



# WHO WANTS TO BE AN ETHICAL LAWYER?

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## QUESTION #1:

True or False:

In-house counsel have a separate set of ethical rules by which they must abide.



## Why the Landscape for In-House Counsel is Different:

- Ethics rules are written for lawyers in private practice
- Less applicability, yet higher expectations

Answer: False



# The Big Six

1. Identifying Your Client
2. Confidentiality
3. Duty as Gatekeepers
4. Attorney-Client Privilege
5. Conflicts of Interest
6. Unauthorized Practice of Law



## QUESTION #2

True or False:

All in-house counsel must be licensed to practice law in the state where they have their office or work.



# The Unauthorized Practice of Law

Answer: Trick Question!

It depends on where you are.

- “Registration” of in-house counsel (NY).
- “Limited” in-house licensing (NJ, PA).
- No specific restrictions on in-house counsel (AR, NH, MS)



## QUESTION #3

True or False:

An in-house counsel can be disbarred for failing to supervise third party vendors.



# The Unauthorized Practice of Law

- ABA Model Rules 5.1 & 5.3.
- In-house counsel are responsible for those they supervise, including subordinate attorneys
- In-house counsel are responsible for third-party vendors acting on their behalf

Answer: True





## QUESTION #4

True or False:

Supervisory in-house attorneys are always responsible for unethical conduct of subordinate attorneys.

Answer: False



# Best Practices to Avoid the Unauthorized Practice of Law

1. Conduct proper due diligence
2. Obtain client consent
3. Document all supervisory activities



## QUESTION #5

True or False:

Representation of the CEO of the company is equivalent to representation of the company itself.



## Identifying Your Client

“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”

ABA Model Rule 1.13

Answer: False



# Identifying Your Client

## Sample *UpJohn* warning:

In my role as general counsel for the company, I represent only the interest of the company and the company is always the client. In the past when I have provided guidance to you, I did so for the benefit of the company. Our investigation may uncover information that potentially puts your personal interest in conflict with those of the company and the company may choose to disclose our communications. Now that your personal interests may potentially diverge from those of the company, it may be appropriate for you to seek separate counsel to insure that your personal interests are protected. As the company's counsel, I cannot act in that role.



## QUESTION #6

True or False:

An *UpJohn* warning (449 U.S. 383) must only address actual conflicts between the organization and the individual.



# Identifying Your Client

Ingredients of an *UpJohn* warning:

1. Counsel's role is to represent the organization, not the individual.
2. Actual or potential conflict between the organization and the individual.
3. Communication may not be confidential – privilege belongs to the corporation and may be waived.
4. Individual may want to retain independent counsel.

Answer: False



## QUESTION #7

True or False:

An in-house lawyer must give an *UpJohn* warning not only when the lawyer knows but also when the lawyer reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.





# Identifying Your Client

Give an *UpJohn* warning when:

- The lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Answer: True



## QUESTION #8

True or False:

The duty of confidentiality is broader than the attorney-client privilege.



## Confidentiality

- Loose lips sink ships
- Broader than you think
- Duty to preserve
- Know your surroundings
- Strong passwords

Answer: True



## QUESTION #9

True or False:

In-house lawyers are always permitted to post their experiences with their company on social media as long as it does not violate the attorney-client privilege.



## Confidentiality

As it applies to social media...

....Everywhere and everlasting

ABA Model Rule 1.8(b)

Answer: False



## QUESTION #10

True or False:

The general counsel of a company is vested with sole authority to report illegal activity of an employee to the CEO of the company.



# Duty as Gatekeepers of the Organization

- “Up-the-ladder” reporting duty
- What happens when the top of the ladder is not high enough?

ABA Model Rule 5.1

Answer: False



## QUESTION #11

True or False:

An in-house lawyer must only report actual misconduct of an employee.





## Duty as Gatekeepers of the Organization

- “Where were the lawyers??”
- Ethical duty to take steps to prevent harm to the company

Answer: False



## QUESTION #12

True or False:

In-house lawyers can use trusted outside counsel to help fulfill their duty as gatekeepers of the organization.



