CONFIDENTIALITY, CONFLICTS, AND THE ORGANIZATION AS A CLIENT

CONFIDENTIALITY

- Three sources:
  - 1. The Law of Evidence (attorney-client priv.)
  - 2. The Law of Agency (fiduciary)
  - 3. The Law of Civil Procedure (work product)

ATTORNEY CLIENT MATERIAL
(You know it when you see it)

- Communciation
- Between client and lawyer
- In confidence
- In course of seeking/giving legal advice

WORK PRODUCT

- “Documents and tangible things”
- Ordinary Work Product-substantial need
- Opinion Work Product-extraordinary need

AND THERE'S MORE

- Any information related to the representation

LOYALTY
(That Means Conflicts)

- Client Interest vs Lawyer's Interest
- Lawyer's Duty to Multiple Current Clients
- Lawyer's Duty to Current and Former Client
- Lawyer's Duty to current Client and Non-Client

CONFLICT EXISTS

- Directly adverse
- Significant risk the representation will be materially limited

BUT WAIT, THERE'S MORE

- Waiver on Informed Consent

  (Confirmed in writing)

Lawyer "reasonably believes"

“Haven’t seen ‘em in years

- Says who? (Ok, he’s gone)

Ok if not substantially related and acquired no confidential information

UNLESS

Informed consent, confirmed in writing

YOU STILL HAVE TO KEEP YOUR MOUTH SHUT

FACTS

- Western Chemical Company
  - Fertilizer Manufacturer
  - Among reasons American agriculture is the world's most productive
  - Fertilizers are composed of materials that are highly toxic.
  - Required to file detailed reports to the EPA
  - Filing an intentionally inaccurate report is a federal crime

FACTS

- Shortage of reportable material
- False reporting alleged
- You are hired to investigate

Will the results of your internal investigation be protected by the attorney-client privilege, the work product immunity or both?

- Leading case on the corporate attorney-client privilege is still Upjohn Co. v. United States, 449 U.S. 383 (1981).
- Upjohn is also still the leading case on lawyer work product in the corporate setting
- Supreme Court's embrace of the corporate privilege has been significantly qualified in Europe. Australian Mining & Smelting Europe Ltd. v. Commission, [1982] C.M.L.R. 264. The opinion was reaffirmed in Akzo Nobel Chemicals Ltd. v. Comm'n, 2007 WL 2693857, 4 C.M.L.R. 3 (Court of First Instance).

Any limits on Communications

Who should controls the privilege?

Is the Government any Different?

“We're all in this together“

Joint Defense Privilege

I don’t love you anymore

- Unless the parties have agreed otherwise in advance, the common interest privilege does not protect information disclosed by the participants in "subsequent adverse proceedings" between them. See Restatement Third, The Law Governing Lawyers § 76, Comment f.
- In re Regents of University of California, 101 F.3d 1386 (Fed.Cir. 1996), cert. denied, 520 U.S. 1193 (1997).

Information from multiple defendants or shared in multilawyer conferences constitute "privileged" or "confidential" information?

Work Product or Attorney Client Privilege?

- Restatement Third, The Law Governing Lawyers § 82
- In re BankAmerica Corp. Securities Litigation, 270 F.3d 639 (8th Cir.2001), cert. den. 535 U.S. 970 (2002), summarizes what a party must show to rely on the crime-fraud exception
- Under United States v. Zolin, 491 U.S. 554 (1989), the party must make a threshold showing that "the legal advice was obtained in furtherance of the fraudulent activity and was closely related to it."
- In re Richard Roe, Inc. 68 F.3d 38 (2d Cir.1995), involved a subpoena for legal records that the government argued "collectively have the real potential of being relevant evidence of activity in furtherance of a crime."

Release of information to prospective buyers?

Does a lawyer face civil liability for a failure to warn third party about a potential or completed client fraud?

- Restatement Third, The Law Governing Lawyers §67 tries to give lawyers some comfort in that regard
- In the mid-90s, creation of a private remedy against lawyers who allegedly assisted their clients to commit securities fraud was dealt a significant blow in Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994).
- The Supreme Court held that lawyers and others who themselves violate §10(b) can be held accountable, but "aiding and abetting" a violation is not enough to make a lawyer liable for civil damages under the securities laws

CONTACT WITH REPRESENTED AND UNREPRESENTED PERSONS

FACTS

- Rapid Corp. has a fleet of trucks and couriers to deliver packages throughout the city.
- The company has made a standing offer to return the shipper's fee for any package not delivered within one hour.
- There is reason to believe that this policy causes Rapid's drivers and couriers to take dangerous chances.

Attorney Lawyer just wants to question witnesses to an accident without the formality and expense of deposing them. What rules regulate his questioning?

