The Developing Role of Corporate Counsel in the Company, and Its Evolving Effects on the Outside Counsel Relationship

ABA TIPS SECTION CONFERENCE – NY 2019
Our Esteemed Panel

- **Marcy Cohen**, Chief Legal Officer & Managing Director, ING Americas, New York, NY
- **Melanie D Margolin**, SVP, General Counsel & Corporate Secretary, Wabash National Corporation, Lafayette IN
- **Shruti Krishnan**, Associate Legal Counsel, Tabletop Media, LLC d/b/a Ziosk LLC, Dallas, TX
- **Catherine Kunz**, Senior Counsel, Raytheon Company, Sterling VA

Moderated by William Kruse, Vice President & Counsel, Gallup, Washington, DC
What are the issues?

- In-House Budgets for Outside Counsel are decreasing
- In-House teams are becoming mini-firms
- Alternative Service Providers are providing a value alternative
- How do Outside Counsel continue to deliver value
- In-House Counsel dislike the project and cost management of Firms
- Firms refuse to evolve to a model that makes sense to corporate clients
"Pretend you are happy to hear from me"

That's a pretty low bar!
We don’t want to redo your work to make it presentable for our BOD or Senior Staff
When we say we have a deadline. We mean it. If you Outside Counsel force us up against a deadline, we bring it In-House next time.
Where are #inhouse lawyers sending their work? 63% of law departments say work previously being done by outside counsel is being taken in-house (per @SKovalan of @ALMLegalIntel at #AALL18) - #InHouseTwitter

10:26 AM - 16 Jul 2018

12 Retweets 13 Likes

Dan Cotter @DCotter1 - 16 Jul 2018
Replying to @DavidLat @SKovalan @ALMLegalIntel
That does not bode well for private practitioners of any size. It is a growing number.
Billings.....We HAVE to talk.
The Corporate Counsel Survival Guide

Yes. This is a shameless book plug.
There is more to a Legal Matter than just Winning

“Everyone comes at issues looking at them through the prisms of their own experiences. As outside counsel, I often viewed things on my desk as tasks to ‘win’ at. Some of this is just because I like to compete. A lot of it was just my way of looking at the issue.

My clients weren’t always looking at it the same way. This wasn’t a game, and it wasn’t something to ‘win’. It was a life matter that had real world consequences. They wanted their life back to normal, and they wanted the headache over.”
There is more to a Legal Matter than just Winning

“Litigation has a way of messing up all of the little things that need to occur for a business. Corporate designee depositions have a real business impact. Think of all the things your CIO could be doing for your company if she wasn’t stuck in depo prep, and then a deposition, and then worrying about how she did in her deposition.”
There is more to a Legal Matter than just Winning

“The hourly billing model has always had an ill side effect of putting at least one of the outside counsel’s interest against that of the company client. The financial incentive for a litigation matter to last forever can’t be ignored, even if I do believe that almost all good outside counsel are ethical at their core and don’t intentionally draw out a matter. You still can’t ignore that the conflict exists.”
In House lawyers know that some outside counsel are swayed by perverse incentives.

Resolving things quickly doesn’t make for a ton of billables!
Example:

Litigation Counsel drafting a multi-defendant brief on behalf of all defendants without consulting In-House Clients!

More money in billables, but not in the interest of the client (at least without permission).
To Break Up With Outside Counsel - Or Just Date Other Outside Counsel on The Side?

“I hate to say it, and my outside counsel friends are probably spitting up their coffee if they are reading this, but you need to occasionally see what else is out there. This isn’t your wife, it’s a vendor for your company, and they need to be continuously vetted for competency, results, and cost.”
To Break Up With Outside Counsel - Or Just Date Other Outside Counsel on The Side?

“In some ways, this is a problem of the modern law firms’ own doing. The days of lawyers staying at firms in established practice groups are over. Firm mergers, whole practice areas jumping ship, and some firms outright closing shop are the new normal.”
“Do you remember your law firm early years? If you went to BigLaw, or even most medium sized firms, there was a regimented training program. Even the small boutique litigation firm I first went to had at least a couple senior partners who undertook my training in a semi-structured manner.”
In-House Teams need help with Training and Development
“Those of you heading in house are in for a surprise on the lawyer training front. Most companies don’t have a formal lawyer training program at all. They might have company training. They’ll have development training for other roles in production, operations, and maybe even accounting. Lawyers, you’re on your own.”
We have a lot of software that didn’t exist a few years ago.

