

ETHICS ISSUES FACING CORPORATE COUNSEL: PART II (HIRING FOR THE LAW DEPARTMENT AND PRESERVING CONFIDENCES)

Hypotheticals

**Thomas E. Spahn
McGuireWoods LLP**

Hypothetical 1

As the General Counsel of a growing company, you are always on the look out for good candidates to join your growing law department. You have been very impressed with an in-house lawyer who works at a competitor against whom your company is currently litigating. You would love to offer her a job, but you wonder about the risks.

- (a) If you hire the in-house lawyer from the competitor, is there a chance that her individual disqualification on the litigation matter would be imputed to your entire law department?

YES

NO

- (b) If you hire the in-house lawyer from the competitor, is there a chance that her individual disqualification on the litigation matter would be imputed to the outside law firm representing your company in the litigation?

YES

NO

Hypothetical 2

You are interested in hiring a third- or fourth-year associate to bolster your law department's intellectual property practice. One associate who practices elsewhere in your state seems like a good prospect, but you wonder whether her individual disqualification might be imputed to your law department -- potentially disqualifying you and your colleagues from handling a number of matters that you and your outside counsel are currently handling adverse to the associate's current firm's clients. Your state just abandoned its traditional approach to the imputation issue -- and now allows hiring law firms and law departments to avoid imputed disqualification by screening lateral hires under certain circumstances.

- (a) Will you be able to avoid imputed disqualification if the associate was actively working as a member of the team at the law firm representing your company's adversary?

YES

NO

- (b) Will you be able to avoid imputed disqualification if the associate had only taken one deposition in the case in which her law firm represents your company's adversary?

YES

NO

- (c) Will you be able to avoid imputed disqualification if the associate had only prepared several abstract legal memoranda in the case in which her current law firm represents your company's adversary?

YES

NO

Hypothetical 3

Having just been "burned" by hiring a young lawyer for your law department who ended up being "Typhoid Mary," you now take every step to screen lateral hires before they come on board. However, you just received a motion to disqualify your law department in a large matter, based on your hiring of a lateral associate. The motion acknowledges that you imposed a screen before hiring the lateral associate, but claims that the screen was not effective -- because it did not mention that lawyers violating the screen would be punished.

Is your law department likely to be disqualified based on this alleged deficiency of the screen?

YES

NO

Hypothetical 4

Two weeks ago, your law department hired a young associate from a large Los Angeles-based law firm. This morning, you received a frantic call from one of your colleagues, who said that he just learned that the young associate had worked at his old firm on an ongoing litigation matter adverse to your company. Your colleague wants you to screen the young associate immediately, and asks whether the immediate imposition of a screen will eliminate the risk that your law department might be disqualified from that litigation matter.

- (a) Can you avoid the possibility of an imputed disqualification by immediately screening the new hire?

YES

NO

- (b) Will you be able to avoid an imputed disqualification if the new hire can establish (under oath) that he did not share any confidences from his old firm with any of your law department lawyers, and that you and your law department colleagues did not acquire any confidential information from the new hire?

YES

NO

Hypothetical 5

Your law department has several large litigation projects that you expect to last for several years. You want to avoid adding to your permanent roster of lawyers, so you are looking into various categories of lawyers that might be able to assist you in these projects. You have asked your department's ethics "guru" about the conflicts of interest ramifications of hiring such lawyers, many of whom have worked on numerous projects for several law firms.

- (a) Will your law department have to worry about the imputation of a lawyer's individual disqualification, if the lawyer will work only on one large case -- conducting research, taking depositions, preparing pleadings, etc.?

YES

NO

- (b) Will your law department have to worry about the imputation of a lawyer's individual disqualification, if the lawyer will work only on privilege review projects, without access to your company's computer network?

YES

NO

Hypothetical 6

Your law department has had trouble hiring qualified lawyers with expertise in a specific patent area, and you were delighted to convince your largest outside law firm to "second" a bright young associate to your law department for two years. The associate will continue to be paid by her former (and future) law firm, and will have an understanding with the law firm that she will return there after her "secondment."

