Ethical Issues in Employment Law for the Financial Services Industry

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Agenda

Part One: Investigating Employees

Part Two: Inadvertent Disclosure

Part Three: Social Media Ethics

Part One: Investigating Employees

Hypothetical

You are in-house counsel for the Acme Company. Bob, a senior businessperson, often comes to you for legal advice regarding Acme business. He also works with you on litigation strategy for handling claims against the Company, and he makes the final decisions when necessary. Recently, a woman junior to Bob made a complaint to HR that Bob had been sexually harassing her. The General Counsel asked you to investigate. Your first order of business is to interview Bob. You inform Bob of the complaint and ask to schedule a time to discuss. Bob asks if he needs a lawyer.

What should you tell him?

What Do You Do?

A. You should tell him this is just an informal conversation and he does not need a lawyer yet.

B. You should tell him that you are the company's attorney, not his, with respect to this conversation, and that you cannot advise on whether he needs a lawyer.

C. You should tell him that you are the company's attorney, not his, with respect to this conversation, but that he is not entitled to have an attorney for this meeting.

D. You should tell him to get a lawyer

What Do You Do?

B. You should tell him that you are the company's attorney, not his, with respect to this conversation, and that you cannot advise on whether he needs a lawyer.

Rule of Professional Conduct 1.13(a)

Upjohn v. United States, 449 U.S. 383 (1981)

Hypothetical

The General Counsel tells you that you will represent both the Company and Bob if the complainant files a lawsuit. Can you take on that representation?

A. No, because there is a conflict.

B. Yes. Even if there is a conflict, the Company is entitled to present a united front vis a vis the plaintiff.

C. No, unless you get waivers from Bob and the Company.

D. It depends on whether Bob did in fact engage in sexual harassment, and what his and the Company's defenses will be.

Joint Representation

D. It depends on whether Bob did in fact engage in sexual harassment, and what his and the Company's defenses will be.

Rules of Professional Conduct 1.13(d), 1.7

Who Are You Representing?

- **ABA Model Rule 1.13:** A lawyer represents the organization and not the directors, officers, shareholders or other constituents
  - Applies to both in-house and outside counsel
  - NY Rule same in this regard
- A lawyer may represent individuals as well with proper consents and no clear conflicts

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Who is the Client?

- If corporation is sued along with an individual defendant, an initial decision must be made whether to have the corporation's counsel also represent the individual
  - If so: must obtain signed joint representation letters stating that confidences will be shared and in the event of a future conflict, the law firm will represent the corporation

Who Holds the Privilege? Communications with Corporation

- The in-house attorney's client is the company itself
- The corporation holds the privilege and may waive it
- "It is settled that a corporate client . . . can claim the privilege." *Costco Wholesale Corp. v. Superior Court*, 47 Cal. 4th 725, 733 (2009).
- "The privilege is that of a 'client' without regard to the non-corporate or corporate character of the client." *Radiant Burners, Inc. v. Am. Gas Ass'n*, 320 F.2d 314, 322 (7th Cir. 1963).
- Confidential communications between in-house counsel and his client are privileged to the same extent as communications between a client and counsel retained from outside. *See Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 413 S.E.2d 630, 638 (1992) (noting that privilege "exists between a corporation and its in-house attorney").

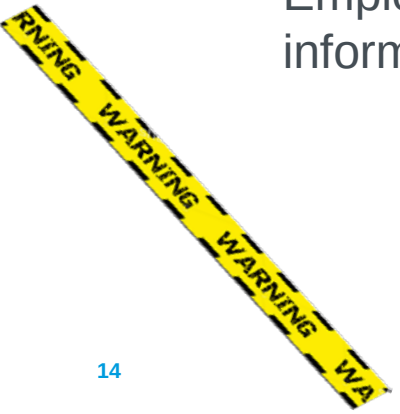
Who Holds the Privilege? Communications with Employees

- Communications with members of top management are privileged
  - *Consolidation Coal Co. v. Bucyrus-Erie Co.,* 89 Ill.2d 103 (1982).
- In *Upjohn v. United States*, the U.S. Supreme Court found that the attorney-client privilege may extend to communications involving middle- and lower-level employees in certain circumstances.
  449 U.S. 383 (1981).
  - *Upjohn* replaced the circuit split between the "control group" test and "subject matter" test
  - The privilege may apply to communications between in-house counsel and lower-level employees when they are made in order to secure legal advice. *Doehne v. EmpRes Healthcare Mgmt., LLC*, 190 Wash. App. 274, 281 (2015).

