

Ethical Issues for In-House and Outside Counsel

California Minority Counsel Program-Kaiser Permanente 7th Annual CLE Marathon
Wednesday, January 10, 2018 (10:15 a.m. to 11:15 a.m.)



Panelists

In-House Counsel

- ▶ Tony Rodriguez  **KAISER PERMANENTE**
 - ▶ Senior Counsel, Litigation, Kaiser Foundation Hospitals/Health Plan
- ▶ Karen E. C. Sullivan  **BANK OF THE WEST
BNP PARIBAS**
 - ▶ Vice President, Senior Counsel - Human Resources, Bank of the West

Outside Counsel

- ▶ Albert Giang  **BSF** BOIES
SCHILLER
FLEXNER
 - ▶ Partner, Boies Schiller Flexner LLP
- ▶ Quyen Ta  **KEKER
VAN NEST
& PETERS**
 - ▶ Partner, Keker, Van Nest & Peters LLP

Agenda

▶ Who is the Client?

- ▶ Who are the clients for in-house counsel?
- ▶ What duties are owed to their clients?

▶ Attorney-Client Privileges and Protections

- ▶ Attorney-Client Communication—A Refresher
- ▶ Dual Roles of In-House Counsel
- ▶ Clawbacks
- ▶ Transactions and Sharing Privileged Information

First Principles

- ▶ Fact-intensive and jurisdiction-dependent
- ▶ Be aware of competing duties and interests
- ▶ Doing the ethical thing may not be pain-free...



Who is the Client?

Albert Giang, Boies Schiller Flexner LLP

Karen E. C. Sullivan, Bank of the West



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Who is the client?

- ▶ Client is the Company [CA RPC 3-600(A)]
 - ▶ “**Organization as Client:** In representing an organization, a member 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.”
- ▶ Client is represented by officers, directors, employees, employees, members, shareholders, or other constituents of the company [CA RPC 3-600(E)]
 - ▶ Principle: the corporation itself cannot communicate, so it requires natural persons (*e.g.*, officers, employees) to speak for the company
 - ▶ Different when company agents are acting in their personal interest, unrelated to their roles or responsibilities at the company

Who is *not* the client?

- ▶ Clear understanding of who is the client includes the duty to clarify who is *not* the client
 - ▶ “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. The member 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.” [CA RPC 3-600(D)]

Dual representation?

- ▶ While the Company is always your client, you can sometimes represent company agents concurrently, but rules for dual representation apply
- ▶ **Practice Tip:** If you are concurrently representing a company agent, be vigilant about potential conflicts of interest and the need for informed consent
 - ▶ “If the organization's consent to the dual representation is required by rule 3-310 [governing adverse interests], the consent shall be given by an appropriate constituent of the organization other than the individual or constituent who is to be represented, or by the shareholder(s) or organization members.” [CA RPC 3-600(E)]

Related companies?

- ▶ Generally no conflict representing subsidiaries and affiliates, if parent and subsidiary's interests are aligned
 - ▶ *In re Teleglobe Comm'n*, 493 F.3d 345 (3d Cir. 2007): In-house lawyer for Company A, who also performed work for related companies, was held to be lawyer for all companies during dispute between them. So in-house counsel could not assert privilege over his attorney notes against related companies.
- ▶ **Practice Tip:** When you do work for related companies, assume you are the lawyer for all of them, owe fiduciary duties to all of them, and cannot prefer one over the other
 - ▶ Conflicts may arise: (1) in transactions *between* related companies, (2) when one company becomes insolvent, or (3) where ownership varies or is partial

What is your role?

- ▶ Although in-house counsel wear both business and legal hats, your legal role determines the attorney-client privilege
 - ▶ Attorney-client privilege attaches to a business entity's communications with in-house counsel [*Alpha Beta Co. v. Sup. Ct.*, 157 Cal.App.3d 818, 826 (1984)]
 - ▶ The privilege applies to someone who acts as an attorney for the business entity. Accordingly, privilege covers communications for the purpose of legal representation, consultation, or advice
 - ▶ Attorney-client privilege does not attach to communications with in-house counsel acting in a non-legal capacity [*Chicago Title Ins. Co. v. Sup. Ct.*, 174 Cal.App.3d 1142, 1151 (1995)]

What duties are owed?

- ▶ Duty of confidentiality to client [CA RPC 3-100]
 - ▶ Policy is to encourage honest client communication, including determination of rights: “The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct.”

What duties are owed?

- ▶ Duty of loyalty to client
 - ▶ Includes duty of diligence: “(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence. (B) For purposes of this rule, “competence” is any legal service shall mean to apply (1) diligence, (2) learning and skill, and (3) mental, emotional, and physical ability necessary for the performance of such service. (C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by (1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or (2) by acquiring sufficient learning and skill before performance is required.” [CA RPC 3-110]

What duties are owed?