We’re using it to insource work and manage outside counsel spend.

Practice Notes
- Alternative Fee Arrangements
- Drafting an Effective RFP for Legal Services
- Outside Counsel Conflicts of Interest
- Secondment of Outside Counsel to Law Departments

Standard Documents
- Engagement (Retainer) Letter: Alternative Fee Arrangement
- Engagement (Retainer) Letter: Contingency Fee Arrangement
A BRONX TALE
KEEPIN’ IT REEL
ETHICS AT THE MOVIES

Presented by:
Ritu Gupta, Jin Y. Hwang, Troy E. Larkin, and Michael S. Schwartz
Moderator: Thomas McNally
May 2, 2019
American Bar Association
Model Rules of Professional Conduct
“MRPC”

• What are the MRPC
  – MRPC set forth the rules of ethics that govern the conduct of attorneys in multiple jurisdictions throughout the U.S.
  – MRPC govern interaction between an attorney and
    • The client
    • The adversary
    • The court
    • The public

• Where to find the MRPC
1.1: Competence
1.2: Scope of Representation and Allocation of Authority between Client and Lawyer
1.4: Communication
1.6: Confidentiality of Information
3.2. Expediting Litigation
3.3: Candor Toward the Tribunal
3.5 Impartiality and Decorum of the Tribunal
8.4 Misconduct
“THERE’S A LOT MORE TO COMPETENCE THAN A LAW DEGREE AND A MODICUM OF COURTROOM SKILL.”

FRED THOMPSON
The Competent Lawyer?

BRODERICK & GANZ

THEY READING GLASSES
MRPC 1.1 states:

- A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

SNL: Broderick & Ganz

- Is Jeremy Ganz a competent lawyer?
- Is Lisa Broderick a competent lawyer?
Scope of Representation & Allocation of Authority b/t Client & Lawyer: MRPC 1.2

- a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

- b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

- c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

- d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
The Consigliere

- INSERT GODFATHER CLIP
Did Tom Hagen violate the tenets of MRPC 1.2?
Interaction of the MRPC
Confidentiality and the Criminal
Confidentiality
Confidentiality - Bridge of Spies
Confidentiality of Information
MRPC 1.6

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) 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;
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;
4) to secure legal advice about the lawyer's compliance with these Rules;
5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
6) to comply with other law or a court order; or
7) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
Confidentiality
An Ethical Dilemma
Confidentiality Questions
Confidentiality and the Rules of Evidence

- In Federal Court Confidentiality is codified in Rule of Evidence 26
Confidentiality Among The Firm’s Clients: Indecent Proposal
Confidentiality Among The Firm’s Clients

- Counsel taking a call from one client in the presence of another client
- Disclosure of one side of conversation still a violation
- Other considerations
  - Is it permissible for the lawyer to negotiate this contract for services
  - 1.2(d) Lawyer shall not counsel or assist a client in conduct lawyer knows is illegal
  - 1.4(a)(5) Lawyer required to advise client that his assistance is not permitted
It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.
“To produce, or not to produce, that is the question.”

Ellen M. Boyle
A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
A lawyer shall not:

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
A lawyer shall not:

diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.
[cont.] A Lawyer shall not

- (g) present, participate in presenting or threaten criminal charges to obtain an improper advantage in a civil matter.
Delay, Delay, Delay

An incompetent lawyer can delay a trial for months or years. A competent lawyer can delay one even longer.

— Evelle J. Younger —
MRPC 4.1 Truthfulness in Statements to others

In 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.

- Mr. Ward violated this

MRPC 4.2 Communication with Person Represented by Counsel:

- In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

- Mr. Ward didn’t violate in speaking with low level employee
MRPC 4.3 Dealing with Unrepresented Person; In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

- Mr. Ward violated MRPC 4.3 by not disclosing who he was!
MRPC 3.2. Expediting Litigation

- A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client and shall treat with courtesy and consideration all persons involved in the legal process.
- An attorney who fails to make a reasonably diligent effort to comply with proper discovery requests may be found guilty of dilatory practices.