- (a) Could your law department be disqualified from representing your corporation in a matter based on the "secondment" of a lawyer from its outside law firm?

YES

NO

- (b) Must the "seconded" lawyer check for conflicts before assisting law department colleagues in a matter adverse to a company who might be represented by the lawyer's once and future law firm?

YES

NO

- (c) Could the outside law firm be disqualified in a matter based on the "seconded" lawyer's return to the law firm?

YES

NO

Hypothetical 7

You work in-house in a state that does not allow screening of lawyers to avoid imputed disqualification of an individually disqualified lawyer. Your law department is considering hiring several paralegals who previously worked at a law firm that is frequently adverse to your company.

- (a) Do you risk imputed disqualification of your law department by hiring a paralegal who has been working on the other side of a large case that goes to trial next year?

YES

NO

- (b) Will you be able to avoid any risk of imputed disqualification by screening any individually disqualified paralegal from your side of the case?

YES

NO

Hypothetical 8

Your law department just hired two new lawyers and one new assistant. The lawyers recently graduated from law school, and the assistant had previously worked only for doctors. You wonder about the ethical and professional implications of bringing on new folks like this.

- (a) Do you have any responsibility for assuring that lawyers and non-lawyers you supervise comply with the ethics rules?

YES

NO

- (b) Can you be held responsible for any ethics violations by lawyers and non-lawyers you supervise?

YES

NO

Hypothetical 9

You joined your client's law department about six weeks ago. At one recent conference of all corporate officers, it dawned on you for the first time that you are not covered by your client-employer's standard indemnification provision that covers all other officers.

May you arrange for an indemnification provision in your client-employer's bylaws that covers all in-house lawyers?

YES

NO

Hypothetical 10

You have been very successful in your tenure at a high-tech company's in-house law department. You recently received an offer from another company to join its law department, at a substantial pay increase. That company sends you a proposed employment agreement that would: (1) prevent you from serving in the in-house law department of any of the company's competition for a period of one year after you leave the company; and (2) preclude your representation of any clients adverse to the company for a period of five years after you leave the company.

- (a) May you sign an employment agreement under which you agree not to serve in a competitor's in-house law department for one year after you leave the company?

YES

NO

- (b) May you sign an employment agreement under which you agree not to take any representations adverse to the company for a period of five years after you leave the company?

YES

NO

Hypothetical 11

You just spent an hour interviewing one of your corporate client's former employees.

Are your communications protected by the attorney-client privilege?

YES

NO

Hypothetical 12

As your corporate client has downsized, it increasingly relies on temporary agency employees who are not on your client's payroll -- but who spend every day at the client's headquarters building handling clerical tasks.

Will the attorney-client privilege protect communications with or in the presence of these non-employees?

YES

NO

Hypothetical 13

One of your client's executives has the annoying habit of sending her fellow employees copies of your emails answering legal questions the executive posed to you -- to keep these employees "in the loop" even though they are not directly involved in the issues the emails discuss.

Does such a practice jeopardize privilege protection?

YES

NO

Hypothetical 14

One of your corporate client's senior executives likes to establish what she calls "tiger teams" to deal with the client's thorniest problems. You wonder about the privilege impact of involving outsiders as "tiger team" members.

- (a) Does the privilege protect communications with, in the presence of, or shared with an environmental consultant that your client considers a key participant in such a "tiger team?"

YES

NO

- (b) Would the privilege analysis be any different if you retained the environmental consultant?

YES

NO

Hypothetical 15

You just sent an email to your client recounting verbatim your telephone conversation with the Assistant U.S. Attorney who is pursuing criminal charges against your client for selling defective products.

(a) Is your email protected by the attorney-client privilege?

YES

NO

(b) Is your email protected by the work product doctrine?

