

THE LAW & ROLE OF IN-HOUSE COUNSEL

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INTRODUCTION (week 1)

An overview of the degree to which lawyers are employed by business, governmental and non-profit organizations to provide them legal advice for a salary, instead of any other fee arrangement. A foreshadowing of the effect of this on their independence, perceived independence, licensing, and their exposure to liability. A review of the role gone wrong (or has it?): GM v. Merck. Questions of in house counsel's role as clients, as organizations, and questions of who acts for the organization.

Materials:

- The Role of In-House Lawyers, San Francisco Attorney (Summer 2008),
http://www.sfbar.org/forms/sfam/q22008/in_house_lawyers.pdf
- Lawyers in Business, Chapter 1 (pp. 5-10) (Yale Law School)
http://www.law.yale.edu/documents/pdf/CDO_Public/CDO_Lawyers_In_Business_Public.pdf
- Top Ten Things I Know Now that I Wish I Knew Then (B. Bulacan, Assoc. of Corp Counsel)
<http://www.acc.com/legalresources/publications/topten/wikntiwikt.cfm?makepdf=1>
- Advice to Law Firm Partners Considering Going In-House,
<http://www.inhouseblog.com/going-in-house/>
- At Hearing on G.M. Recall, Mary Barra Gives Little Ground [GM GC's defective part strategy] (NY Times July 18, 2014)
http://www.nytimes.com/2014/07/18/business/senate-hearing-on-general-motors.html?_r=0
- Turnaround Artists (Dechart)[Merck then GC's Vioxx Strategy]
http://careers.dechert.com/files/RepresentativeExperience/311bf4f5-c96a-4004-84cd-024a72eac723/Presentation/ceRepresentativeExperienceFile1/Dechert_AmLaw_Litigation_Dept_2008.pdf
- ABA Mentoring New Lawyers- In House Counsel
<http://www.americanbar.org/publications/tyl/topics/in-house-counsel.html> (esp. Other Side of Paradise; Six Rules; Attorneys on the Inside -Functions and Goals
<http://www.acc.com/legalresources/publications/topten/wikntiwikt.cfm?makepdf=1>
- How the financial crisis changed the role of in-house lawyers <http://www.legalweek.com/legal-week/blog-post/2418047/how-the-financial-crisis-has-changed-the-role-of-in-house-lawyers>

THE ROLE OF IN-HOUSE COUNSEL IN COMPLIANCE: CRIMINAL AND GOVERNMENTAL

(weeks 2 and 3)

The role of lawyers as law enforcers, keeping the organization from violating the rules. The risk reward structure of private law violation (efficient breach), regulatory violations and criminal exposure. Who decides? The role of management, levels of management and boards. Prophylactic policies, training and effective control mechanisms to prevent and identify

wrongdoing. What does Sarbanes Oxley esp. section 205, say about handling this in terms of reporting and retaliation?

When, inevitably, something wrong has happened, factors to consider in counseling. Risks to individuals and the enterprise and how to balance them. When does self reporting, or confession and mitigation make sense? When should outside counsel be called?

Materials:

-The Significance of the Sarbanes-Oxley Whistleblower Provisions, Daniel P. Westman, *The Labor Lawyer*, Volume 21, Number 2, Fall 2005

<http://www.mofo.com/~media/Files/Publications/2005/10/The%20Significance%20of%20the%20Sarbanes-Oxley%20Whistlebl%20Provisions/Files/The%20Significance%20of%20the%20Sarbanes-Oxley%20Whistlebl%20Provisions/FileAttachment/05FallLaborLawyer.pdf>

- Preventing Discrimination and Harassment In The Workplace

<http://www.acc.com/legalresources/quickcounsel/pdahitw.cfm>

-Sample Codes of Conduct, Apple; Walmart

http://files.shareholder.com/downloads/AAPL/0x0x443008/5f38b1e6-2f9c-4518-b691-13a29ac90501/business_conduct_policy.pdf

http://media.corporate-ir.net/media_files/IROL/11/112761/corpgov/Ethics%20Current.pdf

-The Costs and Benefits of Regulatory Cost-Benefit Analysis

<http://www.complianceweek.com/blogs/boards-governance/the-costs-and-benefits-of-regulatory-cost-benefit-analysis>

-Cost Effectiveness and Legal Compliance: An Analysis of Securities Law Compliance for the Start-Up Company [esp. Conclusion]

<http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1017&context=chtlj>

-Understanding the Costs of Compliance [Gartner Group on Stanford web site]

http://logic.stanford.edu/poem/externalpapers/understanding_the_costs_of_c_138098.pdf

