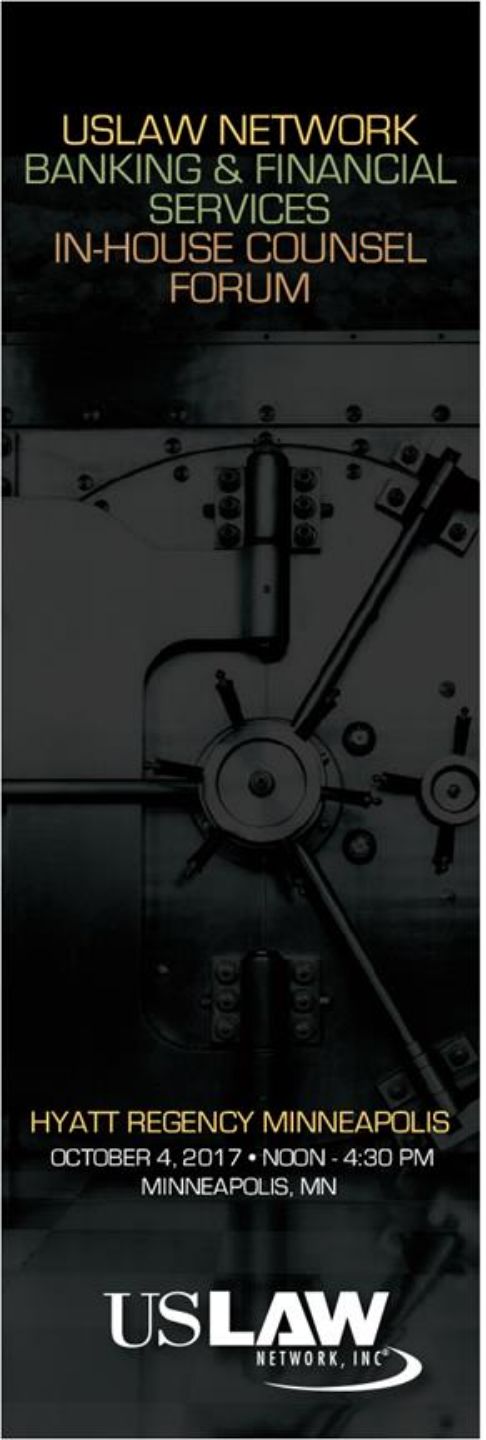

Ethics Panel Discussion

Hyatt Regency Minneapolis

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2017 GC Survey

- Compliance and ethics management as the top priority for the year ahead
- Labor and Employment issues ranked second at 29 percent
- Outside counsel management ranked third at 27 percent

Unlicensed Practice of Law

Anwar v. Fairfield Greenwich Ltd., 982 F. Supp. 2d 260 (S.D.N.Y. 2013)

- An unlicensed in-house attorney was compelled to give testimony, though the company for which the attorney worked objected on the grounds of attorney-client privilege.
- The court held that attorney-client privilege was not applicable in this case, as the company could not have reasonably believed that the in-house attorney was licensed.

Unlicensed Practice of Law (cont.)

Crews v. Buckman Labs. Int'l, 78 S.W.3d 852 (Tenn. 2002)

- An associate in-house attorney was terminated for reporting, both to the company and to the Board of Law Examiners, that the company's general counsel "engaged in the unauthorized practice of law"; the attorney filed a retaliatory discharge claim.
- This retaliatory claim was permitted, as the attorney possessed a permissive duty to report the unlicensed practice of law and a mandatory duty to refrain from furthering the general counsel's application for bar admission.

Advising Employees, Officers and Shareholders

Dinger v. Allfirst Fin., Inc., 82 Fed. Appx. 261 (3d Cir. 2003)

- In-house counsel advised two officers as to the date by which their stock option rights would terminate; the officers later realized that the attorney had informed other stock option holders of a later date by which the stock options were required to be exercised. The two officers sued the attorney for breach of fiduciary duties and negligent misrepresentation of a material fact
- Though the court held that the in-house counsel did not breach his fiduciary duties and did not negligently misrepresent a material fact, the court did state that there had been a ““confidential relationship and a corresponding fiduciary duty” between the attorney and the officers.

Conflicts of Interest Between Company and Company Employees

Yanez v. Plummer, 164 Cal. Rptr. 3d 309 (Cal Ct. App. 2013)

- An employee was fired subsequent to a deposition in which the employee's interests were counter to the company's interests. The employee then sued the company's in-house counsel for malpractice, as the attorney had told the employee that he represented the employee during the deposition.
- As the attorney represented both the employee and the company, there was a conflict of interest; the attorney was required to seek an informed waiver of the conflict from the employee.