RPC 3.3 Candor To the Tribunal

- Obligated to make a reasonably diligent inquiry into how long it would take to comply with plaintiff’s discovery request before representing to the court that it was burdensome and would take thousands of hours.
MRPC 3.4. Fairness to Opposing Party and Counsel

- 3.4(d) “in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party”
- Ms. Ward violated 3.4(d) by failing to comply with a reasonable discovery request
Depositions and Ethics
The Deposition: The Insider

THE INSIDER  THE RAINMAKER
Objections NJ Rules of Court 4:14-3.1(c)

- No objection shall be made during taking of deposition other than to form or to assert a privilege
- Right to otherwise object is preserved for trial
- No objection shall be expressed in language that suggests an answer
- Can only direct witness not to answer question on grounds of privilege, confidentiality, or a limitation to a previously issued court rule
Ethics at Deposition

- Once Witness Sworn in there shall be no communication between counsel and deponent except to assert privilege, confidentiality, limited purposes of prior court order N.J. Ct. Rule 4:14-3

- 3.3(a)(3) Lawyer not knowingly offer evidence that is false

- 3.4(b) Lawyer shall not counsel or assist a witness to testify falsely
Ethics Issues: Depositions and Trial Testimony

- **Change in Testimony**
  - Attorney required to Disclose to Adversary when client is going deviate from pre-trial deposition testimony. McKenney v. Jersey City Med. Ctr. 167 N.J. 359 (2001) RPC 3.3

- **Sanctions**
  - Fines
  - Barring witness
  - Award of Attorney Fees
    - Overturns sanctions from misconduct at deposition in medical malpractice case
Impartiality and Decorum of the Tribunal RPCS 3.5 & 3.6
Impartiality and Decorum of the Tribunal: RPC 3.5

- A Lawyer shall not
  - (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law
  - (b) communicate ex parte with such person except as permitted by law
  - (c) Engage in conduct intended to disrupt a tribunal; or
  - (d) have communication with any adjudicative officer about his/her post-retirement employment
A Lawyer shall not:
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(c) communicate with a juror or prospective juror after discharge of the jury if:
   (1) the communication is prohibited by law or court order;
   (2) the juror has made known to the lawyer a desire not to communicate; or
   (3) the communication involves misrepresentation, coercion, duress or harassment; or
(d) engage in conduct intended to disrupt a tribunal.
Ethical Issues

- Ex Parte contact
- Excused by potential that national security interests are implicated?
- Contact produces the result defense desired
Attorney Advertising:

Quick LAWYER

SPEEDY LEGAL SOLUTIONS!
RPC 7.1 Communications Concerning a Lawyer’s Service

- (a) A lawyer shall not make false or misleading communications about the lawyer, the lawyer’s services, or any matter in which the lawyer has or seeks a professional involvement.

- (b) Unethical for lawyer to use advertisement known to be disapproved by Committee on Attorney Advertising or a substantially similar ad.
A communication is false or misleading if it:

- (a)(1) contains material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not material misleading
A communication is false or misleading if:

(a)(2) is likely to create an unjustified expectation about the results the lawyer can achieve, or implies that the lawyer can achieve results by means that violate the RPC or other law.
A communication is false or misleading if it:

- (a)(3) compares lawyer’s services with other lawyers’ services unless the name of the comparing org. is stated; basis can be substantiated and communication contains a disclaimer “No aspect of this advertisement has been approved by the Supreme Ct. of NJ”
A communication is false or misleading if:

- (a)(4) relates to legal fees other than:
  - (i) a statement of the fee for initial consult
  - (ii) a statement of the fixed contingent fee charged for a specific legal service
  - (iii) a statement of range of fees for specifically described services
  - (iv) a statement on specified hourly rates
  - (v) the availability of credit arrangements
  - (vi) a statement of the fees charged by a qualified legal assistant
NJ Opinions on Advertising

Balance of 1st Amendment with Dignity of Profession

Petition of Felmeister & Isaacs: NJ Supreme Court in 1986 attorney ads predominantly informational:
1. Related to criteria that would “assist the consumer in his or her selection of an attorney”
2. Reflect the performance of attorneys and the quality of the services they render
3. Limiting prohibition on use of drawings, animations, dramatization, music, or lyrics to television advertising

Dwyer v. Cappell: 2014 3rd Circuit ruled attorney’s website quoting portions of judicial opinions favorably discussing his legal abilities was not misleading under RPC 7.1 and barring the quotes violated 1st Amendment
(a) Subject to 7.1, a lawyer may advertise through public media. All ads must predominantly be informational. No drawings, animations, dramatizations, music or lyrics may be used.

