

Everything You Need to Know About Ethics You Learned In Kindergarten – Or Did You?

Ethical Reminders for In-House Counsel

by: Goulston & Storrs

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Practical Tips to Avoid Privilege Waivers

by: [Richard M. Zielinski](#)

- Ask yourself “is this document really necessary?” and take a “less is more” approach to the creation of privileged documents. People tend to create documents carelessly, then try to tack a privilege label on them after the fact when the subpoena or document request comes in.
- Make it your practice, to the extent possible, to record privileged information on a separate document. Many documents prepared by in-house counsel, such as meeting notes, Board minutes, and the like, contain both privileged and non-privileged information.
- Label all privileged communications – including e-mails – as such.
- Segregate privileged documents in corporate files and restrict access to those files to persons in the Company’s control group and other employees on a “need to know” basis. Remember, these documents are supposed to contain “confidence and secrets,” and should be handled as such.
- Think twice before routinely copying lower-level employees and outside consultants on privileged communications.
- Whenever making large scale document productions, in either a business or litigation context, take at least the following precautions:
 - Screen the documents for privilege, and record what those steps were, and
 - Before producing the documents, when the playing field is level for all parties involved, enter into “clawback” agreements that inadvertently produced privileged documents will be returned to the party producing them. The rules of evidence and civil procedure endorse such agreements.
- Finally, if you learn that privileged documents have been produced inadvertently, take immediate steps to get them back.

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Confidential Communications with In-House Counsel in Europe

by [Timothy J. Dacey](#)

Privilege Rules in the European Union:

- In competition cases brought by the European Commission, communications with in-house counsel are not considered privileged.. *AM & S Europe Ltd. v. Commission*, European Court Reports 1982 page 01575; *Azko Nobel Chemicals Ltd. v. European Commission*, Joined Cases T-125/03 and T-253-03, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003A0125:EN:HTML>.
- In matters governed by national law, some European countries recognize the legal professional privilege for communications with in-house counsel. Examples: England, Ireland, Spain. Some countries do not. Examples: France, Austria, Italy, Sweden. Some countries recognize the privilege, but require additional steps to protect the independence of in-house counsel. Example: the Netherlands.
- Several European countries do not permit in-house counsel to be a member of country's bar or law society. Example: France.
- For a summary of privilege law country-by-country, see Eversheds, *Attorney Client Privilege in Europe*, <http://www.eversheds.com/documents/AttorneyClientPrivilege.pdf> (includes instructions on how to say "dawn raid" in twenty different languages.)

Implications for U.S. Litigation:

- In deciding what privilege law to apply, U.S. courts look to see which country has the predominant interest in whether a communication should remain confidential. If a transaction touches base with the U.S., American law applies. Otherwise, communications with a foreign attorney will be governed by the privilege law of the foreign country.
- Under U.S. law, a privileged communication must usually be with a member of the bar. Accordingly, communications with foreign in-house counsel who are not licensed attorneys in their own countries will not be treated as privileged, even when American law applies.
- Voluntary submission of privileged communications to a foreign law enforcement agency will usually result in a waiver of the privilege in the United States..
- Compelled submission of privileged communications to a foreign law enforcement agency will not result in a waiver of the privilege, but the party claiming the privilege must show that any available privilege was asserted and that disclosure was made in response to court order, subpoena, or a similar demand backed by sanctions for non-compliance.

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Practical Implications:

- On matters governed by the law of the European Union, employ outside counsel admitted to practice in a member state to direct the Company's compliance program.
- On matters governed by the law of the individual nation, know whether local law recognizes the legal professional privilege for in-house counsel. If it doesn't, consider using outside counsel for legal advice on sensitive matters.
- In hiring in-house counsel abroad, be sure to comply with any requirements of local law to insure that communications with counsel are covered by the legal professional privilege. (E.g., the requirements of Dutch law to insure the independence of attorneys employed as in-house counsel.)
- If your company is concerned about preserving the privilege in U.S. litigation, try to limit voluntary disclosure of information to foreign government agencies. Be prepared to show that all available privileges were asserted and that any disclosure to foreign authorities was made under compulsion, i.e. under a threat of specific sanctions, after all available privilege claims have been exhausted.
- And always remember the wise advice of Martin Lomasney: "Never write if you can speak; never speak if you can nod; never nod if you can wink."