# Duty as Gatekeepers of the Organization

## How to Avoid Failing as a Gatekeeper:

1. Effective use of trusted outside counsel
2. Guidelines and training
3. Maintain documentation

Answer: True



# Attorney Client Privilege

“The general counsel has one foot planted firmly in the shifting treacherous terrain of the law, and the other planted just as firmly in the oozing swamp of business.”

T. Terrell, 46 Emory L.J. 1005 (1997)



## QUESTION #13

True or False:

There is a rebuttable presumption of a  
attorney-client privilege for  
communications between in-house  
counsel and business executives.



# Attorney Client Privilege

- Fighting the presumption of business partner v. attorney
- Courts' presumption

Answer: False



# Attorney Client Privilege

“To minimize the threat of corporations cloaking information with the attorney-client privilege in order to avoid discovery, the claims of privilege in the corporate context will be subject to a heightened level of scrutiny.”

Southern Bell v. Deason,  
632 So.2d 1377 (Fla. 1994)



# Attorney Client Privilege

## Negative Assumptions:

- If outside counsel is involved, the confidential communication is presumed to be a request for the provision of legal services
- If in-house counsel is involved, the presumption is that the attorney's input is more likely business than legal in nature

Lindle v. Life Investors Ins. Co. of America,  
267 F.R.D. 382 (N.D. Okla. 2010).





## QUESTION #14

True or False:

To be protected by the attorney-client privilege, the communication from an attorney must be in response to a request for legal advice.



# Attorney Client Privilege

## Should Apply If:

- Legal advice of any kind is sought
- From a professional legal advisor
- The communication relates to that purpose
- Made in confidence
- By the client
- Are in his or her instance permanently protected
- From disclosure by himself or by the legal adviser
- Except that the protection can be waived

8 J. Wigmore, Evidence 2292

Answer: True



## QUESTION #15

True or False:

Attorney notes are always protected by the attorney-client privilege?



# Attorney Client Privilege

## What is NOT Privileged....

- Facts
- The reason counsel was retained
- Foundational questions
- Documents transmitted to an attorney
- Attorney notes
- Witness statements
- Drafts of documents

Answer: False



## QUESTION #16

True or False:

Business advice that is given in conjunction with legal advice is protected by the attorney-client privilege.



# Attorney Client Privilege

## When Will the Privilege Apply?

- Only when you are acting as a lawyer providing legal advice, NOT when you are acting as a business partner providing business or other advice
- Predominant Purpose Test. See *In re County of Erie*, 473 F.3d 413 (2d Cir. 2007).

Answer: False



## QUESTION #17

True or False:

If an in-house lawyer provides legal advice in response to a non-privileged email, that response is cloaked with the attorney-client privilege.

# Attorney Client Privilege

"The mere presence of a lawyer's name at the top or bottom of a document isn't the bell that causes the dog named Privilege to salivate."

*Nedlog v. ARA Serv., Inc.*, 131 F.R.D. 116, 117 (N.D. Ill. 1989)

Answer: False







# Attorney Client Privilege

## No Privilege Examples:

- No privilege in Georgia Pacific v. GAF Roofing Mfg. Co., 1996 WL 29392 (S.D.N.Y.) because lawyer acted as negotiator.
- No privilege in Sackman v. Liggett Group, Inc., 167 F.R.D. 6 (E.D.N.Y. 1996) because “the role delegated to attorneys was one that could have been performed by ... a doctor, scientist, or tobacco company executive.”



## QUESTION #18

True or False:

Copying outside counsel will help cloak business advice with the attorney-client privilege.



# Attorney Client Privilege

Ways to Ensure the Attorney-Client Privilege will Apply:

1. Properly mark privileged communications
2. Set out the legal purpose at beginning of document
3. Clearly separate business advice from legal advice
4. Train the company employees on the difference

Answer: False



## QUESTION #19

True or False:

Hiring your brother-in-law as outside counsel or a third party vendor can create a conflict of interest.



# Conflicts of Interest

- Hiring Conflicts of Interest
- Conflicts internal to the company

Answer: True



# Conflicts of Interest

## When Conflicts Can Arise:

1. Internal investigations
2. Drafting employment agreements
3. Drafting compensation agreements
4. Advising clients on exercising stock options
5. Managing outside counsel
6. Benefits advice
7. Affiliate transactions
8. Insolvency situations

# QUESTIONS?

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