▶ Duty to others

- ▶ Avoid advising violation of law to client: “A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid.” [CA RPC 3-210]
- ▶ Avoid affirmative misrepresentations to others: “In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.” [ABA Rule 4.1]
- ▶ But generally cannot disclose confidential information of the client in the process: “If a member acting on behalf of an organization knows that an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner which is likely to result in substantial injury to the organization, the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e).” [CA RPC 3-600(B)]

Case Study I

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Case Study I - Principles

- ▶ *Upjohn v. United States*, 449 U.S. 383, 397 (1981): Corporate attorney-client privilege applies to a wider group than the corporation's "control group."
- ▶ Sample *Upjohn* warning:
 - ▶ Explain early who you represent: "I represent the company, and not you, and cannot give you legal advice."
 - ▶ Explain your purpose (e.g., conducting interview to gather information to provide legal advice to the company)
 - ▶ Explain the privilege: "Your communications with us, as part of this investigation, are confidential and protected by, among other things, the attorney-client privilege. As the Company is our client, the attorney-client privilege belongs solely to the Company. Accordingly, the Company, in its sole discretion, may elect to waive the privilege and reveal your communications with us to third parties."
 - ▶ Recognize situations where separate counsel may be needed. In those instances, encourage employees to retain separate counsel.

Case Study II

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Case Study II - Principles

- ▶ Generally, there is no affirmative obligation for in-house counsel to externally report past wrongs. But there is a California Rule of Professional Conduct that you shall not advise the violation of any law, rule, or ruling of a tribunal. [CA RPC 3-210]
- ▶ When discussing internally, options include: “(1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or (2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.” If not, “the member's response is limited to the member’s right, and, where appropriate, duty to resign in accordance with rule 3-700.” [CA RPC 3-600(B) & (C)]
 - ▶ Narrow exception for future bodily harm: permitted but not required to engage in limited disclosure to prevent criminal act that attorney reasonably believes “is likely to result in death or, or substantial bodily harm to, an individual” [CA RPC 3-100(B)]

Useful Cases

- ▶ *Alpha Beta Co. v. Sup. Ct.*, 157 Cal.App.3d 818 (1984)
- ▶ *Chicago Title Ins. Co. v. Sup. Ct.*, 174 Cal.App.3d 1142 (1995)
- ▶ *D.I. Chadbourne, Inc. v. Sup. Ct.*, 60 Cal.2d 723 (1964)
- ▶ *Van Asdale v. International Game Technology*, 577 F.3d 989 (9th Cir. 2009)
- ▶ *Yanez v. Plummer*, 221 Cal.App.4th 180 (Cal. Ct. App. 2013)

Attorney-Client Privileges and Protections

Tony Rodriguez, Kaiser Foundation Hospitals/Health Plan

Quyên Ta, Kecker, Van Nest & Peters LLP



Attorney-Client Communications—Refresher

▶ Elements:

- ▶ 1. A confidential communication from a client
- ▶ 2. To a lawyer (or his subordinate, paralegal, etc.)
- ▶ 3. For the primary purpose of securing legal advice, legal services or assistance in a legal proceeding

- ▶ *NOTE:* Communications from lawyer to client reflecting the client's privileged communication are also privileged, as is the lawyer's work in preparation for serving the client (derivative privilege and work product)

Attorney-Client Communications—Refresher

- ▶ Attorney-client communications/privilege extends to in-house lawyers as well. *Upjohn v. United States*, 449 U.S. 383 (1980)
- ▶ *But* not necessarily in some foreign jurisdictions.
- ▶ Dual Roles of in-house counsel: GCs and AGCs now often carry other roles:
 - ▶ Corporate secretary
 - ▶ VP of Sales
 - ▶ VP of Operations
 - ▶ VP of HR

Attorney-Client Communications

“Primary Purpose Test” (More Stringent)

- ▶ In-house counsel may play a dual role of legal advisor and business advisor...in order to successfully assert the attorney-client privilege, the corporation must clearly demonstrate that the communication in question was made for the express purpose of securing legal not business advice...
- ▶ *Septa v. Caremark PCS health L.P.*, 254 F.R.D. 253 (E.D. Pa. 2008)

Attorney-Client Communications

“Significant Purpose” Test (Less Stringent)

- ▶ As long as “one of the significant purposes” of the communication is to obtain or provide legal advice, the communication has a “primary purpose” of obtaining or providing that advice.
- ▶ Communications may have “legal” and “non-legal” purposes.
- ▶ *In Re Kellogg Brown & Root, Inc.*, 2014 WL 2895939 (D.C. Cir. 2014)