Who Holds the Privilege? Communications with Employees

- To determine whether communications with employees were privileged, the Court considered whether the communications:
  - Were made by employees to corporate counsel, at the direction of superiors
  - Concerned matters within the scope of the employees' corporate duties
  - Included information that was not available from upper management
  - Were made to employees who were aware that they were being questioned so that the corporation could obtain legal advice
  - Were considered confidential and kept as such

Communications with Employees
Upjohn Warnings



- Lawyers must advise employees in internal investigations that they represent the company and not the employee, and that while the interview may be privileged, the privilege belongs to the company
- Failure to include *Upjohn* warning can result in finding that attorney-client relationship was created between the lawyer and employee
  - Employee can then determine whether to waive the privilege and disclose information the company prefers to control

Communications with Employees

New York courts have repeatedly found that interviews of a corporation's employees by its attorneys as part of an internal investigation can be protected by the attorney-client privilege, and that the privilege extends to the attorneys' summaries and notes pertaining to the interviews. *See, e.g.*, *Robinson v. Time Warner*, 187 F.R.D. 144, 146 (S.D.N.Y. 1999); *Cart v. Cornell Univ*., 173 F.R.D. 92, 95 (S.D.N.Y. 1997).

Communications with Corporation's Agents

- The privilege usually extends to those who are *authorized to act on a client's behalf* with respect to a particular matter, if that person/agent:
  - Has decision-making authority regarding the matter about which legal advice is sought;
  - Is implicated in the chain of command relevant to the subject matter of the legal services; or
  - Is personally responsible for or involved in the activity that might lead to liability for the corporation.

Communications with Corporation's Agents

- "By including 'authorized representative' in the definition of client,' attorney-client privilege statute extends privilege to cover not only communications directly between client and attorney, but also those between client's agents and the attorney." *Hyon v. Selten*, 152 Cal. App. 4th 463, 469 (2007).
- A client's communications with an accountant, hired by the client's attorney, were privileged because the accountant was functionally equivalent to a foreign language translator who helped the attorney understand his client's story. *United States v. Kovel,* 296 F.2d 918, 921 (1961).
- "When an agent communicates with the principal's attorney, the agent speaks as the client, or principal, and his or her communications are protected to the same extent as though the principal was speaking . . . . Generally, communications made to a legal advisor through one serving as an agent of the client will be privileged." *Stopka v. Am. Family Mut. Ins. Co.*, 816 F. Supp. 2d 516, 529 (N.D. Ill. 2011).

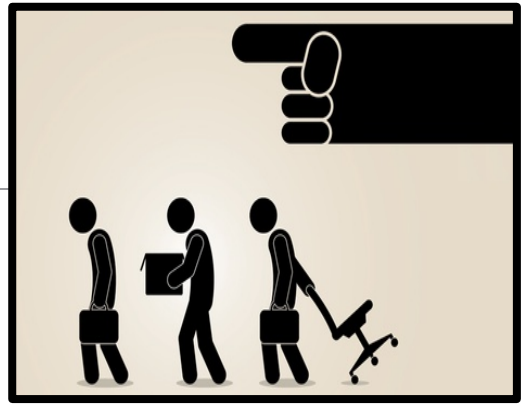
Communications from Former Employees

- “Where the corporate employee is a former employee, communications (1) which occurred during employment remain privileged; (2) of whose “nature and purpose” was for the corporation's counsel to learn facts related to a legal action that the former employee was aware of as a result of his or her employment, are privileged regardless of when they occurred; and (3) between a corporation’s counsel “and a former employee whom counsel does not represent, which bear on or otherwise potentially affect the witness' testimony” are not privileged.”
  - *Nicholls v. Phillips Semiconductor Mfg.,* 2009 WL 2277869 (S.D.N.Y. July 27, 2009)

Communications from Former Employees

- Some states have extended the privilege to former employees based on the corporation's perceived need to know what its former employees know. *See In re Allen*, 106 F.3d 582, 605–06 (4th Cir. 1997).
- Illinois law allowed a former employee to testify as long as he did not testify about the substance or subject of his communications with his former company's attorney. *Favala v. Cumberland Eng'g Co., a Div. of John Brown Inc.*, 17 F.3d 987, 990 (7th Cir. 1994).

