

ETHICS ISSUES FACING IN-HOUSE LAWYERS WHO REPRESENT COMPANIES IN JOINT VENTURES

Hypotheticals

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Hypothetical 1

Recently your company and another large chemical company formed an LLC to operate a joint venture that shows great promise. The management team from both members of the joint venture LLC has asked you whether the LLC can hire one law firm to represent the joint venture. Although the potential cost savings are attractive, the firm and you (as inside counsel) have a number of questions to consider.

- (a) Must the firm disclose to the other company that it represents your company on a totally unrelated matter?

YES

NO

- (b) Will the privilege protect the firm's communications with joint venture employees assigned by either of the members to the joint venture?

YES

NO

- (c) If adversity develops between the two members, may the firm be adverse to your company?

YES

NO

- (d) If adversity develops between the two members, may the firm be adverse to the other company?

YES

NO

- (e) If adversity develops between the two members, may the firm be adverse to the joint venture itself?

YES

NO

Hypothetical 2

You are representing your company in negotiations with another company over the creation of a joint venture.

You just read a memorandum that one of your company's vice presidents sent to the other company -- under a strict confidentiality agreement. The memorandum included the following three sentences:

Our anti-trust attorney has reviewed the current and proposed language and has found that we are at risk and should not proceed. This finding is based, in part, on a review of the case facts from a recent case in Oregon. We strongly believe it is in your and our best interests to avoid the increased possibility of a similar situation ever happening here.

You wonder about the effect of the vice president including those sentences in the memorandum to the other company.

(a) Has your company's vice president waived the attorney-client privilege by including those three sentences in its memorandum to the other company?

YES

NO

(b) If your company has waived the privilege, will the waiver extend to other internal corporate communications on the antitrust issue?

YES

NO

Hypothetical 3

Having been "burned" in previous joint venture creation negotiations by a privilege waiver problem, you are trying to figure out a way to preserve privilege protection for communications between your company and another proposed joint venture member. The in-house lawyer representing the other member has suggested a common interest agreement as a way to preserve privilege from third parties' waiver claims.

May your company avoid waiving privilege protection during joint venture creation negotiations by entering into a common interest agreement with the other proposed member?

YES

NO

Hypothetical 4

Your company and another company created an LLC joint venture, and you would like to jointly represent your company and the LLC. However, that arrangement has prompted you to ask some questions.

(a) May you jointly represent your company and the joint venture?

YES

NO

(b) If you are not fully licensed in the state where the joint venture will operate, may you jointly represent your company and the joint venture?

YES

NO

(c) Will the attorney-client privilege protect your communications with your company's employees who have been assigned to the LLC?

YES

NO

(d) Will the privilege protect your communications with the other member's employees assigned to the joint venture?

YES

NO

(e) If your company asks you for a confidential analysis of how it might unwind the joint venture, must you advise the joint venture's management about that request?

YES

NO

(f) How do you advise one of your company's designated LLC board members if the board member asks about the following scenario: the joint venture was hoping to develop a product that would generate profits for both members, but one of the joint venture's scientists has just developed a product that could be hugely profitable for the joint venture, but would compete directly with one of your

company's main products. Should your company's designated LLC board member vote to continue developing that product?

YES

NO

- (g)** If you discover that one of your company's employees assigned to the joint venture has engaged in serious misconduct that might substantially harm the joint venture, must you report that to the joint venture?

YES

NO

Hypothetical 5

It looks like adversity is beginning to develop between your company and the other member of an LLC joint venture. You are jointly representing your company and the joint venture itself. You are wondering to what extent such adversity affects your ability to represent your company in any upcoming dispute.

(a) May you represent your company in a dispute with the joint venture?

YES

NO

(b) May you represent your company in a dispute with the other member?

YES

NO

(c) Are there any steps you could have taken to assure your availability to represent your company in the event of such adversity?

YES

NO

Hypothetical 6

The last time your company created a joint venture with another chemical company, both you and the company had real problems. Your company now wants to start a joint venture without creating a separate entity, but instead by entering into a contract with the other chemical company. You have never dealt with an arrangement like that before, and you wonder about how that will affect your responsibilities.

- (a) If you represent only your company in connection with the joint venture, will the privilege protect your communications with the other member's employees assigned to the joint venture?

YES

NO

- (b) May you jointly represent both members in connection with the joint venture's operations?

YES

NO

- (c) May you assure privilege protection for your communications with the other member's employees assigned to the joint venture by arranging for a common interest agreement between your company and the other member?

YES

NO

Hypothetical 7

Your company's use of a contract rather than an entity joint venture arrangement seems to be running off the tracks again, and adversity is developing between your company and the other member. Now you wonder where that leaves you.

- (a) If you have jointly represented both members in the joint venture in connection with third party matters, may you represent your company in a dispute with the other member?

YES

NO

- (b) If your company entered into a common interest agreement with the other member related to threatened litigation with a third party, may you represent your company in a dispute with the other member?

YES

NO