Dual Role of In-House Attorney Can Jeopardize Attorney-Client Privilege

- The attorney-client privilege only attaches if the attorney is performing legal work. **National Texture Corp. v. Hymes**, 282 N.W.2d 890 (Minn. 1979)
- A client must expressly seek legal advice in order for there to be attorney-client privilege. **Leer v. Chicago, M., St. P. & P. Ry. Co.**, 308 N.W.2d 305 (Minn. 1981)
- However, the attorney is allowed to consider business considerations when giving legal advice, so long as the legal advice is not solely incidental to the provision of business advice. **Aetna Casualty & Surety Co. v. Sup. Ct.**, 153 Cal. App.3d 467 (1984)
- If the "sender is not actively seeking legal advice from the attorney," it might not be enough to "simply copy[] an in-house attorney on a memorandum or an email message" in order to obtain attorney-client privilege.

Inadvertent Disclosure and Federal Rules of Evidence 502

- Federal Rules of Evidence 502 states that inadvertent disclosures of privileged material in federal proceedings do not "operate as a waiver of privilege in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error."
- In order to fall under the protections of Rule 502, the attorney must make reasonable efforts "To protect the confidential information in the first place, and if incidents of inadvertent disclosure happen, act promptly in response to them."
- Also under Rule 502, "a voluntary disclosure of protected information in a federal proceeding . . . results in a waiver only of the communication or information actually disclosed."
  - There is only a waiver of the communication or information that was not disclosed if: (1) the original waiver was intentional and (2) "fairness requires a further disclosure of related, protected information."
- Minnesota law states that the client may waive the attorney-client privilege, as the privilege is "personal to the client," though an attorney might potentially have implied authority to waive the client's privilege. **Swanson v. Domning**, 86 N.W.2d 716 (1957); **Carroll v. Pratt**, 76 N.W.2d 693 (1956).

Preserving Evidence

Harkabi v. SanDisk Corp., 275 F.R.D. 414 (S.D.N.Y. 2010)

- After his company was issued a document preservation letter, in-house counsel attempted to preserve certain evidence (including digital evidence) by circulating four "Do-Not-Destroy" memoranda and directing a company officer to preserve the laptops on which the digital evidence was stored.
- Over a year later, in-house counsel approved a request wherein the data from these laptops were preserved, and the laptops were reissued to other employees. However, the preserved data was later unable to be retrieved.
- The court held that, while the company acted with a culpable (at least negligent) state of mind, terminating sanctions were not warranted as there was a lack of proof that the evidence was intentionally destroyed; instead, the court imposed an adverse inference instruction and monetary sanctions.

False Discovery Responses

Haeger v. Goodyear Tire and Rubber Co., 793 F. 1122 (9th Cir. 2015)

- Goodyear's legal counsel for a products liability case "failed to search for, and/or withheld" relevant documents; one attorney also lied to the Judge about submitting all required discovery documents.
- The attorneys were held to have committed misconduct in bad faith and were sanctioned.
  - While this opinion was amended and superseded on denial of rehearing en banc by **Haeger v. Goodyear Tire and Rubber Co,** 813 F.3d 1233 (9th Cir 2016), the substantive findings of that opinion were essentially the same as the previous 2015 ruling.
  - However, the 2016 case was reversed and remanded by **Goodyear Tire & Rubber Co. v. Haeger,** 137 S. Ct. 1178 (2017), which overturned the award granted to plaintiffs, as the lower court had awarded plaintiffs their legal fees for "both expenses that could be causally tied to Goodyear's misconduct and those that could not." The USSC stated that a court may only grant legal fees that "the innocent party incurred solely because of the misconduct."

Whistle Blowing/Reporting Improper Business Practices

Pang v. International Documents Services, 356 P.3d 1190 (Utah 2015)

- An in-house attorney was fired after warning the company that it was violating usury laws; the attorney then sued for wrongful termination (among other things).
- Though a Rule of Professional Conduct required in-house counsel to inform higher authority within the company when the company violated the law in a way that was likely to substantially injure the company, the attorney's termination did not violate public policy because that specific Rule of Professional Conduct did not encapsulate a "public policy of sufficient magnitude to qualify as an exemption to the at-will employment doctrine."

Whistle Blowing/Reporting Improper Business Practices (cont.)