Communications from Former Employees



- However, some states do not extend the privilege to ex-employees after termination of employment
  - *Newman v. Highland Sch. Dist. No. 203*, 381 P.3d 1188, 1191 (Wash. 2016) (ruling that the attorney-client privilege does not shield post-employment communications between corporate counsel and the corporation's former employees, even if the communications concern events that occurred during employment and within the scope of employment)
  - *Connolly Data Sys. v. Victor Technologies*, 114 F.R.D. 89, 94 (S.D.Cal.1987) (holding that a former employee is not: "1) the natural person to speak for a corporation; 2) the usual person who would ordinarily be utilized to speak to the company's attorney; 3) required to talk to the attorney about the dispute, and 4) was not the only one with relevant knowledge" and therefore the attorney-client privilege did not apply)

New York Internal Investigation Issues

- New York applies the **primary purpose test** to assess whether communications and materials underlying internal investigations are privileged
  - Is the primary purpose of a communication to obtain/render legal advice?
  - If so, the communication will be privileged
- "An investigative report does not become privileged merely because it was sent to an attorney." *Vessalico v. Costco Wholesale Warehouse*, 2016 WL 3892403, at *2 (E.D.N.Y. July 14, 2016).
- "The primary purpose test does not require that legal advice was the sole purpose of the investigation or that communications at issue would not have been made but for the fact that legal advice was sought." *In re Gen. Motors LLC Ignition Switch Litig.,* 80 F. Supp. 3d 521, 530 (S.D.N.Y. 2015).

Attorney-Client Privilege Best Practices

- Mark communications as “Privileged and Confidential”
  - Remember that simply branding the communications does not confer the privilege
  - Failure to brand the communications does not destroy the privilege
- Do not mix business and legal communications
- Do not forward privileged communications outside of the organization
- Have counsel or an agent of counsel conduct or supervise all interviews and maintain all files on a confidential basis

Hypothetical

- You are in-house counsel to public company (“INC”) involved in a federally regulated activity, and as such, subject to a routine compliance audit. An employee, Lisa, advises you of a compliance failure, but her supervisor, Bob, says it isn’t material and can be fixed by the next audit.
- The regulator asks you if there is anything else he should know.
- You believe the item is very material and clearly needs to be reported, but INC’s Deputy GC, your supervisor, says not to tell the regulator.
- What do you do?

Refer Up The Ladder

- ABA Model Rule 1.13(b) and NYRPC 1.13(b)(3) indicate that in this situation you may:
  - Ask Bob to reconsider
  - If necessary, refer the matter to higher authority
- To determine how to proceed, you must consider:
  - Seriousness of the violation
  - Consequences of failing to inform regulator
  - Motivations of Lisa, Bob, and Deputy GC
  - Scope of your responsibilities
  - Policies of INC for such matters

What if no one listens to you?

- **Model Rule 1.13(c):** “lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.”
- **NYRPC 1.13(c):** “lawyer may reveal confidential information only if permitted by Rule 1.6, and may resign in accordance with Rule 1.16.”

What if no one listens to you?

- Rule 1.6 allows disclosure of Confidential Information only
  - (1) to prevent reasonably certain death or substantial bodily harm;
  - (2) to prevent the client from committing a crime;
  - (3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;
  - (4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;
  - (5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or (ii) to establish or collect a fee; or
  - (6) when permitted or required under these Rules or to comply with other law or court order

Hypothetical

Brian was recently moved from the legal department of Acme Company to the compliance group. Many people in compliance are attorneys, although the group is considered on the business side of the Company. When he was in the legal department, Brian often gave both legal and business advice to Company employees. Mark, an employee who often came to Brian for legal advice, called Brian on his personal cell phone later in the evening and said he had an urgent legal matter and needed advice. He told Brian about an issue the Company was having with one of its suppliers, and asked what to do. Brian said that from a legal perspective, Mark should ask for two different contract terms. He also advised on what Mark could do from a business perspective.

Is Mark's conversation with Brian privileged?

Privileged?

