's okay for a lawyer to engage in the semblance semblance as a synonym for why. And then they issued another opinion 747 smoothly with respect to this case, where they said, you can get around this case, if the primary reason you meet with the individuals in the first instance, is has nothing to do with representing them. It's only merely to talk to them. And then thereafter, after 15 minutes or 30 minutes or an hour, you can then turn to a different subject, because you had your interview with them. Just so long as the primary purpose is not to secure legal fees, was really just sure that that doesn't get around this opinion. This opinion is out there. as a as a trap for people, if if if some aggressive plaintiffs lawyers, and the judge who wants to hurt you want to use it, it's still actually technically the law in your state. It's not the law and you'll be glad to know in the Western District of Oklahoma,

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and other states, like New Jersey have a very different anti solicitation rule. But New York's rule is still this family member close personal friend or current and prior clients. So be careful All of this. And as you'll see on page 18 of the slide is not just in this area, there were multiple, lots of people don't like lawyers engage multiple representation of clients in complex litigation, they find lots of ways to get around this. I'm not going to spend any more time on this. But here are some examples of areas where there are other additional issues that lawyers need to be aware of out there. Lots of judges just don't like it's not just the craziest judge in the Rivera decision. There are lots of other decisions that are harmful to lawyers when they try to represent multiple parties. Next slide is page 19, which talks about the dangers of documents, I just want to quickly go

through some of these with us with with the audience. One is, there are different standards for when you have to keep documents when you can get rid of them. Again, you need to know what the rule of your jurisdiction is. And the consequences for not understanding this are quite profound. Nancy temple in the Enron case, Morgan Stanley and dispute with Ron Perlman, very bad consequences for the Kirkland Ellis firm in the Qualcomm dispute with Broadcom 19, Qualcomm lawyers, or put under professional all the way to describe professional hell for a number of years, some of whom never recovered, rendered radioactive because of the way they retained or didn't retain documents, and of course, in the computer age, this is a particular nightmare. And page 20, some of you may have heard about ways to deal with some of these issues, it's so called reforms to the federal civil procedure and the federal rules of evidence to allow for in an invertible waiver. And, again, good intentions, I guess. But the problem is, is I can show you and I've given you some examples here on page 20, where courts faced with almost exactly the same fact patterns have found that in one case, what the lawyer did was reasonable. And so we're going to protect and not let there be waiver. And in almost exactly the similar situation, courts reaching the opposite conclusion. So what this means is, you get sort of a false sense of security. And because oh, I can just, if it's inadvertent, I can get it back. But what you really done is given the power over these documents, and your clients need to, in most cases, have a magistrate judge, and whether he likes your client, or likes you, or doesn't like you and doesn't like your client. That's a pretty strong weapon that he or she, the magistrate judge has to really hurt you. So be careful when you engage in this in these protocols about inadvertent waiver and citation, the federal rules and federal evidence. The law on this, as it's developed, is very, very scattered. And you're really putting your hands in the fate of one person, the magistrate judge, because these are not appealable orders. Then there's the return of materials disclosed by mistake, and somewhat similar. Feel the the rules on this 4.4 D. look pretty innocent. That what do you do. But if you don't handle these obligations, the comments to the rules, make it clear that you're maybe subject to judicial sanctions, if you don't return them if you don't follow instructions. items that are not part of the rule itself, but the development of case law and other judicial glosses. As I've cited a number of them here, you really need to be careful that if you don't, if you don't, if you only look at the text of the rule itself,

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you don't do any Delve any deeper. You could be really, really hurt by not turning materials that come over the transom. By mistake, dealing with documents can be very, very dangerous. And slide 22 just gives you some more examples of how courts have interpreted these ethical obligations if you have much differently than the rules themselves, just on the face of the rules read on page 23. This is a, I don't want to spend too much time on this, because I think we're running out of time. But these are some decisions by the DC Circuit Court of Appeals involving a company called Kellogg, brown and root for a large defense contractor. were handling an investigation and internal investigation, which is something that lawyers do quite a bit. And it's

