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Ethics: Going Beyond the Model Rules

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Scenario One

Scenario One: Reporting Up and Out

- MWU has to file Discharge Monitoring Reports for its outfalls. One of GC's duties is to provide legal advice re compliance with DMR obligations.
- Signer was the MWU employee designated as the "responsible official" who signs the DMRs.
- New Signer has just been assigned that task. In reviewing the DMRs for the last year, he is surprised to see that there are never any entries of discharges in excess of the limits. When he asks the supervisor of the outfalls how she is able to do it, she just smiles and says, "I guess Signer and I are just lucky. And we always give the lab people our spare football tickets."

- New Signer is suspicious. He asks a person in the lab who analyzes the samples. Lab Tech also just smiles and says, “It’s a science, but it’s also an art. How about those Seahawks?”
- New Signer reports his suspicions to his supervisor, who tells him not to worry about it.
- New Signer persists and goes up the ladder, but again is rebuffed.
- New signer then comes to GC. GC tells him that she’ll talk with senior management. She does so but is told not to worry about it.

Questions re Scenario One

- What are GC's ethical obligations? Does it depend on which state GC is in?

- If GC is in a state in which "reporting out" is permitted, what factors should GC consider in deciding whether and how to report out?

- Assume that GC has been rebuffed in her efforts in going up the ladder to deal with the failure of MWU to report repeated instances of discharges in excess of the permit limits and that she is not permitted by her state ethics rule to "report out." Concerned about her personal liability, she decided to resign from her job.
- Assume further that, after she resigns, GC learns that there is a health hazard to those living immediately downstream of the discharge associated with the levels and frequency of the MWU's excess discharges. Is she now free to disclose that information to the local newspaper?

Relevant Model Rules

RPC 1.6 Confidentiality of Information

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) To prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

RPC 1.6 (cont.)

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; . . . .

RPC 1.13 Organization as Client

(b) If a lawyer for an organization knows that an officer, employee . . . intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

RPC 1.13 (cont.)

Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

RPC 1.13 (cont.)

(c). . . If (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of the law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information related 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.

Scenario Two

Scenario Two: Corporate Miranda Warnings and Conflicts of Interest

- MWU, Signer and Lab Tech are charged criminally. They are also sued by Downstream Parents and Children for reductions in their property values and increased risk of cancer from their swimming in the river into which the outfall pours.
- Prior to the lawsuits, GC conducted an investigation, questioning Signer and Lab Tech. Prior to starting the interviews, GC gave each his/her Corporate Miranda Warnings.
- GC reported on the investigation to Head, MWU's top official. GC also asked Head what he knew about the discharge problem and what he did once he learned. No Corporate Miranda Warnings were given to Head.

- Outside Counsel is retained to represent MWU, Signer and Lab Tech in the civil action and MWU in the criminal case. The engagement letters recites that any information disclosed to Outside Counsel by any of the clients shall be deemed disclosed to all the clients. Also, if a conflict arises, Outside Counsel will be able to withdraw from representing the employee(s) and continue to represent MWU.
- GC tells Outside Counsel about her interviews with Signer, and Lab Tech.
- Outside Counsel evaluates the interviews and concludes that there is a conflict, because Signer and Lab Tech acted in violation of MWU policy and MWU can cut a good plea deal on the criminal case if it waives its privilege re the interviews with Singer and Lab Tech. Must Outside Counsel withdraw from representing Singer and Lab Tech in the civil case? Can they continue to represent MWU? How about GC?

- Concerned Parents and Children note Head's deposition. In preparing for the deposition, GC tells Outside Counsel about her discussions with Head about his role in the matter.
- Prior to interviewing Head, Outside Counsel and GC give Head his Corporate Miranda Warnings. Head asks them what they've been smoking -- he says he views GC as his own attorney. And he hopes she hasn't told Outside Counsel anything about her discussions with him

- Just prior to Head's deposition, Concerned Parents and Children add Head as a defendant. Can Outside Counsel represent Head in the lawsuit? Has Outside Counsel been tainted by what she learned about Head in talking to GC? Can Outside Counsel continue to represent MWU in the lawsuit? Can GC continue in her job as GC?
- GC hires New Counsel for MPU. Head gets his own counsel.
- GC attends Head's deposition, During the deposition, Head testifies that he was never told by anyone that there was any problem with the DMRs. This directly contradicts what Head told GC in their discussions. Can GC tell New Counsel what Head told her in the discussions? Does GC have an obligation to advise the Court about Head's false testimony?

Suggested Corporate Miranda Warnings, to be given before any interview or discussion

- Both in-house and retained counsel represent the company, not the individual
- The interview is privileged. The privilege belongs to the company, and can only be waived by the company
- The employee should keep the interview confidential, so as to preserve the privilege
- The purpose of the interview is to assist the lawyers in advising/defending the company
- The employee is free to, and depending on the circumstances may want to, retain his/her own counsel

Relevant Model Rules

RPC 1.13(f):

"In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."

Comment 10 to RPC 1.13

"There are times when the organization's interest may be or become adverse to those of one or more of its constitutents. In such circumstances, the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged."

Relevant Model Rules

RPC 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false.

RPC 3.3(a) cont.

If the lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

RPC 1.0 Terminology

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

Comment 1 to RPC 3.3

. . . [This Rule] also applies when the client is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition.