In re Koeck, D.C. Ct. App. Bd. on Prof'l Responsibility, No. 14-BD-061 (8/30/16)

- An in-house attorney (Koeck) was fired and filed a retaliation complaint with OSHA. She, after being encouraged by her own counsel (Bernabei), also released confidential documents to the press and to government entities.
- Both Koeck and Bernabei engaged in misconduct and were sanctioned, as they released confidential information to the press; however, Bernabei did not violate the Rules of Professional Conduct by assisting Koeck in disclosing the information to the SEC, as Bernabei subjectively believed that disclosure was permitted, and this belief was objectively reasonable.

Whistle Blowing/Reporting Improper Business Practices – Alternate Perspective

Van Asdale v. International Game Technology, 577F.3d 989 (9th Cir. 2009)

- IGT's in-house attorneys were fired and brought a claim against the company "under the whistleblower protection provisions of Sarbanes-Oxley."
- The Appellate Court held that the lower court erred in granting summary judgment to IGT, as the attorneys engaged in protected conduct when they reported their concerns about illegal activity in violation of the Sarbanes-Oxley Act to higher-ups in the company.

Giving Advice to Related Companies

GSI Commerce Solutions, Inc. v. BabyCenter L.L.C., 618 F.3d 204 (2d 2010)

- A law firm represented Johnson & Johnson ("J&J") specifically for certain compliance matters and the agreement between the firm and company attempted to waive certain conflicts of interest; the same law firm also represented BabyCenter, a wholly-owned subsidiary of J&J. After the firm's representation of BabyCenter ended, the firm attempted to represent a client directly adverse to BabyCenter, who moved to disqualify the firm.
- The court held that the firm was disqualified, as J&J and BabyCenter had a "substantial operational commonalty" to be treated as one client, and the firm still represented J&J.
- Furthermore, the waiver of conflicts contained in the original agreement between the law firm and J&J was narrowly construed and held inapplicable to the current situation.

Giving Advice to Related Companies (cont.)

In re Teleglobe Commc'ns. Corp., 493 F.3d 345 (3rd Cir. 2007)

- A parent company acquired a second company but later abandoned it; debtor subsidiaries of the second company then sued the parent company and requested certain materials from the parent company in discovery.
- The parent company claimed that many requested documents were protected by the "common interest privilege," as the parent company's attorneys had consulted with the second company's employees and attorneys about "matters where [the companies] shared a common legal interest."
- The court held that the common interest privilege did not apply, as it only applies "when clients are represented by separate counsel."
- Instead, the court remanded the case to the district court for further fact finding in lines with the opinion (specifically addressing whether the parent company and debtors were "jointly represented by the same attorneys on a matter of common interest") to determine whether the court would compel the parent company to produce the documents.

Risks When In-House Counsel for Family or Closely Held Business

People v. Miller, 354 P.3d 1136 (Colo. O.P.D.J. 2015)

- Miller served as a shareholder and a director of his family's corporation, as well as legal counsel for the corporation. He entered into multiple interested transactions with the corporation without obtaining the corporation's consent; he also hid the transactions from the board of directors.
- The court held that Miller violated various Rules of Professional Conduct, including rules concerning concurrent conflicts of interest and a rule prohibiting dishonest, fraudulent, or deceitful conduct.

Disgorgement as a Remedy for Unethical Conduct

Kaye v. Rosefielde, 75 A.3d 1168 (N.J. Super. Ct. App. Div. 2013)

- An attorney who served as both Chief Operating Officer and general counsel for a company participated in misconduct by engaging in business conduct with a client without following the Rules of Professional Conduct concerning conflicts of interest.
- Rules of Professional Conduct addressing conflicts of interest apply to in-house counsel, even if said counsel is also an officer of the corporation it represents.

Kaye v. Rosefielde, 121 A.3d 862 (N.J. 2015)

- Even if an employer has not sustained economic loss due to an employee's breach of the duty of loyalty, a court may still order the equitable disgorgement of that employee's compensation.

Court Did Not Allow Disgorgement as a Remedy for Unethical Conduct – Alternate Perspective

Chism v. Tri-State Constr., Inc., 193 Wn. App. 818 (Wash. Ct. App. 2016)

- Though a jury awarded an in-house attorney certain bonuses, the trial court disgorged $1.1 million of his award because the in-house counsel had violated various ethical rules of conduct.
- The Court of Appeals reversed the trial court's disgorgement, as there was generally an absence of precedent to allow disgorgement of attorney wages (as opposed to attorney fees) for violations of the ethical rules.
- Specifically, the court stated that "[b]ecause there is no standard measure for a disgorgement order, nor a requirement that it be imposed as a compensatory measure, it poses a significant threat to the legislative policy in favor of the consistent payment of employee wages."
- This reasoning is supported by the concept that "lawyer-employees are protected by the same wage and hour laws that apply to employees in comparable positions."

Questions?

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