- ABA Model Rule 4.2 is the principal authority
- ABA Formal Opinion 95-396 (July 28, 1995)
- Restatement Third, The Law Governing Lawyers §99

Whom does the rule seek to protect?

- Attorney Grievance Comm'n v. Kent, 653 A.2d 909 (Md.1995), Lawyer Kent's conduct violated both Rules 1.7 and 4.2.
- Parker v. Pepsi-Cola General Bottlers, Inc., 249 F.Supp.2d 1006 (N.D.Ill.2003), the court found that Pepsi and its attorneys violated Illinois' version of Model Rule 4.2.
- State v. Harper, 995 P.2d 1143 (Okla.2000), the court found no evidence the defense lawyer knew the true facts and held that, in the absence of such knowledge, there is no violation of Rule 4.2.' Rule 4.2, Comment [8] supports this result.

- Utah State Bar Ethics Advisory Opinion 98-07 (1998) examined whether a lawyer for the plaintiff in an accident may contact the adjuster for the defendant's insurance company directly. The opinion concluded, the plaintiff's lawyer may only contact the insurance company through its counsel unless the plaintiffs lawyer knows that the insurance company does not consider itself to be represent-ed by counsel in the matter.
- May a lawyer contact the in-house counsel of an opponent that is represented by outside counsel? ABA Formal Opinion 06 443 (Aug. 2006) says yes.

May represented clients talk to each other without going through their lawyers?

- State Bar of California, Formal Opinion 1993-131 (1993) gives the standard answer that the clients *may* talk; indeed, it says that failure to encourage such talks may forfeit opportunities to terminate disputes short of trial.
- Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 2002-3, says that a lawyer may advise a client what to say in the meeting between the clients
- In Holdren v. General Motors Corp., 13 F.Supp.2d 1192 (D.Kan 1998), the court recognized that clients may talk to each other without violating Rule 4.2, but it said plaintiff's counsel had "circumvented" Rule 4.2 in violation of Rule 8.4(a) by "encouraging" his client to obtain affidavits.

How about former employees?

- Restatement Third, The Law Governing Lawyers §100, Comment g
- In Camden v. Maryland, 910 F.Supp. 1115 (D.Md.1996), the court recognized that lawyers may contact most former employees of a represented firm, but said contact is prohibited with former employees who had "been extensively exposed to relevant trade secrets, confidential client information, or similar confidential information of an-other party interested in the matter." Id. at 1122.
- G-I Holdings, Inc. v. Baron & Budd, 199 F.R.D. 529 (S.D.N.Y. 2001), because both the interviewers and former employees were lay persons who might inadvertently disclose the privileged information, the court issued a protective order under which the interviews could only continue.
- Muriel Siebert & Co. v. Intuit Inc., 868 N.E.2d 208 (N.Y.2007), declined to disqualify Intuit's counsel for interviewing a former Siebert official that the lawyer knew had substantial privileged and confidential information.

Is the Government different?

- Restatement Third, The Law Governing Lawyers §101
- ABA Formal Opinion 97-408 (Aug. 2, 1997) found that Model Rule 4.2 would cover contact by the lawyer for a private party in a dispute with a government agency, but it also found that Rule 4.2 has "an important exception based on the constitutional right to petition and the derivative public policy of ensuring a citizen's right of access to government decision makers."
  - Do you see anything in Model Rule 4.2 that supports the require-ment of advance notice to government counsel?
  - Does Comment [5] to Model Rule 4.2 give textual basis for the requirement?
  - The ABA Committee reasoned that the requirement is necessary to allow the government official to consult counsel and learn where the boundary is between policy discussions and talk about the merits of the litigated case. Is that persuasive to you?

How do you handle your own crowd?

- Should she take a "we're all in this together" approach?
- Should she instead advise the truck driver to obtain independent counsel?
- How about the vice president in charge of the truck maintenance facility?
- The board members who approved the on-time delivery guarantee?
- Look beyond Model Rule 4.3; does Model Rule 1.13(f) provide important direction as well?
- Should Company lawyer become the lawyer for each of the corporate officers, directors and employees personally?
- What problems would arise if Bentley chose that course?

- United States v. Talao, 222 F.3d 1133 (9th Cir.2000). The defense counsel cannot use Rule 4.2 to prevent the prosecutor's contact with a “whistle-blower” employee. Otherwise, the court said, "subornation of perjury" could be "cloaked by an ethical rule.“
- See, Rule 3.4(f), permits advice to employees who are not clients not to talk to the other side if they will "not be adversely affected" by the refusal.

Duty to Give a *Miranda* warning?

- Restatement Third, The Law Governing Lawyers § 103, Comment e suggests the dilemma the situation presents.
- W.T. Grant Co. v. Haines, 531 F.2d 671 (2d Cir.1976). ABA Standards Relating to the Administration of Criminal Justice, The Defense Function, Standard 4-4.3(c) says: "It is not necessary for defense counsel or defense counsel's investigator, in interviewing a prospec-tive witness, to caution the witness concerning possible self-incrimination and the need for counsel.

