

Ethical Considerations in Government Investigations

Panelists: David Peavler, H.D. Vest, Inc. (Irving, TX)
Vice President and General Counsel
Gil M. Soffer, Katten Muchin Rosenman, LLP (Chicago, IL)
Managing Partner
Jason Varnado, Jones Day (Houston, TX)
Partner

Moderator: Jay Dewald, Jackson Walker, LLP (Dallas, TX)
Partner

SCENARIOS

1. Who's the Client?
2. In-House Attorney's Obligations to Report Misconduct
3. Maintaining Confidentiality, Privilege – Here and Abroad
4. Internal Investigations – Obligations to Company Employees
5. Client Ignores Your Advice
6. Client Misrepresents Your Advice to Obtain Benefit

The “Who’s the Client?” Conundrum

- One of in-house counsels’ biggest challenges:
 - making clear who they represent
 - and, of equal importance, who they do not represent.
- Challenging because we are fellow employees and may have collaborated on other matters.
- Most often arises in:
 - HR/Employee Discipline matters
 - Ethics hotline/internal whistleblower complaints
 - Government or SRO inquiries
- For in-house counsel, we know who our client is: the company. **See Texas Rule 1.12(a); Model Rule 1.13(a).**
 - Typically not an issue where all interests align. **Texas Rule 1.12, Com. 5.**
- But do our officers, directors and co-workers truly understand where our loyalties lie?

But what if there is or could be a conflict?

- Rules burden the lawyer to clarify the relationships.
- A lawyer must explain the client’s identity when:
 - it is apparent that the company’s interests are adverse to those of the constituents with whom the lawyer is dealing, or
 - when explanation appears reasonably necessary to avoid misunderstanding on their part. **Texas Rule 1.12(e); Model Rule 1.13(f).**
- When the lawyer knows or reasonably should know that an unrepresented person misunderstands the lawyer’s role, the lawyer must make reasonable efforts to correct the misunderstanding. **Texas Rule 4.03; Model Rule 4.3.**

What to say when there is a potential conflict

- Where you think the company may be, or later become, adverse to the co-worker, you should inform them:
 - That there is a conflict or potential conflict of interest;
 - That you represent the company and cannot represent or provide legal advice to the co-worker;
 - That the co-worker may not be able to assert privilege over communications with you; and
 - That the co-worker may wish to obtain independent representation. ***Texas Rule 1.12, Comment 4.***
- Advisable to contemporaneously document this disclosure.

Internal Investigations or Government/SRO Inquiries

- Heightened consequences amplify the “Who’s the Client?” question.
 - DOJ’s Yates Memo and SEC’s Cooperation Program both incentivize companies to turn over information about individual culpability.
- *Upjohn* warnings are critical in these contexts.
 - ABA Model *Upjohn* disclosures are a good starting place.
 - Consider putting them in writing and having employees acknowledge receipt.
 - Is potential conflict or consequence so great as to merit separate counsel?
- Doing this poorly can have grave consequences.
 - *Sandusky/Penn State* cases

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