A. No, because Brian is not working as a lawyer for the Company anymore.

B. Yes, because Brian is a lawyer and he clearly gave legal advice to Mark.

C. Maybe, but only to the extent of the legal advice given, not the business advice.

D. Maybe, because Brian may not be functioning as a lawyer anymore, but if so, the entire conversation is privileged.

Privileged?

C. Maybe, but only to the extent of the legal advice given, not the business advice.

Part Two: Inadvertent Disclosure

Inadvertent Disclosure: Ethical Rules

- Under ABA Formal Opinion No. 05-437 (2005), there is a duty to notify the sender:
  - "A lawyer who receives a document from opposing parties or their lawyers and knows or reasonably should know that the document was inadvertently sent should promptly notify the sender in order to permit the sender to take protective measures."
- No. 05-437 withdrew Formal Opinion No. 92-368, which imposed three duties on the receiving lawyer:
  - (1) to refrain from examining the materials; (2) to notify the sending lawyer of the receipt of the materials; and (3) to abide by the instructions of the sending lawyer

Inadvertent Disclosure: New York

- New York Rules of Professional Conduct, Rule 4.4(b)
  - "A lawyer who receives a document, electronically stored information, or other writing relating to the representation of the lawyer's client and knows or reasonably should know that it was inadvertently sent shall promptly notify the sender."
  - Modeled after ABA Model Rules of Professional Conduct

Inadvertent Disclosure: Rule 4.4(b) Comments

- 4.4(b) recognizes that lawyers sometimes receive information mistakenly sent by opposing parties or their lawyers
  - Potential Solution: Agreements containing explicit provisions as to how the parties will deal with inadvertently sent documents
    - If No Agreement: If a lawyer knows or reasonably should know that such a document or other writing was sent inadvertently, Rule 4.4(b) requires only that the receiving lawyer promptly notify the sender
    - BUT: Although 4.4(b) does not require that the receiving lawyer refrain from reading or continuing to read the document, the lawyer may be subject to court-imposed sanctions, including disqualification and evidence-preclusion
      - *See* Rule 4.4(b), Comment [2]

Inadvertent Disclosure: FRCP

- **FRCP 26(b)(5)(b)**: Claiming Privilege or Protecting Trial-Preparation Materials
  - If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it
  - After being notified, the receiving party must:
    - promptly return, sequester, or destroy the specified information and any copies it has;
    - not use or disclose the information until the claim is resolved;
    - take reasonable steps to retrieve the information if the party disclosed it before being notified;
    - and may promptly present the information to the court under seal for a determination of the claim

Inadvertent Disclosure: Privilege Waiver under Federal Rules

- **FRE 502(b)**: When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:
  - (1) the disclosure is inadvertent;
  - (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
  - (3) the holder promptly took reasonable steps to rectify the error
- Methods of preventing inadvertent disclosure
  - Rule 502(d) order
  - Privilege review
  - Document production quality control

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Inadvertent Disclosure: Rule 502(d) Order

- **Rule 502(d)**: "A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding."
  - Application of 502(d) agreement does not depend on whether disclosure was inadvertent
- **Judge Andrew Peck**
  - "There is no legitimate basis for a party to object to a Rule 502(d) order, in any event, the Court can enter a Rule 502(d) order over objection or even *sua sponte*."
  - "It is almost malpractice not to seek a Rule 502(d) order."

Inadvertent Disclosure: Privilege Waiver in State Court

- Three state-law approaches to privilege waiver following inadvertent disclosure:
  1. **Strict:** Voluntary production of any document, whether intentional or accidental, results in a waiver
  2. **Middle of the Road:** Court balances five factors:
     - Reasonableness of the precautions taken by the producing parties to prevent the inadvertent disclosure;
     - Number of inadvertent disclosures;
     - Extent of the disclosures;
     - Promptness of measures taken to rectify the disclosure; and
     - Whether the overriding interest of justice would be served by relieving the party of its error.
  3. **Lenient:** Inadvertent production of a privileged document never constitutes a waiver, except through intentional and knowing relinquishment