-The Emerging Crisis Management Practice <http://www.lawdragon.com/feature-articles/the-emerging-crisis-management-practice/>

-The Crisis Management Lesson from Toyota and GM <https://hbr.org/2014/03/the-crisis-management-lesson-from-toyota-and-gm-its-our-problem-the-moment-we-hear-about-it/>

-The Benefits of a *Miranda*-Type Approach to *Upjohn* Warnings

<http://apps.americanbar.org/litigation/committees/commercial/articles/spring2012-0412-benefits-miranda-warning-upjohn-warnings.html>

-Litigation: *Upjohn* warnings and external consultants

<http://www.insidecounsel.com/2013/04/18/litigation-upjohn-warnings-and-external-consultant>

-Coming Clean and Cleaning Up: Does Voluntary Self-Reporting Indicate Effective Self-Policing?

<http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1490&context=facpub>

LARGE SCALE CIVIL PROBLEMS, IS THE SCOPE THE SAME? (Week 4)

Did GM's counsel hard line serve the company? Did Merck's and Whirlpool's? BP's soft line?
Dealing with the press.

Materials:

-GM material above

-BP. Feinberg in.

<http://www.reuters.com/article/2012/03/08/us-bp-spill-claims-idUSBRE82716720120308>

-Feinberg out. http://www.nola.com/news/gulf-oil-spill/index.ssf/2012/03/louisiana_lawyer_set_to_take_k.html

-BP appeals go nowhere. <http://touch.latimes.com/#section/-1/article/p2p-82227590/>

-Whirlpool. http://www.cleveland.com/court-justice/index.ssf/2014/10/federal_jury_rejects_class-act.html

-Privilege and PR Firms.

https://www.wc.com/assets/attachments/ACCA_Docket_Privilege_and_PR_Firms_July_Aug_2001.PDF

-Privilege in crises situations. <http://www.insidecounsel.com/2012/08/23/ensuring-attorney-client-privilege-in-crises>

-Knowing How to Talk to the press <http://www.americanbar.org/publications/tyl/topics/in-house-counsel/know-when-how-talk-to-the-media.html>

-Dealing with the Press in high profile cases

http://www.americanbar.org/publications/litigation_journal/2014-15/summer/dealing_the_press_highprofile_cases_how_neutralize_13th_juror.html

-Ethical limits of dealing with the press

http://www.americanbar.org/content/dam/aba/publications/litigation_journal/summer2015/responding-to-media-reports.authcheckdam.pdf

CREATION OF ATTORNEY CLIENT PRIVILEGE - IN-HOUSE V. OUTSIDE COUNSEL, COMMON V. CIVIL LAW (week 5)

The common law presumption that outside counsel are sought for legal advice, v In-House counsel for business advice. The effect of non-legal titles on the character of the advice. The civil law rule that employed attorneys cannot create privilege, but have a duty of nondisclosure. The competition dichotomy in Britain, and a comparison with varying rules on accountant privilege in the US.

Materials:

-Upjohn. UPJOHN CO. v. UNITED STATES, 449 U.S. 383 (1981)

-See enclosed material on In house a/c, Sections A & B

-7 Best Practices for Preserving A/C Privilege

http://www.corpcounsel.com/id=1202728127773/7-Best-Practices-for-Preserving-InHouse-Counsel-Privilege?cmp=share_email&slreturn=20150626123631

WAIVER OR TERMINATION OF PRIVILEGE - UNFORSEEN PRIVILEGE HOLDERS; CORPORATE DEATH (week 6)

Sale of all or part of a business. Trustees in bankruptcy.

Materials:

-Material on In house a/c, Sections C et seq.

-Defunct Company

http://www.americanbar.org/content/dam/aba/publications/litigation_committees/trialpractice/red_vision_systems_v_national_real_estate.authcheckdam.pdf

-Ethical Issues for In-House Counsel (including privilege)

http://www.dorsey.com/files/upload/santon_ethical_issues_inhouse_counsel.pdf

-No Privilege for Risk Managers.

http://apps.americanbar.org/litigation/litigationnews/top_stories/060915-risk-management-privilege.html

INTERNAL INVESTIGATIONS (week 7)

Upjohn warnings. Intention to create privilege v. disclosure use. Selective waivers. Potential liability to participants under 18 USC 1001.

Materials:

-ACC Material <https://www.acc.com/chapters/canada/upload/Internal-Investigations.pdf>

- Nuts and Bolts of Internal Investigation http://www.corpcounsel.com/id=1202728127773/7-Best-Practices-for-Preserving-InHouse-Counsel-Privilege?cmp=share_email&slreturn=20150626123631

LICENSING AND CLE: BE CAREFUL WHAT YOU WISH FOR (week 8)

The ACC model rule and its effects. Comparison with rules of professional conduct for multi-jurisdictional practices. Role of pro hac vice.

