



CONFLICTING ROLES AND RESPONSIBILITIES OF THE GENERAL COUNSEL AND THEIR ETHICAL IMPLICATIONS

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GENERAL COUNSEL ROLE BECOMING INCREASINGLY COMPLEX

- GCs are playing a critical role in protecting their organization from compliance risks.
- Given recent attention on corporate scandals there is increased emphasis on governance issues.
 - Higher expectation on general counsel.
 - Increased duty on general counsel to communicate wrongdoing to higher authorities in organization.
 - GCs of non-profits not immune to these trends.

GENERAL COUNSEL ROLE BECOMING INCREASINGLY COMPLEX (cont.)

- General counsel often directly accountable/responsible for:
 - Risk assessment
 - Document management
 - Code of conduct
 - Compliance training
 - Risk management

THE UNIVERSITY AS CLIENT

- General counsel role by its very nature leads to heightened risk of ethical dilemmas.
 - Aspect of being GC that is most attractive (working closely with one client/employer) is precisely what makes in-house ethical considerations challenging.
 - University management likely to view GC as more than just an attorney working for the school.
 - Advice GC provides not exclusively legal.
 - Maintaining confidentiality to client creates ethical conflicts when constituents of client behave in manner adverse to client.

THE UNIVERSITY AS CLIENT (cont.)

- Overview of the organization as client
 - ABA model rule 1.13: “a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
 - Who are the university or college’s duly authorized constituents?
Board of trustees; senior management, faculty, employees.
 - Whether or not client is an organization or an individual, lawyer owes client the same duties:
 - Fiduciary duty of undivided loyalty
 - Duty to maintain client confidence and secrets
 - Duty to represent client competently

SCENARIOS RAISING HEIGHTENED ETHICAL CONCERNS

- Overview of the organization as client (cont.)
 - Examples in which ethical issues surrounding representation of university or college are particularly nettlesome:
 - Internal investigations.
 - Determining who to take directions from when there may be competing instructions from board members or university management.
 - Determining whether general counsel is acting as a legal or business advisor in determining scope of attorney client privilege .

ETHICAL ISSUES ARISING DURING INTERNAL INVESTIGATIONS

- University may ask General Counsel to conduct internal inquiries into allegations of employee or management misconduct. Two main issues raised: (a) are investigations protected by attorney client privilege; and (b) what are General Counsel's duties to the organization and to its employees.

- Attorney Client Privilege Issues in Internal Inquiries
 - Privilege determination varies by jurisdiction.
 - Does Upjohn rule that privilege applies to communications with all corporate employees provided certain criteria are met have any application in the University context.
 - Minority Control Group test-conversations only protected if they are with officers and agents responsible for directing organization's actions in response to legal advice.
 - Regardless of which rule applies, attorney client privilege extends only to communications, not facts.

ETHICAL ISSUES ARISING DURING INTERNAL INVESTIGATIONS

- General Counsel's Duty to Represent Entity in Internal Inquiries
 - Under ABA Model Rule 1.13, General Counsel represents the organization acting through its duly authorized constituents.
 - A lawyer must, in matters within the scope of representation, "avoid impermissible conflicts of interest." **Restatement of the Law Governing Lawyers**, Section 16.
 - Conflicts arise if employees of organization believe that counsel represents them, not the entity.
 - Attorney- Client relationship may arise by implication. **See Restatement of the Law Governing Lawyers**, Section 14.

ETHICAL ISSUES ARISING DURING INTERNAL INVESTIGATIONS

- General Counsel should protect the University by adequately disclosing who you represent, and the nature of the investigation. In Upjohn, the Supreme Court recommended that counsel state:
 - Counsel is conducting an internal investigation on behalf of the organization.
 - Purpose of the investigation is to provide legal advice to the entity.
 - Counsel represents the entity and not any individual employee.
 - The employee may seek independent legal representation (note: this is not necessarily the case in all inquiries).
 - Any information disclosed to counsel may not be protected by attorney-client privilege, may be disclosed to the organization, and may even be disclosed to third parties at the organization's discretion.

TAKING DIRECTION FROM THE ORGANIZATION

- General Counsel's duty is to represent the University. Generally this means acting under the direction of President and the Board and accepting their decisions.
- Duties of General Counsel where following directions may result in substantial injury to the organization.

TAKING DIRECTION FROM THE ORGANIZATION (cont.)

- Reporting Out: Amended ABA Model Rule 1.6:
 - A lawyer *may* disclose client confidences to the extent he reasonably believes it is necessary
 - 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, or
 - 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 service.

TAKING DIRECTION FROM THE ORGANIZATION (cont.)

- Amended ABA Model Rule 1.13: if a lawyer knows of a violation of law or a legal duty to the organization in a matter related to the representation that is likely to result in substantial injury to the organization.
 - *And* the highest authority in the organization fails to timely and appropriately address the violation, then the lawyer
 - *May* reveal information relating to the representation, but only if and to the extent the lawyer believes necessary to prevent substantial injury
- The rule does not apply to internal investigations or representation to defend the organization or an officer or employee.
- State ethical obligations.

MULTIPLE ROLES OF GENERAL COUNSEL

- Strains on attorney-client privilege due to multiple hats of General Counsel.
 - Many General Counsel say they give business advice frequently.
 - Communications during contract negotiations may have legal and business components.
 - Funneling information through General Counsel to claim privilege.

- General Counsel as Manager
 - Non-legal roles complicate privilege issues.
 - Practical tips to protect privilege.

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Prior to joining Sallie Mae, Mr. Lavet served as a trial attorney in the Civil Division of the U.S. Department of Justice, and as a partner with the law firm Cole, Corette & Abrutyn, where he specialized in complex commercial litigation, and securities litigation. He is a member of the bar of the District of Columbia. He served as a past President of the Washington Metropolitan Area Corporate Counsel Association and as a member of the Board of Directors of the Association of Corporate Counsel.

Mr. Lavet graduated with honors from the University of Pennsylvania in 1976 and received his law degree with honors, from Georgetown University Law Center in 1979.