Q. Legal Ethics: Compliance and Counsel—Privilege and Investigations: Dos and Don’ts on Maintaining Privilege

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LEGAL ETHICS: COMPLIANCE AND COUNSEL

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OUTLINE OF PRESENTATION

- Relevant Model Rules of Professional Conduct
- What is the Attorney-Client Privilege
- Compliance Officers and Outside Counsel
- Recent Case Law Developments
- Real Life Examples
- Lessons Learned
**RELEVANT MODEL RULES OF PROFESSIONAL CONDUCT**

- Rule 1.1 – Legal Knowledge and Skill
- Rule 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer
- Rule 1.6 – Confidentiality of Information
- Rule 1.13 – Organization as Client
- Rule 3.4 – Fairness to Opposing Party and Counsel
- Rule 4.1 – Truthfulness in Statements to Other
- Rule 4.3 – Dealing with Unrepresented Person

**MODEL RULES 1.1 AND 1.2**

**Rule 1.1**
- Need provide competent representation
- Legal knowledge, skill and prep reasonably necessary for representation

**Rule 1.2**
- Generally, attorney must listen to and follow client’s requests
- But, cannot counsel or aid in fraudulent or criminal act
### Rule 1.6

- Lawyer cannot reveal information relating to client’s representation absent client’s informed consent
- Lawyer **may** reveal info to extent lawyer reasonably believes necessary to:
  - Prevent client from committing crime or fraud
  - Prevent, mitigate or rectify substantial injury reasonably certain to result or has resulted from client’s crime or fraud
- Rule forms primary basis for attorney-client privilege

### Rule 1.13

- Lawyer retained or employed by an organization represents the organization
- Lawyer take actions reasonably necessary to secure best interests of organization, not any officer, employee or other person
- May represent principal officer or shareholder too, but be wary of conflicts
**RULES 3.4 AND 4.1**

- **Rule 3.4**
  - Lawyer needs to interact with all other parties fairly
  - Don’t unlawfully obstruct access to evidence
  - Don’t knowingly disobey ethical obligation
  - Can still advocate zealously

- **Rule 4.1**
  - Don’t knowingly make false statement of material fact or law
  - Don’t fail to disclose material fact when disclosure needed to avoid criminal or fraudulent act

**RULE 4.3**

- When interact with unrepresented person, need to express nature of interest
- Remedy misperceptions about lawyer’s role
- Do not provide legal advice to unrepresented person
ATTORNEY-CLIENT PRIVILEGE

- Protects communications between client and attorney
- Designed to encourage open and honest communication
- Exceptions exist
- Corporations entitled

TYPICAL ELEMENTS TO PRIVILEGE

- Person asserting is or tried to become client of attorney
- Communication made to attorney or someone acting on behalf of/at direction of attorney
- Communication made for purposes of obtaining legal advice or services
**COMPLIANCE AND COUNSEL**

- What is role of Compliance Officer?
- What is role of Outside Counsel?
- How to structure relationship?

**SAMPLE INTERNAL COMPLIANCE TREE**

- Incident Occurs
  - Compliance Department Notified
    - By phone or in person
    - Outside Counsel
      - By phone or in person
      - CEO/President
        - By phone or in person
        - Audit and Compliance Committee Chairperson
          - By phone or in person
          - Executive Leadership
            - By phone or in person
            - Executive Leadership
              - By phone or in person
              - Marketing
                - By phone or in person
                - Other Management as needed

*Includes but is not limited to HIPAA Allegations (dependent on size and scope), Fraud allegations, OCR issues, HHS issues, FBI and other regulatory investigations, etc.*
COMPLIANCE AND COUNSEL

- Need good, open and consistent communication
- Stay in touch and update as necessary
- Align goals and objectives
- Be a resource

CHIEF COMPLIANCE OFFICER ("CCO")

- The "conscious" of the organization doing what’s right to prevent and detect misconduct.
  - Review regulatory standards
  - Implement written policies and standards of conduct
  - Conduct effective training and education
  - Develop and ensure effective lines of communication
  - Conduct internal monitoring and auditing
  - Enforce standards through well-publicized disciplinary guidelines
  - Respond promptly to detected offenses and undertake corrective action
**Role of the CCO**

- CCO should report to the CEO / President
- CCO should have direct contact to the Board of Trustees
- CCO must have
  - **Trust** from and with employees
  - **Communicate** effectively
  - **Collaborate** with all levels of the organization and departments

**Conflict for CCO Who is an Attorney**

*Biggest obstacle for many CCO’s is the privilege question and “legal advice”*

- CCO is not legal counsel for corporation
- Split in roles must be recognized
- Manage expectations and scope of role
RECENT CASE LAW

- U.S. ex rel Baklid-Kunz v. Halifax Hospital Medical Center, 2012 WL 5415108 (M.D. Fla. 2012)

BARKO

- Addressed application of attorney-client privilege to internal investigation
- Could privilege attach to investigation related to company’s compliance program? - NO
- Investigations not tied to seeking advice from outside counsel
- Interviewed employees not informed of purpose of investigation
- Applied “but for” determination, i.e. the communication would not have occurred if not seeking legal advice
**Barko Concerns**

- Undercut many common practices and assumptions
- Called into question scope of attorney-client privilege
- Involvement and direction of legal counsel very important
- Can investigations driven by regulatory compliance be privileged?

**Kellogg Brown & Root (KBR)**

- Appellate decision reversing Barko
- Restored previous expectations regarding attorney-client privilege
- Four key takeaways:
  1. Being in-house counsel does not dilute privilege
  2. Investigations by non-attorneys at attorney’s direction can still be privileged
  3. No “magic words” needed
  4. Investigation pursuant to regulatory requirements can still be privileged
**KBR - Takeaways**

- Review policies and procedures regarding internal investigations
- Contact counsel when internal investigation needed
- Let attorneys direct investigations
- Document attorney’s involvement and fact investigation for seeking legal advice
- Despite no requirement for “magic words,” let employees know purpose of investigation
- Include attorneys in all communications
- Mark privilege on documents

**Halifax Health**

- Discovery decision addressed applicability of attorney-client privilege to emails and other communications
- Among documents are issue were created by or directed to in-house counsel and compliance personnel
- Court held that communications to in-house counsel and corporate employees **not** entitled to presumption of privilege
**HALIFAX HEALTH**

- Court found following types of communications not privileged:
  - Compliance logs
  - Audits and fair market value communications by compliance, finance and case management departments
  - Emails from in-house counsel and compliance personnel – compliance not considered legal

**HALIFAX HEALTH TAKEAWAYS**

- Non-lawyers should explicitly ask for legal advice or that info is to help with advice
- Just copying lawyer on email will not usually get privilege applied
- Clearly state when non-lawyers are acting at the instruction of an attorney
- Involve outside counsel
### REAL LIFE EXAMPLES

- **Medical Assistants billing**
  - Billing for services directed by physicians
- **HIPAA violations involving a resident**
  - Inappropriate access of medical records
- **Resident billing questions**
  - Billing for services performed by residents and supervision requirements
- **HIPAA violation involving a vendor**
  - Question whether patient information provided to medical equipment company
- **Division Chief billing but not performing services**
  - Billing for services not personally performed

### LESSONS LEARNED

- Involve counsel whether it be internal or external
  - Earlier the better
- Attorney’s ethical obligations may drive a different result than client wants
  - Client skirting the edge creates complex situation
- Open and honest relationship very helpful
- Attorney, in most instances, must respect client’s wishes
QUESTIONS?

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