often subject to subsequent litigation, people try to discover what to place the notes of lawyers etc. This is an example where a very specific company and just getting client counsel did it absolutely horrible job to me, of doing this investigation the right way. And they did virtually everything wrong, that you could do. Incredibly, the DC circuit, which, for reasons, it's still a little unclear to me, with one exception, made about eight rulings on the law, which are completely wrong, completely inconsistent with Supreme Court precedent with law privileges love work product. Wrong, wrong, wrong and wrong. And so when you're doing one of these investigations, first of all, the thumb is what the the takeaway section on page 23 is, never send non lawyers to do what lawyers should. That's one mistake they did there. Another is, when you're doing it using a 30, b six witness, never show him or her the disputed discovery material, and then try to block questions about that material. When that person's under oath. Another important example, the takeaway from this is courts can be very difficult places to litigate, attorney client work product issues, judges, a lot of lawyers do not understand these issues. It's been my experience. And a lot of judges don't either, as witnessed by, again, the DC Circuit Court of Appeals, pretty prominent court, six very distinguished judges completely botched us. In large part, I think, because some some amicus briefs, the Chamber of Commerce put in that suggestion at the end of the world would come if these materials were not protected from discovery. So let me just end on on this page with saying, if you really want to know more about this particular set of just awful, awful, awful decisions on how not to do corporate internal investigation, you can read my article, the DC Circuit wrong and longer, which is in the New York Business Law Journal from 2015. And you can see this on my website. And I was just getting up there.

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So multi jurisdictional traps for lawyers. PAGE 24. There are lots of things that you need to know about how the disease interplay of ethics rules in each state can trap you

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when you're doing legal work in other states, and how much temporary practices allowed, whether they're going to exert jurisdiction over your behavior, all these things you need to be aware of. I've highlighted the way Delaware has handled some of this some very good decisions by Delaware. So you need to think about that. Unfortunately, a lot of the most difficult multi jurisdictional traps, commissioned by the ABA looked and looked into these a couple of years ago called the 2020 Commission. And they basically, at the end of all this hard work, their conclusion was, gee, these are really tough issues. Hopefully, somebody someday can actually decide them, because they're beyond our ability to figure out. A third thing to watch Lawyers need to think about, again, more multi jurisdictional chances. Is it okay to threaten criminal or regulatory action in litigation to gain some sort of tactical advantage? And, literally, there are three different answers to that. 27 jurisdictions say it's okay. Delaware, it's an affirmative, good thing to do. In six

jurisdictions, absolutely not, which I always thought the wallet. And then 18 jurisdictions have some sort of wiggle room, including New York, which surprised me when I looked into this and put an article on it. So if you think you can do this with impunity, or you think you can not do this with impunity, you should know there are three different three different buckets of approaches here. And in 18, jurisdictions, it's sort of you better look very closely on with the laws. Then the last thing on this page is, what about restricted settlements? Can you enter into those and the rule and most, most jurisdictions 5.6 says no. But as I write here, most lawyers, many are many lawyers do it anyway. And some states actually have a law that says, even if it's unethical, the settlements themselves are enforceable in New York. So strikingly, surprisingly, is one of the last thing I'll talk about on slides, 25, and 26, is, for all the terrible things I've tried to highlight for you to be aware of, and encourage you to think more about and be careful where you step into the quagmire here is, it couldn't be worse, we could be in Europe. So just to highlight a couple things is in New York, in Europe, there's no in house privilege. In house lawyers are not thought of as lawyers in house lawyers can appear in European Commission. The law in Europe, in particular, about preparing witnesses, is completely different, completely different than that of law in the United States, where that's not just said to be okay, but it's encouraged as part of being a good lawyer is to spend a lot of time preparing a witness for testimony, that's considered suborning. perjury, which most of us from European countries. Then these last decisions I've highlighted for you the the RBS rights case, and the your, your Asian Natural Resources case, shows you that the approach that especially in Great Britain that they have with respect to internal investigations and protecting lawyer work, both privilege and work product papers, in those contexts, very different. So if you are going to be working in a multinational law firm or multinational company, and you think if you conduct an internal investigation, not the way they did it, kill the broad route. But the opposite of that, which I've talked about in greater detail in my article, you'll, you'll be very surprised that the courts in Western Europe and in particular, in Great Britain Don't, don't deliver you the importance of the privilege and work product anyway near as we do. So, it's not just the multi jurisdictional traps waiting for you here in this country. But when you go abroad, and you're part of a team that's working in Germany, or France, Great Britain, and you're trying to communicate with in house lawyers who don't have a privilege, number one, and number two, you're trying to protect your work product out of an investigation, the courts may not view that as protectable

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at all.

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So it's one thing to cross the Hudson River and finding that the law is different in New Jersey, across the Atlantic Ocean, belong many of these issues, governing lawyer behavior and conduct

are very, very different as well. So again, it could be worse, we could be in Europe. So on that uplifting final note, I will end and I thank you for your attention. I hope you've learned some new and different things here. And again, be very, very careful. These are very serious subjects and very tough issues for lawyers to deal with. They're not easy. And I unfortunately don't have easy answers for many of them other than please be careful. Thank you so much.