“Uncomfortable Situations for In-House Counsel, and How to Navigate them Gracefully”

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Goals of the Presentation:

- To enhance awareness by In-House Counsel of developments relating to their ethical roles and professional responsibilities;
- To underscore the relevance of these new developments to the daily challenges faced by In-House Counsel;
- To emphasize In-House Counsel’s acknowledged role as a key strategic business partner to management.
“In A Nutshell”

- The role of the In-House Counsel is evolving.
- This increases “The Partner-Guardian Tension”.
- New, prominent controversies are arising concerning In-House Counsel duties.
- Governance and management have a responsibility to monitor these developments.
Our Main Points

- **You** know this.
- **They** (the board; the ELT; the CCO; regulators) do not necessarily know this.
- It is *very important* that they know this.
- There is *a lot of data* to help get them there.
The Major Developments:

- Commonwealth v. New Foundations
- Commonwealth v. Spanier
- Michigan Bar Grievance Commission
- Hershey Trust
- NYSE Governance Services/Barker Survey
- Heineman, Jr. publication
Key RPC Involved

- 1.2 (Scope of Representation)
- 1.6 (Confidentiality of Information)
- 1.13 (Organization as Client)
- 1.7 (Conflict of Interest)
- 4.3 (Unrepresented Person)

Note: may vary state-by-state
Who is the In-House Counsel’s Client?
Who is the Client? (cont’d)

- Highly consequential new state court decision.
- In essence: executives were not properly represented by counsel during grand jury proceedings.
- Focus on the professional relationship of In-House Counsel to organizational executives.
Who is the Client? (cont’d)

- For internal investigations: (1) clarify who within legal team will conduct; (2) be prepared to give “UpJohn” warnings and have outside counsel references/resources available; and (3) develop written protocols/internal coordinating committee.
- More broadly, consider: (1) executive performance and compensation; (2) disclosure of risk issues to board; and (3) potential merger.
“Do I Represent the Whole System, or Don’t I?”
“Do I Represent” (cont’d)

A foundational issue: are all of the legal entities in the system clients of the In-House Counsel?

Simultaneous representation of wholly owned or controlled entities: “one client” rule.

Address distinctions between wholly or partially controlled entities should be addressed to avoid privilege risks – control can be complex issue.

See RPC 1.7, 4.3.
“Do I Represent” (cont’d)

- Possible written protocol: (1) identifying clients of the legal department; (2) defining “control” for this purpose; (3) setting forth mutual parent and subsidiary understandings of what in-house representation entails (i.e., selection of outside counsel, governance/corporate matters, contract matters, labor and employment matters).

- Be attentive to vigorous representation and attorney-client privilege tensions.
Role of In-House Counsel in Addressing Corporate Ethics
In-House Counsel is specifically empowered to provide ethics advice by virtue of the rules of professional responsibility; principally Rule 2.1. Consideration of ethical, reputational implications of proposed corporate action. Long standing public discourse frames the lawyer’s role as a primary guardian of the organizational reputation.
“Corporate Ethics” (cont’d)

The intersection of “is it legal?” with “is it right?” can be seen in many situations, such as:

- Quality of care
- Clinical research
- Voluntary reporting or public disclosure of an event
- Disclosure of an issue to the governing board
- Potential discrimination or mistreatment of students or employees
The In-House Counsel and Internecine Disputes
Internecine Disputes (cont’d)

- In-House Counsel are increasingly drawn into “internecine” controversies between corporate constituents.
- RPC 1.13(a) serves as a useful touchstone: The general counsel does not serve the CEO, the senior leadership team, the Board as a whole, or Board leadership. She represents the organization.
Internecine Disputes (cont’d)

- The following areas, among others, are ripe with potential for disagreement among internal constituents: (1) substandard clinical or business performance; (2) pace or efficacy of innovation (i.e., telemedicine, global health, tech transfer/development, consumer-driven health); and
Internecine Disputes (cont’d)

- (3) potential merger/acquisition/joint venture transactions (i.e., management-driven concerns, extent of board disclosure, Board member disagreements).
- Seek alignment when possible.
Communicating Professional Responsibilities Without Sounding Pompous
There is a strategic advantage in asking others to assist and even take the lead in some communications.

Customize the approach to the attitudes, appetites and culture of the overall client and its constituents (i.e., periodic written or in-person updates for management; regular written updates for Board committee, with in-person attendance; other internal meetings).
Communicating Professional (cont’d)

- Communications should emphasize that legal counsel is adding value, and is an invested partner in the organization’s success.
- Be clear and concise. Listen to goals, and repeat them back when possible.
- Seek continuous feedback from management. Do not surprise colleagues unless unavoidable.
- Tie client service to performance evaluations.
The Crossroads of Legal and Business Advice
The Crossroads (cont’d)

- Multiple surveys, treatises provide that In-House Counsel's role has evolved to becoming a core member of the senior management team and a participant in strategic decisions and actions.
- This can lead to blurred distinctions as to whether In-House Counsel’s advice provided is "legal" or "business" related.
- This raises significant attorney-client privilege issues.
ACP applies when communication is "primarily for the purpose...“; for “mixed” communications, focus is on “predominant purpose”.
- Label not enough; need "legal connection".
- Burden of proof on party claiming the ACP.

Others in management should be clear as to the importance of having general counsel as both a strategic and legal advisor.
"Houston, (I Think) We've Got a Problem"
“Houston, (I Think)” (cont’d)

- New state court decision addresses whether (and if so under what circumstances) in house counsel can report violations directly to the state attorney general and bypass the board. Involves “nightmare” scenario.

- For general counsel, the more practical implications typically relate to internal management of “bet the farm” issues.
“Houston, (I Think)” (cont’d)

- These issues include major litigation, a regulatory or accreditation matter, an emerging risk management issue, an innovation, a potential deal with a third party, or the like.
- Important to carefully consider professional responsibilities related to internal and external communication, risk management plan and organization’s responses.
Concluding Observations
It is the responsibility of the board to embrace the accepted role of In-House Counsel in the challenges she faces in connection with her expanded responsibilities.