Comment 8 to RPC 3.3

The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of the testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

SCENARIO THREE

Scenario Three: Preservation and Discovery Issues

- Metro Water Utility (MWU) had an employee, Whistler, who had complained, in Month 1, about what he claimed were safety problems at the facility.
- Whistler's supervisor found that most of the alleged problems were meritless but did deal with the one real problem by the end of Month 2.
- Whistler continued to make complaints and in Month 3 told his co-workers that management was retaliating against him. His supervisor concluded there were no bases for the complaints. The supervisor also heard about the retaliation comments but didn't respond in any way, other than to put some notes about the event in his office computer and on his personal laptop.

- Whistler's work performance had been poor and got worse. In Month 5, the supervisor put Whistler on a Performance Improvement Plan. Whistler didn't react well to the PIP and renewed his grousing about retaliation.
- In Month 7, the supervisor sent MWU's General Counsel (GC) an email, seeking advice about the termination procedure and the retaliation issue. GC's reply email contained her advice.

- In Month 11, the supervisor terminated Whistler and sent an email to GC advising about the termination and about Whistler's threat, at his exit interview, to "sue MWU for all its worth."
- In Month 12, the GC got a call from Whistler's lawyer, demanding that Whistler be reinstated. The GC discussed the facts with the supervisor, concluded there was no merit, and told Whistler's lawyer to pound sand.
- In Month 24, Whistler brought a wrongful termination and wrongful retaliation lawsuit, against MWU and the supervisor, who had recently retired.

- In Month 24, GC retained Outside Counsel who asked GC if she had sent out a preservation notice. She hadn't but did so in Month 25.
- Whistler's lawyer served document requests for MWU. MWU serves objections and, after some back and forth, Whistler's lawyer brings a motion to compel regarding GC's Month 7 email.

Questions: MWU asserts that GC's Month 7 email to the supervisor is protected as attorney work product, arguing that it was made in anticipation of litigation. Any problems with that? Ideally, when would the preservation notice have been sent?

- Back in Month 12, when the GC had interviewed the supervisor, the GC also interviewed one of Whistler's co-workers, who told her that he thought there was some merit to Whistler's retaliation issue. But further investigation convinced GC that there was no real basis for the co-workers assessment, and so GC had discounted it in her email to the supervisor. GC did memorialize her interview with the co-worker. Tragically, the co-worker died a few weeks later in a car accident on the way to work.
- Whistler's lawyer now moves to compel production of GC's interview notes.

Question: Any problem with GC's assertion of attorney work product protection for the interview?

More facts and questions

- The supervisor had retired back in Month 18. Per MWU policy, his computer was reformatted and given to another employee. Also, per policy, his email was deleted from MWU's system.
- MWU agreed to retain Outside Counsel to defend the retired supervisor. No one discussed preservation with him until Outside Counsel interviewed him in Month 28. By that time, he'd gotten a new laptop, so his notes about Whistler and the drafts of his evaluations of Whistler that he'd kept on his old laptop were gone.

Questions: Does MWU have some spoliation problems? Does GC have any ethical issues? Does Outside Counsel?

Relevant Model Rules

RPC 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

More facts and questions

- When Whistler's lawyer served document requests for MWU and the retired supervisor, Outside Counsel sent copies to GC.
- GC forwarded the requests to HR and to the supervisor who replaced old supervisor, asking them to let her know if they had any responsive documents or emails. No communication was made to those in the chain of command above the supervisor level.
- HR sent GC the personnel file for Whistler, but no emails. The replacement supervisor sent an email saying she didn't have any documents or emails.
- The GC forwarded the personnel file and told Outside Counsel about the results of the search.

Questions

- Did the GC make an adequate effort to search for documents? Does she have an ethical obligation to do so?
- Should Outside Counsel have been more involved in determining the scope of the search? In supervising the document search? Does he have an ethical obligation to do so?

RPC 1.4 Communication

(a) A lawyer shall:

. . .

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RPC 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

. . .

(d) in pretrial procedure, . . . fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

More facts

To add to the misery, retired supervisor testified at his deposition about the notes on his office computer and his laptop. Needless to say, Whistler's lawyer brings yet another motion to compel, and for sanctions, and for a spoliation instruction.

Questions

- Does Outside Counsel have a duty to disclose the fact that relevant emails were deleted by MBU when the supervisor retired? Does GC have such a duty? When should these disclosures have been made?
- Does Outside Counsel have a duty to disclose the fact that supervisor's computer was reformatted and that potentially relevant documents were lost? Does GC have such a duty? When?
- Does Outside Counsel have a duty to disclose the fact that retired supervisor's old laptop contained documents responsive to Whistler's requests? Does the GC have to do so? When?

Yet more facts and questions

Prior to Whistler first making his complaints, MWU had permitted its employees to access MPU's Facebook page and create entries on it. While at his work site, Whistler posted entries re his complaints and his treatment on his page on MWU's Facebook page.

Questions:

- Does MPU have to collect those entries in response to a document request?
- Should those entries have been included within the scope of the preservation notice?
- What disclosure obligation does MPU have if the entries were deleted when Whistler was fired or at some time thereafter?

- If the Court imposes sanctions and/or a jury instruction re spoliation, does MWU have a claim against Outside Counsel? Does Outside Counsel have a conflict of interest re its subsequent work on the matter?
- If the Court imposes sanctions and/or a jury instruction re spoliation, does the retired supervisor have a claim against Outside Counsel? Against GC? Against MWU?
- Does Outside Counsel have a conflict of interest in continuing to represent both MWU and the retired supervisor?

Additional Questions or Comments?