PANEL 5

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Ethical Considerations when Dealing with Complex Compliance Issues

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I. Risks to Clients Created By Inside Counsel

A. Inadvertent Disclosure

Model Rule of Professional Conduct 4.4(b) states that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." Comment [2] clarifies, "Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, 'document' includes e-mail or other electronic modes of transmission subject to being read or put into readable form."

What happens when an inadvertent disclosure is made orally?

In August 2001, Marvell Semiconductor's General Counsel Matthew Gloss leaves voicemail to Jasmine Network's in-house counsel, asking him to return the call. Gloss does not successfully hang up. Instead, Gloss can be heard saying, "Sehat doesn't go to jail. [Marvell VP] might go to jail." Later, another company officer says: "If we took that IP on the pretense just evaluating it, and put it in our product …." Jasmine later filed lawsuit, seeking $26 million plus punitive damages, for theft of trade secrets. *Jasmine Networks Inc. v. Marvell Semiconductor Inc.*, 1-01-CV-90141, Santa Clara County Superior Court, San Jose, CA.

Nine years of litigation, and two trips to the California Appellate Court later, the jury sides with Marvell.

B. Advertent But Unauthorized Disclosure

What happens when an inside counsel disclose confidential and/or privileged information intentionally?

In April 2003, a man named Dimitrios Biller goes to work as in-house for Toyota Motor Sales USA ("TMS"). In December 2006, Biller complains to Toyota's General Counsel, alleging unethical discovery practices. By September 2007, Biller's employment had ended and he entered a severance agreement with Toyota that included a $3.7 million settlement and a confidentiality provision. A year later, Biller launched consulting practice and website on which he used information about his work on TMS products liability litigation, that TMS believed to be confidential. TMS sued in state superior court seeking a temporary restraining order and permanent injunctive relief to prevent Biller from violating what TMS considered to be attorney-client privilege. In July 2009, Biller filed a complaint against TMS in the Central District of California, alleging violations under the RICO Act, constructive wrongful discharge, intentional infliction of emotional distress, and defamation. *Biller v. Toyota Motor Corp*., 2:09-5429, C.D.

Cal. By January 2011, an arbitrator rules for Toyota. The district court confirmed the abritrator's award, granting Toyota's summary judgment on Biller's RICO claims and ruling against Biller's claims of defamation and fraud. It also found for Toyota for breach of contract based on multiple instances of unauthorized disclosure of Toyota information, awarded Toyota $2.5 million for unauthorized disclosure and $100,000 in punitive damages, and ordered Biller to return documents. *Biller v. Toyota Motor Corp*., 2011 U.S. Dist. LEXIS 154655 (C.D. Cal., Mar. 17, 2011). In February 2012, the Ninth Circuit affirmed. *Biller v. Toyota Motor Corp*., 668 F.3d 655 (9th Cir. Cal. 2012).

1. Other Cases

- *Prudential Insurance Co. v. Massaro*, 38 Fed. Appx. 828 (3d Cir. 2002): Company granted permanent injunction against former inside counsel who disclosed privileged and confidential information. The court held, "[a]bsent a judicial finding [authorizing disclosure, Massaro's] confiding in attorneys adverse to Prudential, giving sworn statements to authorities investigating the company, [and] filing an affidavit in open court all were in flagrant violation of Massaro's duty as an attorney."
- *Kennedy v. Gulf Coast Cancer & Diagnostic Center*, 326 S.W.2d 352 (2010): Former inside counsel now in litigation with the company cannot retain and use a memorandum from its outside counsel regarding the company's potential liability for an insider's alleged misconduct.

2. Can you terminate a lawyer-whistleblower?

- *Compare Weider v. Skala*, 593 N.Y.S.2d 752 (1992) (associates in law firms may be special), *with Bartel v. NBC Universal, Inc.*, 543 F.3d 901 (7th Cir.)

(journalists are not); *Horn v. New York Times*, 760 N.Y.S.2d 378 (neither are physicians); *Bohatch v. Butler & Binion*, 977 S.W.2d 543 (Tex. 1992) (neither are physicians).

- *Rojas v. Debevoise & Plimpton*, 634 N.Y.S.2d 358 (N.Y. Sup. Ct. 1995) (fired associate failed to allege that she was "faced with the choice … of continued employment or possible suspension or disbarment for violation of an ethical obligation").
- *Waldman v. NYNEX Corp.*, 1999 WL 292634 (N.Y. Sup. Ct. 1999) (denying motion to dismiss claims of in-house attorney, where question of fact as to whether group "functioned solely as an in-house law firm, or … was more in the nature of a mid-level manager").