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Tips for In-House Counsel Conducting Internal Investigations

by [Richard J. Rosensweig](#)

- Before commencing the investigation, counsel should consider whether s/he has a conflict. Determine whether investigation may touch upon matters on which counsel previously advised anyone at the company as this prior involvement may materially interfere with counsel's independent professional judgment. Also, if counsel currently represents in another matter any member of the company who is a subject of the investigation, s/he must at least advise both the company and the individual about a potential conflict of interest and obtain a written waiver concerning the conflict from both before accepting the assignment.
- Counsel should avoid dual representation if at all possible. It creates complexities regarding the role and duty of counsel. It can also could jeopardize the company's ability to cooperate with authorities and waive the attorney-client privilege to avoid a criminal or other consequences.
- Counsel should advise each person he interviews about the purpose of the interview, that counsel is retained to provide advice to the company in the matter at hand, and that the interview is necessary for counsel to provide legal advice to the company.
- Counsel should deliver the Upjohn (a/k/a Corporate Miranda) warning before commencing any interview with a member of the company. Advise the interviewee that counsel represents the company, not the employee, and that while the interview is subject to the attorney-client privilege, the privilege is the company's, and not the employee's, and the company alone can assert or waive it. Also advise the interviewee that s/he has no role in making a decision whether or not to waive the privilege.
- Advise the employee that the substance of the interview may be disclosed to third parties, including the government.
- Prepare a form summarizing the Upjohn warning and ask the employee to sign this form affirming that he has received and understood the warning.
- Do not provide legal advice to a member of the company who is being interviewed about the investigation.
- If at any point a member of the company who is being interviewed asks whether s/he needs his or her own attorney, tread carefully, refer to any company policies on retention of counsel, and refrain from advising the interviewee not to seek counsel.

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- After each interview, memorialize the substance. The memorandum should document the delivery of the Upjohn warning, counsel's opening remarks, witness questions and clarification provided by counsel, closing remarks, and where appropriate, counsel's mental impressions with respect to the witness. Mark this memorandum as being subject to attorney-client privilege and the work product doctrine.
- Where the company itself is the focal point of a government inquiry and/or allegations of significant corporate malfeasance have been lodged, management, including usually the general counsel's office, should not be, and should not be perceived to be, in charge of the investigation. A committee of the Board of Directors consisting of the independent members should be delegated the task by the Board of Directors of overseeing the conduct of the investigation.
- Outside counsel which has not had a substantial prior relationship with the Company and its senior management should be retained to conduct significant internal investigations.
- Agree upon specific reporting procedures and protocols for documenting the investigation.

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Ethical Dos and Don'ts for Web 2.0

by [Laura D'Amato](#)

Lawyers are increasingly using social networking sites like Facebook, Linked In and Twitter for marketing and other purposes like gathering information about parties and witnesses in a case or executives involved in a transaction. In addition, sites like Legal OnRamp, Martindale-Hubbell Connected and others are specifically designed to facilitate communication between in-house counsel and outside counsel. Many commentators believe that the use of social media is going to transform the practice of law much like email did a decade or so ago. While there is no doubt that these sites can be useful, they do raise numerous ethical issues for lawyers and other serious issues for their clients. Below is a list of “dos and don'ts” for you and your company to keep in mind when venturing into the world of social media.

DO be clear about your identity and role in a matter or transaction.

Commentary: Rule 8.4(a) of the Rules of Professional Conduct prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. The Philadelphia Bar Association Professional Guidance Committee recently issued an advisory opinion addressing whether an attorney could hire a third party to become a Facebook “friend” of a potential non-party witness so that the attorney could obtain information about the witness for use at trial. The Professional Guidance Committee said that such conduct would violate the ABA Model Rule 8.4(a) (upon which the Massachusetts Rule is based).