State Inadvertent Disclosure Approaches

- *Nova Southeastern University, Inc. v. Jacobson*, 25 So.3d 82 (Fla. App. 2009) (Explaining that Florida courts do not apply a strict rule that counsel's inadvertent production alone waives the attorney-client privilege; instead, courts balance five factors)
- *Newark Unified Sch. Dist. v. Superior Court*, 245 Cal. App. 4th 887, 190 Cal. Rptr. 3d 721 (2015) (holding that 'waiver' does not include accidental, inadvertent disclosure of privileged information by the attorney)
- *Nicholson v. Keyspan Corp.*, 836 N.Y.S.2d 501 (Sup. Ct. 2007) (explaining that disclosure operates as a waiver unless it shown that there the party intended to maintain confidentiality, reasonable steps were taken, the party "acted promptly" after discovering the disclosure, and the opposing party would not suffer undue prejudice)
- *Smith v. Bos. Sci. Corp.*, No. 07-2074, 2009 Mass. Super. LEXIS 1853 (June 23, 2009) (explaining that if prompt notification is made following the discovery of an inadvertent disclosure, the Court must make the determination of whether the disclosure constituted a waiver of privilege)

Intentional (But Improper) Disclosures

- *Forward v. Foschi*, 911 N.Y.S.2d 692 (N.Y. Sup. 2010)
  - Client improperly accessed the opposing party's emails and gave them to his attorney
  - Court: Attorney, upon realizing that the communications were privileged, should have disclosed his receipt of such communications and attempted to mitigate the circumstances
- ABA Rules 8.4(b) & (c) are also applicable
  - Prohibit lawyers from engaging in criminal or dishonest conduct
- If there is no dishonest conduct, *see* ABA Rule 8.4(d)
  - Prohibits lawyers from engaging in "conduct that is prejudicial to the administration of justice"

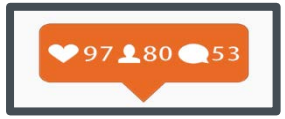
Hypothetical

- Opposing lawyer accidentally copies you on an e-mail or letter intended for her own client. It contains a commentary on a proposed term sheet, negotiation objectives, acceptable terms, deal makers and deal breakers.
- What do you do?

Part Three: Social Media Ethics

Social Media as Evidence

- "The great virtue of a laptop is that it can be used on one's lap, while sitting on a sofa, or perhaps while in bed. Indeed, we note that the **Facebook page for 'Using the laptop in bed' . . . has nearly one million 'Likes.'**"
  - *Ferraro v. Hewlett-Packard Co.* (7th Cir. 2013)

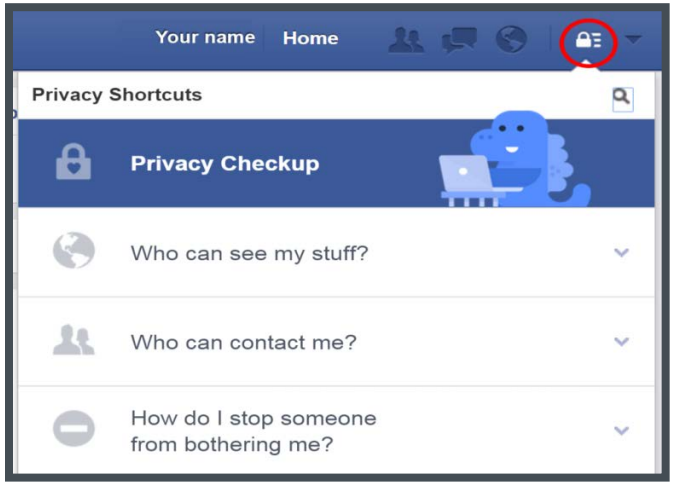


Social Media as Discovery

- "[I]t is reasonable to infer from the limited postings on plaintiff's **public** Facebook and MySpace profile pages that her **private** pages may contain material and information that are relevant to her claims or that may lead to the disclosure of admissible evidence."
  - *Romano v. Steelcase*, 30 Misc. 3d 426 (N.Y. Sup. Ct. 2010)

Social Media as Discovery

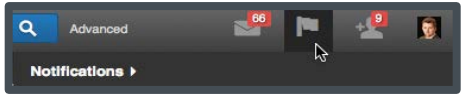
- "To deny defendant an opportunity to access these sites not only would go against the liberal discovery policies of New York favoring pretrial disclosure, but would condone plaintiff's attempt to hide **relevant information behind self-regulated privacy settings**."
  - *Romano v. Steelcase*, 30 Misc. 3d 426, (N.Y. Sup. Ct. 2010)