Attorney-Client Communications—9th Circuit

- ▶ Most courts in the 9th Cir. apply the “primary purpose” test.
- ▶ E.g.:
 - ▶ *U.S. v Salyer*, 853 F. Supp. 2d 1014, 1018 (E.D. Cal 2012)
 - ▶ *United States v. Chevron Texaco Corp.*, 241 F. Supp. 2d 1065 (N.D. Cal 2002)

Attorney-Client Communications—9th Circuit

- ▶ BUT some courts in 9th Cir. apply the “because of” standard. *In re CV Therapeutics, Inc. Securities Litigation*, No. C-03-3709 SI (N.D. Cal. 2006) (J. Chen)
 - ▶ Standard often utilized w/r/t work product doctrine
 - ▶ “If in light of the nature of the document and the factual situation in a particular case, the document can be fairly said to have been prepared or obtained *because of the prospect of litigation*”
 - ▶ Considers “**totality of circumstances**” when it can be fairly said that the document was created because of anticipation of litigation and would not have been created in substantially similar form but for the prospect of that litigation.

Attorney-Client Communications Factors Courts Consider

- ▶ Fact-based inquiry / Case-by-Case
- ▶ Formalities: sender? who else is included in the email? Is the document marked?
- ▶ Content of document
- ▶ Is there mention of legal advice?
- ▶ Title of lawyer
 - ▶ Why was lawyer included in the email (and in which capacity - e.g., board member v. lawyer)
- ▶ Is outside counsel involved in communication?

Attorney-Client Communications

Lessons Learned/Dual Roles

- ▶ Lawyer's title: Should lawyers have a legal title only?
- ▶ Make sure that if legal counsel is *also* playing another role, the emails make clear that the lawyer is on the email for the *legal purpose*
 - ▶ Being on the email chain or being cc'ed is not enough!
 - ▶ The non-attorney employee must discuss their intent to seek legal advice. See *Datel Holdings Ltd. v. Microsoft Corp.*, C-09-05535 EDL, 2011 WL 866993 (N.D. Cal. Mar. 11, 2011) (citing *U.S. v. ChevronTexaco*, 241 F.Supp.2d at 1077).
- ▶ Start a new email chain if you want to clearly maintain legal protections
- ▶ Separate legal and non-legal advice (hopefully in different emails); Be explicit
 - ▶ "My legal advice is..."
 - ▶ "My business advice is..."
- ▶ If an in-house lawyer has both business and legal titles, consider bringing on another lawyer as the "legal advisor"
- ▶ Remind folks *not* to forward emails to others who do not need to know (spouse, friends inside or outside the company)

Clawbacks—Fed. R. Civ. Pro. 26(b)(5)(B)

Producing Party:

- Notify any receiving party of the claim and the basis for it
- Must preserve info until claim resolved

Receiving Party:

- Return, sequester, or destroy information
- Must not use info until dispute resolved
- May present info to Court under seal for determination

Clawbacks—California law

State Comp. Ins. Fund v. WPS, 70 Cal. App. 4th 644 (1999)

- Imposes absolute duty on attorney receiving material clearly privileged and claimed to have been inadvertently disclosed to refrain from using documents until dispute resolved.
- When material received is not obviously or clearly privileged but *arguably* privileged, attorney's duty is to notify the privileged holder, and await instructions on how to proceed.

Clawbacks—California law

McDermott, Will & Emery v. Superior Court, 10 Cal App. 5th 1083 (2017)

- Inadvertent disclosure of material - could lead to disqualification
- Lawyer sent analysis to Dick Hausman, who forwarded it onto lawyers at McDermott (and other non-lawyers, including sister-in-law)
- GDC found the email in McDermott files
- Hausman DQ'ed GDC if they used that document in deposition
- Hausman claimed he did not intend to forward it to non-lawyers so did not waive privilege. GDC claimed waiver.
- H: GDC violated *State Comp Ins. Fund* and *Rico v. Mitsubishi*; Affirmed disqualification of GDC
 - Email still privileged after it was forwarded
 - Disputed evidence re whether Hausman forwarded the email to non-lawyers was inadvertent

Clawbacks—Lessons Learned

- **Producing Party:**
 - Be careful with document review and production
 - Clawback as soon as possible
- **Receiving Party:**
 - Notify producing party as soon as become aware
 - Do not exam, review, or analyze
 - Do not use the information in any litigation until the privilege claim has been resolved.
 - When in doubt, seek Court guidance.
 - Err on the side of caution (lesson - GDC got DQ'ed!)