The opinion can be found at:

http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf

DON'T disclose any confidential or proprietary information.

Commentary: Sites like Legal OnRamp and Martindale-Hubbell Connected provide in-house counsel with the opportunity to ask questions and pose hypothetical problems to outside counsel. If the questions/hypotheticals are not crafted carefully, or if the conversations get too specific, they could inadvertently reveal sensitive information about your company.

DO limit the group of people who can view your Facebook page and the number of recipients to whom your Twitter communications are sent.

Commentary: The use of Facebook and other sites for personal purposes can be problematic professionally. A good rule of thumb is to avoid posting anything that you don't want your colleagues or adversaries to see. Also remember that any of your “friends” on Facebook can post (potentially embarrassing) information about you. Therefore, it is a good idea to make sure your privacy settings are set properly so that only your “friends” have access to your posts.

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DON'T violate copyright or other intellectual property laws.

Commentary: One of the key benefits of social media is how easy it is to access and share information with large audiences. Be careful, though, when referring to or attaching other materials that you do not violate any copyright or other intellectual property laws.

DO consider developing a policy for social media sites by employees.

Commentary: By now it is standard practice for companies to have email and internet usage policies. Although these policies are a good foundation for social media policies, they do not cover all of the issues raised by the use of social media (a relatively new technology) by employees. For example, email and internet policies probably don't address the need for transparency in an employee's communications or the need to protect the company's confidential and proprietary information. A good social media policy can set guidelines for the use of social media in a manner that is productive for the company while minimizing any potential problems.

DON'T exaggerate your experience or qualifications.

Commentary: Rule 7.1 prohibits a lawyer from making a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as whole not materially misleading. Although this rule is particularly relevant to the use of social media sites for marketing purposes, it is also important to keep in mind when preparing your profile on LinkedIn or other professional networks.

DO make sure that you and your company are not involved in a matter before commenting on it.

Commentary: Although this may sound obvious, don't post a message or comment on any matters that your company is involved in. Rule 3.6 of the Massachusetts Rules of Professional Conduct prohibits a lawyer from commenting on any investigation or litigation in which the lawyer is or has been involved except in certain limited situations. Perhaps less obvious, you also should not take a position in a blog that may be inconsistent with a position you (or your outside counsel) are taking in a pending matter.

DON'T comment negatively about the judiciary.

Commentary: This issue has become a popular one on legal blogs due to a recent New York Times article about a handful of lawyers who have gotten themselves in trouble for making derogatory comments about judges. Although it is rarely a good idea to post negative comments about other members of the legal profession, Rule 8.2 specifically prohibits a lawyer from making a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or a magistrate, or of a candidate for appointment to judicial or legal office.

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A copy of the New York Times article can be found here:

<http://www.nytimes.com/2009/09/13/us/13lawyers.html?scp=1&sq=schwartz%20legal%20battle%20online%20attitude&st=cse>

DO include a disclaimer.

Commentary: When blogging about legal issues, it often is a good idea to include a disclaimer stating that any posts made by attorneys do not constitute legal advice and do not create an attorney-client relationship. Although not foolproof, they can be helpful in establishing the parameters of your participation in a particular blog or website.

DON'T communicate with represented parties.

Commentary: Rule 4.2 provides that “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 lawyers has the consent of the other lawyer or is authorized by law to do so.” Be careful not to unwittingly communicate with a represented party by “friending” them or adding them to your Twitter network.

DO use common sense.

Commentary: As the founder of lexblog, Kevin O’Keefe, pointed out in a September 16, 2009 post on his blog called “Real Lawyers Have Blogs,” which he wrote in response to the New York Times article referenced above, it is important to remember that although the use of social media may be relatively new to lawyers, the same good old-fashioned rules of common sense apply.

Mr. O’Keefe’s blog post can be found here:

<http://kevin.lexblog.com/2009/09/articles/social-networking-1/ny-times-misses-boat-on-legal-ethics-versus-lawyers-online-activity/>