What happens when the Cops come?

- ABA Prosecution Function Standard 3-2.7
- Consider United States v. Thomas, 474 F.2d 110 (10th Cir.1973), cert. denied 412 U.S. 932 (1973).

- State v. Miller, 600 N.W.2d 457 (Minn.1999),

Does this apply to the Government ,supervising FBI and other federal agents?

- United States v. Ryans, 903 F.2d 731 (10th Cir.1990), the court reported that "it is now well settled that [Model Rule 4.2] applies to criminal as well as civil litigation," and that it applies to agents of public prosecutors “when they act as the alter ego of the government prosecu-tor.” Id. at 735.

Should government lawyers be subject to the strictures of Model Rule 4.2?

- The Thornburg Memorandum
- The Reno Memorandum
- U. S. v. Ferrara, 847 F. Supp. 964 (D.D.C. 1993)
- McDade Act (28 U.S.C.A. 530 (B))

- United States v. Colorado Supreme Court, 87 F.3d 1161 (10th Cir.1996), was one of the first direct Justice Department challenges to the applicability of state ethics rules to federal prosecutors. The district court held that because no federal prosecutor had been disciplined by the state there was no case or controversy, but the Tenth Circuit said the mere threat of discipline was enough to give the court jurisdiction. The Rule 3.8 prohibition also raised a threat to the grand jury process sufficient to require a hearing in the district court. The court then remanded for further proceedings.
- Earlier, in a 5-4 decision written by Justice Scalia, United States v. Williams, 504 U.S. 36 (1992), had held that grand juries were independent of the judicial branch and traditional judicial regulation did not apply to their operation. Thus, usual court rules did not apply and federal prosecutors need not present exculpatory evi-dence to a grand jury.
- Matter of Howes, 940 P.2d 159 (N.M.1997) (per curiam), was the first state case to impose discipline on a federal prosecutor who complied with the Justice Department regulations on ex parte contact. The court also said that the Reno Memorandum was not promulgated under valid statutory authority, and the supremacy clause did not independently protect *F* federal prosecutor from state professional discipline for his official acts.
- Congress has now resolved this issue by federal legislation that expressly makes federal lawyers subject to state ethics rules. Called the McDade Act, the law took effect in April 1999 and is found at 28 U.S.C.A. § 530B. Do you agree with this resolution of the issue?

THOU SHALT NOT LIE, CHEAT OR STEAL

TEN COMMANDMENTS

- I. THOU SHALT NOT KILL
- II. THOU SHALT NOT BEAR FALSE WITNESS
- III. THOU SHALT NOT STEAL
- IV. THOU SHALT NOT COMMIT ADULTERY
- V. THOU SHALT NOT DISCRIMINATE

- VI. THOU SHALT NOT GOSSIP
- VII. THOU SHALT KNOW THY STUFF
- VIII. THOU SHALT JUST DO IT
- IX. THOU SHALT CALL THY CLIENT BACKETH
- X. THOU SHALT NO LOSE THY MIND

THOU SHALT NOT KILL

- RULE 8.4 Misconduct
- It is professional misconduct for a lawyer to commit a criminal act…..

Thou shalt not bear false witness

- Rule 3.3 Candor Toward the Tribunal
- A lawyer shall not…
- Fail to disclose to the tribunal legal authority….know to be directly adverse

- Rule 4.1 Truthfulness in Statements to Others

- A lawyer shall not…make a false statement of material fact or law….
  - (in negotiation, you may get a pass)

- Rule 7.1 Communications Concerning a Lawyer's Services
- A lawyer shall not make a false communication about the lawyer or lawyer's services

THOU SHALT NOT STEAL

- Rule 1.15 Safekeeping Property
- A lawyer shall hold property of others with the care required of a fiduciary

THOU SHALT NOT COMMIT ADULTERY

- Rule 1.8 Conflict of Interest: Current Clients: Specific Rules
  - (No sex)

THOU SHALT NOT GOSSIP

- Rule 1.6 Confidentiality of Information
- A lawyer shall not reveal a client's confidence without informed consent

THOUS SHALT KNOW THY STUFF

- Rule 1.1 Competence
- Know it, learn it or leave it

THOU SHALT JUST DO IT

- Rule 1.3 Diligence

THOU SHALT CALL THY CLIENT BACKETH

- Rule 1.4 Communication
- A lawyer shall keep a client reasonable informed

THOU SHALT NOT LOSE THY MIND

- Rule 1.16 Declining or Terminating Representation

- A lawyer shall not represent or withdraw if:… the lawyers physical or mental condition materially impairs the lawyer's ability