Material:

-ABA Chart of Rules

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/in_house_rules.authcheckdam.pdf

-Sutherland article

<http://www.sutherland.com/portalsresource/lookup/poid/Z1tO19NPluKPtDNIqLMRV56Pab6TfzcRXncKbDtRr9tObDdEuSZDm0!/fileUpload.name=/Bar%20Licensing%20Compliance%20for%20In-House.pdf>

-Jones Day article <http://www.jonesday.com/files/Publication/89eb9ef7-e976-45e1-bef3-00a7fafa75f3/Presentation/PublicationAttachment/dfd33929-cb77-4d5f-8eb4-0582dc035fb4/Bar%20License.pdf>

IN-HOUSE COUNSEL AS REVENUE SOURCE – FEE SHIFTING (week 9)

How do we compute a “lodestar” for a lawyer who is salaried and has no hourly rate?
When should In-House counsel keep time records so their fees can be shifted?
Can corporations practice law?

Materials:

-Fee Shifting: The Recovery of In-House Legal Fees, 39 Wm Mitchell L. Rev. 227
-Recent Massachusetts Appellate Decision
<http://masscases.com/cases/app/85/85massappct292.html>

MALPRACTICE: POTENTIAL LIABILITY AND INSURANCE (Week 10)

Liability for malpractice: current employer; successor manager (new owner by sale or bankruptcy). Third party rights from representation letters or reliance. Insurance for in house - malpractice; Officers and Directors Errors and Omissions; Comprehensive General Liability.

Materials:

-Law360 <http://www.law360.com/articles/81660/in-house-counsel-at-risk-for-malpractice-claims>
-Chubb via ACC http://www.chubbemail.com/files/MarketBuilder_1211_CCI1.html
-Expect NJ Supreme Court Decision by Fall – forfeiture of in house salary for malpractice
<http://www.jdsupra.com/legalnews/nj-supreme-court-hears-argument-on-wheth-94155/>

THE IN-HOUSE LAWYER AS EMPLOYEE (Week 11)

At common law a client can fire an lawyer for any reason or none. How does this principle interact with employee anti- discrimination laws and other protective statues? What of the special problem of a lawyer’s duty to keep a client’s confidences contrasted with various statutory protections for whistleblowers. Covenants not to compete are increasing common in the business world; they are prohibited in the legal profession. What rules apply to a Senior Vice President and Deputy General Counsel?

Materials:

Attorneys as whistleblowers (Latham & Watkins) <http://www.lw.com/thoughtLeadership/SEC-whistleblowers>
NYCLA Ethics http://www.nycla.org/siteFiles/Publications/Publications1647_0.pdf

Covenants and SLAPP suits <http://www.law.com/sites/articles/2014/03/24/good-news-for-accused-texas-ip-counsel/>

Second Circuit Limits in House as Whistleblowers:

https://www.dlapiper.com/en/us/insights/publications/2013/11/second-circuit-inhouse-counsel-may-not-seek-to-p___/

FIELDS OF KNOWLEDGE (week 12)

What fields do in house lawyers usually focus on? What will they in the future? In a world of increasing specialization, how do enterprises find “General Counsel” to at least issue spot broadly.

Materials:

- In house promising fields <http://www.insidecounsel.com/2014/11/03/litigation-most-promising-field-for-legal-hiring>

-Major Lindsey searches <http://www.mlaglobal.com/legal-career-opportunities>

-ACC committees <http://www.acc.com/committees/>

-In house Mergers & Acquisitions work <http://www.therecorder.com/id=1202733808934/Flood-of-Deals-Swamps-InHouse-Teams?back=law&kw=Flood%20of%20Deals%20Swamps%20In-House%20Teams&cn=20150804&pt=Newswire&src=EMC-Email&et=editorial&bu=Law.com&slreturn=20150704101837>

PROPHLAXIS (week 13)

Keeping the organization out of trouble. Manuals. Education and training. Record retention.

Materials:

-Apple and Walmart policies from week 2 above

-ABA Analysis of Record Retention

<http://www.americanbar.org/content/dam/aba/migrated/buslaw/newsletter/0021/materials/recordretention.authcheckdam.pdf>

-ABA Sample Records Policy

<http://apps.americanbar.org/lpm/lpt/articles/sampledcretionpolicy.pdf>

CONCLUSION AND CLEAN UP (week 14)