- *Van Asdale v. International Game Tech.*, D. Nev. 3:04-703 (5/24/11) (lawyers-whistleblowers awarded $4.6M for wrongful termination under SOX theory).

C. Megaleaks

With Wikileaks' Julian Assange on the prowl for corporate secrets, leaks can turn into public relations disasters for large companies. Assange has stated, "We have one [leak] related to a bank coming up, that's a megaleak. It's not as big a scale as the Iraq material, but it's either tens or hundreds of thousands of documents depending on how you define it. … It will give a true and representative insight into how banks behave at the executive level in a way that will stimulate investigations and reforms, I presume." *See* Andy Greenberg, *WikiLeaks' Julian Assange Wants To Spill Your Corporate Secrets*, Forbes (Nov. 29, 2010).

The industries of pharmaceuticals, technology, energy, and the environment may be targets.

II. Handling Investigations: Lessons from *U.S. v. Stevens*

Model Rule of Professional Conduct 4.1, Truthfulness In Statements To Others, states that, "[i]n the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."

In one of the more dramatic, but under-reported, events highlighting risks facing corporate counsel in recent years, a lawyer in a well respected corporate law department was the subject of a criminal trial in April and May 2011 arising out of her corporate practice of law.

In the late 2002 and early 2003, attorney Lauren Stevens, inside counsel at GlaxoSmithKline, represented her corporate client in connection with an FDA investigation regarding certain alleged off-label promotions of a GSK product. Stevens did what lawyers in her position do—she worked with a team of lawyers, conducted an investigation, and fielded and responded to various FDA requests. Based on the public record, it appears the investigation was largely concluded by 2003.

Seven years later, however, attorney Stevens found herself on the receiving end of an indictment and aggressive criminal prosecution. It appears that, in the intervening years, first the FDA, then the DOJ, had reason to doubt the veracity of Stevens' responses in the investigation.

In November 2010, Stevens was indicted on multiple federal criminal charges, including obstruction, falsification of documents, and aiding and abetting. he prosecutors alleged that Stevens made materially false statements and concealed evidence relating to unapproved uses;

falsely represented that she had completed the production requested by the FDA; falsely denied that company has promoted drug for off-label used; and falsely claimed that the company's uses were consistent with label. All of these steps were alleged to be part of a scheme to curtail further FDA investigation.

The case is instructive on many levels. First, there is the issue of what larger message the prosecution was intended to send. According to the DOJ press release: "This indictment shows that we will investigate those responsible for unlawful acts done on a company's behalf. When individual employees are identified, they will be held accountable for their illegal activity. Individual employees now know that concealing information from the government, obstructing investigative activity and making false statements to federal investigators will be investigated and prosecuted," said Richard DesLauriers, Special Agent in Charge, FBI, Boston Division.

Similarly, the Wall Street Journal reported that: "Government officials have said they decided to go after more individuals to create a stronger deterrent and prevent companies from viewing fines as merely 'a cost of doing business.'"

Second, the case is instructive as it shows how a prosecution against a corporate lawyer—a relatively rare event—will be tried and defended. For example, the DOJ apparently was quite interested in introducing into evidence materials from CLE courses attorney Stevens had attended in the past, as part of its efforts to establish that she knew or should have known that she was engaged in improper conduct. Think about that the next time you're earning CLE credits.

Third, the case highlights an omnipresent risk for attorneys: that work product intended to remain privileged and confidential might, someday, be used in an unintended way. In this case, the government was able to access internal law department memoranda, including one

highlighted in the indictment itself. Specifically, as noted in the DOJ press release, the indictment focused on a previously privileged legal memorandum that was prepared by Stevens that set for forth the "pros" and "cons" of producing the slide sets to the FDA. According to the indictment, one of the "cons" was that the slide sets would provide "incriminating evidence about potential off-label promotion of [the drug] that may be used against [the company] in this or in a future investigation." Instead of providing the requested slide sets to the government, Stevens represented that the company's responses to the FDA's requests was "final" and "complete."

Happily for Ms. Stevens, at the close of the prosecution's case, the trial judge directed a judgment of acquittal in her favor. Further, the trial judge took a dim view of the government's efforts to use privileged information in the prosecution, noting that "[t]he prosecutors were permitted to forage through confidential files to support an argument for criminality of the conduct of the defendant." To the judge, the internal privileged documents "show a studied, thoughtful analysis of an extremely broad request from the Food and Drug Administration and an enormous effort to assemble that information and respond on behalf of the client."

The question remains though, if the judge had left the question to the jury, would it have reached the same conclusion?