(b) Keep a copy of a recording of ad for 3 years

(c) A lawyer shall not give $$ to person recommending the lawyer’s service
Attorney Advertising in Cinema: Art Imitating Life

- Advertising for Weight Loss Litigation in Film
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ETHICS AT THE MOVIES

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© Lifehack Quotes
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MRPC 8.4(g)

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.
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Did Ms. Ward Violate RPC’s?

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Impartiality and Decorum of the Tribunal: RPC 3.5

- A Lawyer shall not
  - (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law
  - (b) communicate ex parte with such person except as permitted by law
  - (c) Engage in conduct intended to disrupt a tribunal; or
  - (d) have communication with any adjudicative officer about his/her post-retirement employment
A Lawyer shall not:
(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
(b) communicate ex parte with such a person except as permitted by law;
(c) communicate with a juror or prospective juror after discharge of the jury if:
   (1) the communication is prohibited by law or court order;
   (2) the juror has made known to the lawyer a desire not to communicate; or
   (3) the communication involves misrepresentation, coercion, duress or harassment; or
(d) engage in conduct intended to disrupt a tribunal.
“Bridge of Spies”
Ethical Issues

- Ex Parte contact
- Excused by potential that national security interests are implicated?
- Contact produces the result defense desired
Attorney Advertising:

Quick Lawyer

Speedy Legal Solutions!
RPC 7.1 Communications Concerning a Lawyer’s Service

- (a) A lawyer shall not make false or misleading communications about the lawyer, the lawyer’s services, or any matter in which the lawyer has or seeks a professional involvement.

- (b) Unethical for lawyer to use advertisement known to be disapproved by Committee on Attorney Advertising or a substantially similar ad.
A communication is false or misleading if it:

(a)(1) contains material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not material misleading
A communication is false or misleading if:

- (a)(2) is likely to create an unjustified expectation about the results the lawyer can achieve, or implies that the lawyer can achieve results by means that violate the RPC or other law.
A communication is false or misleading if it:

(a)(3) compares lawyer’s services with other lawyers’ services unless the name of the comparing org. is stated; basis can be substantiated and communication contains a disclaimer “No aspect of this advertisement has been approved by the Supreme Ct. of NJ”
A communication is false or misleading if:

- (a)(4) relates to legal fees other than:
  - (i) a statement of the fee for initial consult
  - (ii) a statement of the fixed contingent fee charged for a specific legal service
  - (iii) a statement of range of fees for specifically described services
  - (iv) a statement on specified hourly rates
  - (v) the availability of credit arrangements
  - (vi) a statement of the fees charged by a qualified legal assistant
Balance of 1st Amendment with Dignity of Profession

Petition of Felmeister & Isaacs: NJ Supreme Court in 1986 attorney ads predominantly informational:
1. Related to criteria that would “assist the consumer in his or her selection of an attorney”
2. Reflect the performance of attorneys and the quality of the services they render
3. Limiting prohibition on use of drawings, animations, dramatization, music, or lyrics to television advertising

Dwyer v. Cappell: 2014 3rd Circuit ruled attorney’s website quoting portions of judicial opinions favorably discussing his legal abilities was not misleading under RPC 7.1 and barring the quotes violated 1st Amendment
(a) Subject to 7.1, a lawyer may advertise through public media. All ads must predominantly be informational. No drawings, animations, dramatizations, music or lyrics may be used.

(b) keep a copy of a recording of ad for 3 years

(c) A lawyer shall not give $$ to person recommending the lawyer’s service
Advertising for Weight Loss Litigation in Film
Attorney Advertising in Cinema: Art Imitating Life