Delay in Seeking Social Media

- Defendant's motion to compel discovery concerning plaintiff's social media accounts denied due to unexplained delay.
  - *Guzman v. Farrell Bldg. Co*., No. 06-8462, 2012 N.Y. Misc. LEXIS 6175 (Sup. Ct. Oct. 3, 2012)

Incorporating Social Media Into Your Discovery Plan



- Include social media at an early stage in your discovery plan
- Update your definition of ESI
- Include social media in your document preservation letters
- Discovery Requests
  - Requests should be narrowly tailored and identify the information sought. *Mailhoit v. Home Depot USA Inc.,* 285 F.R.D. 566 (C.D. Ca. 2012).
  - Social networking content not entitled to protection based on a right of privacy, but must be relevant to the litigation.

Investigating Social Media Ethically

Passive Viewing of Social Media

- Lawyers may view public areas of social media accounts
  - NYSBA Opinion 843 (2010)
  - Certain pages on Facebook are accessible to all members of the network.
  - “Obtaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted.”
  - Lawyer can access these without engaging in deception
    - NY Rule of Professional Conduct 8.4(c): “A lawyer or law firm shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

“Friending” a Represented Party

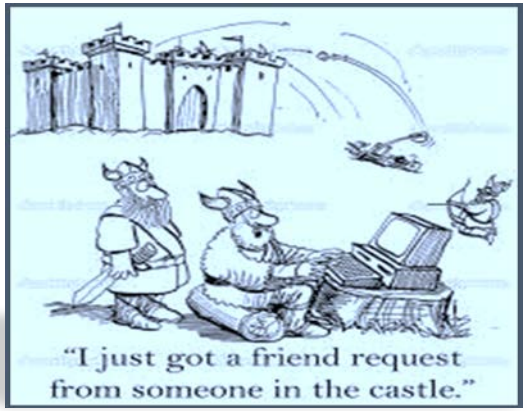
- “No Contact” Rule
  - **NY Rule 4.2(a):** “in representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.”
- Lawyer cannot “friend” certain employees of represented corporation
  - **Comment 7 to Rule 4.2(a):** In the case of a represented organization, paragraph (a) ordinarily prohibits communications with a constituent of the organization who: (i) supervises, directs or regularly consults with the organization’s lawyer concerning the matter, (ii) has authority to obligate the organization with respect to the matter, or (iii) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

“Friending” an Unrepresented Person

- Communicating with unrepresented party
  - **NY Rule 4.3:** three requirements.
    - Lawyer must not state or imply that he is disinterested;
    - must correct any perceived misunderstanding about his role; and
    - must not give out any legal advice other than the advice to secure counsel.
  - Can “friend” an unrepresented person BUT must not use deceptive tactics

“Friending” an Unrepresented Person

- Use of Deception
  - **Rule 4.1(a)** (“In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person”)
  - **Rule 8.4(c)**
- Duty to Supervise
  - **Rule 5.3:** A lawyer is responsible for the conduct of a non-lawyer employed or retained by the lawyer if the lawyer orders or directs the specific conduct (or ratifies it after the fact)



Hypothetical

- CEO of your company comes into your office asking for advice about her nanny.
- CEO's nanny has admitted that she is an illegal alien and wants sponsorship for a green card.
- CEO says: "*I want to fire my nanny. I'm concerned though because I've been paying her off the books.*"

Can you advise CEO?

- NYRPC Rule 1.1 requires a lawyer to have “competence” in an area in which she is providing advice
- NYRPC Rule 1.2 prohibits assisting a client in a fraud or crime
- NYRPC Rule 1.7 regarding conflicts of interest poses several problems in this scenario

Hypothetical

- In-house counsel is sitting in a hearing, at counsel table, with outside counsel.
- Outside counsel is making a presentation to the court. He makes comments about the negotiation of a corporate deal that are materially inconsistent with the facts. In-house counsel is aware of that discrepancy.
- What, if anything, must or should the in-house counsel do?

Your Obligations As In-House Counsel

- NYRPC 5.1: “lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to these Rules.”
- Same in Model Rules.

Questions?

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