** Consider setting forth procedures re inadvertent disclosure in protective order

Sharing Privileged Information During M&A (Due Diligence & Negotiation)

- **Scenario:** Purchaser requests information from seller to assess litigation, compliance or regulatory risks
- Seller often does not want to provide privileged information because privilege is waived if given to a third party.
- Without sharing this information, purchaser may decline to move forward with the deal.
- **Solution: Common Interest doctrine**

Common Interest Doctrine

- 1. **Fifth Circuit Court of Appeals:** Applies only when two or more clients participate in joint attorney-client discussions for preparing a *common litigation defense*.
- 2. **Most Federal Courts and Delaware:** Protects information whose *primary purpose* for the communication is for the parties to obtain legal advice or to further a legal interests (rather than for business purpose)

Common Interest Doctrine Protective Measures/Takeaways

- ▶ Enter into written confidentiality agreement with purchaser
- ▶ Enter into a written common interest agreement with the purchaser to document shared legal interest
- ▶ Limit the individuals to whom disclosure is made to the purchaser's in-house legal team or outside counsel
- ▶ Helps to show discussion of litigation strategy; be explicit

Questions?

Don't forget to sign the Official Record of Attendance form to get CLE credit!

Panelist Biographies

January 10, 2018



Albert Giang AGiang@bsfllp.com

Boies Schiller Flexner LLP

- ▶ Albert Giang is a litigation partner in the Los Angeles office of Boies Schiller Flexner LLP (BSF). As part of his general litigation practice, he specializes in representing technology companies and startups, and his clients include some of the most respected companies in the “sharing economy” and e-commerce space. He has been asked to serve two stints in-house at a leading technology company and provides strategic counseling on cutting-edge regulatory issues, governmental compliance, class actions, and complex consumer and employment disputes.
- ▶ Albert has been named one of the “Most Influential Minority Lawyers” by the Los Angeles Business Journal and one of the “Best Lawyers Under 40” by the National Asian Pacific American Bar Association (NAPABA). As part of his deep commitment to diversity and inclusion in the legal profession, he serves as a Fellow on the Leadership Council on Legal Diversity, on the Executive Advisory Council for Asian Americans Advancing Justice—Los Angeles, and as co-chair of NAPABA’s Amicus Committee. Albert previously clerked for the Honorable Richard A. Paez on the Ninth Circuit, and graduated with distinction from Stanford Law School.

Tony Rodriguez Tony.Rodriguez@kp.org

Kaiser Foundation Hospitals/Health Plan

- ▶ Tony Rodriguez has been a Senior Counsel in the Kaiser Foundation Health Plan national legal department since 2015, where he is one of several attorneys who are responsible for commercial litigation matters, including provider disputes, class actions, and complex subpoenas. A 1992 graduate of UCLA Law School, Tony began his practice in southern California before joining Morrison & Foerster in San Francisco as an associate in 1996, where he was a partner from 2001 through 2014. At Morrison & Foerster, Tony's practice included securities, telecom, consumer class action, and health care litigation.

Karen E. C. Sullivan karen.sullivan@bankofthewest.com

Bank of the West

- ▶ Karen E.C. Sullivan is presently in-house employment counsel at Bank of the West. She received her undergraduate A.B. degree at Smith College, majoring in Economics and receiving a 5-College Consortium Certificate in International Relations. She then received her J.D. at Boalt Hall School of Law, at U.C. Berkeley. Karen E.C. Sullivan has more than 20 years of firm and in-house labor and employment law expertise. In addition to firm experience at Wilson Sonsini Goodrich & Rosati, she has previously provided in-house national and international labor and employment counsel advice at McKesson Corp., Symantec, Sun Microsystems, and Dell Computer Corporation.

Quyen Ta qta@keker.com

Keker, Van Nest & Peters LLP

- ▶ Quyen Ta is a partner at Keker, Van Nest & Peters LLP, a litigation boutique in San Francisco. Her practice focuses on consumer class action defense, intellectual property, and other high-stakes, complex civil litigation. She has tried numerous cases and has handled a significant number of civil matters in state courts, federal courts, and before the International Trade Commission.
- ▶ She serves as lead counsel in numerous class action matters throughout the country in various industries. Her representative clients include Public Storage, CubeSmart, Molina Healthcare, TSMC, NRG Energy, and JM Eagle. She was selected by the *Recorder* as a "Lawyer on the Fast Track" and a "Woman Leader in Tech Law." She was recognized as a "Best Lawyer Under 40" by the National Asian Pacific American Bar Association. Recognized as a leader in the Northern District of California, she was selected by the federal judges to serve a three-year term as a Lawyer Representative. Quyen is active in bar and community activities, and speaks frequently on diversity and inclusion issues.