YES

NO

Hypothetical 16

One of your client's vice presidents routinely copies you on her emails. To save time, the vice president does not explicitly ask for your advice about the emails' subject, but you know that by copying you she is seeking your legal advice.

Is a court likely to find that the privilege protects such emails?

YES

NO

Hypothetical 17

Your client has asked you to help it prepare for a rate-making administrative hearing?

Will the work product doctrine protect materials your client prepares in connection with the hearing?

YES

NO

Hypothetical 18

You are working on a document production in a court where you were admitted pro hac, but had never appeared before. You are now reviewing documents your client's accountant prepared when the client thought litigation was likely, but not imminent.

Will the work product doctrine protect such documents?

YES

NO

Hypothetical 19

You are considering withholding a document based on a work product claim, but your client just told you that it did not start preserving pertinent documents until about 18 months after it created that document.

Will claiming work product protection for that document risk a spoliation claim against your client?

YES

NO

Hypothetical 20

Your client prepared some documents to comply with a government mandate to record each product failure.

Will the work product doctrine protect those documents?

YES

NO

Hypothetical 21

Working closely with you and your colleagues in the law department, your corporate client adopted an internal requirement that employees prepare an "incident report" after each industrial accident.

Will the work product doctrine protect these "incident reports"?

YES

NO

Hypothetical 22

As you plan to prepare your corporate client's key witness for her deposition, you select a handful of the most important documents that you would like to review with her during your preparation session.

- (a) If your adversary asks during the deposition, will you have to disclose the identity of those documents if you selected them from documents produced to the adversary?

YES

NO

- (b) If your adversary asks during the deposition, will you have to disclose the identity of those documents if you justifiably withheld the documents from production as privileged or protected work product?

YES

NO

Hypothetical 23

After a fatal industrial accident on its offshore oil platform, your client appointed one of its senior engineers to investigate the accident's root cause. Acting on your advice, the engineer did not keep copies of her witness interview notes or even her report. You successfully asserted work product protection for those documents, but now the plaintiff has noticed the engineer's deposition -- intending to ask her about what the witnesses told her during her investigation.

Does the work product doctrine protect the engineer's oral communications with witnesses?

YES

NO

Hypothetical 24

Your client is trying to cooperate with a government investigation into possible defects with your client's best-selling product. You would like to cooperate, but worry about the waiver effect.

May you share privileged documents with the government without making them available to private plaintiffs?

YES

NO

Hypothetical 25

You prepared a memorandum describing the likely outcome of ongoing litigation, which to your dismay your client forwarded to her investment banker.

(a) Did your client waive the attorney-client privilege?

YES

NO

(b) Did your client waive the work product doctrine?

YES

NO

Hypothetical 26

Your client asked you whether she can share one of your litigation analyses with her public relations firm -- as long as she insists that the public relations agency sign a strict confidentiality agreement.

(a) Will such a confidentiality agreement affect the privilege waiver analysis?

YES

NO

(b) Will such a confidentiality agreement affect the work product waiver analysis?

YES

NO

Hypothetical 27

Although you worry about waiving your clients' attorney-client privilege and work product protections, you worry even more about a subject matter waiver -- which might require your client to disclose additional otherwise protected documents or communications.

- (a) Will your client waive the subject matter waiver by relying on a privileged document in supporting a summary judgment motion?

YES

NO

- (b) Will your client waive the subject matter waiver by sharing your privileged (but not work product protected) email with its investment advisor?

YES

NO

- (c) Will your client waive the subject matter waiver by inadvertently producing a privileged or work product protected document during a hasty document production?

YES

NO

- (d) Will your client waive the subject matter waiver by designating as a trial exhibit one of ten accident scene pictures an investigator took after an industrial accident?

YES

NO

Hypothetical 28

Your corporate client sued its accounting firm for malpractice, alleging that its reliance on the accounting firm's advice about some transaction resulted in financial loss. The accounting firm has now discovered that your client also received advice about the same transaction from a law firm.

Will the court order your client to produce its privileged communications with the law firm about the transaction?

YES

NO