HONING YOUR SKILLS TO AVOID ETHICAL PITFALLS
Tips on Leadership and Communication Strategies
For You and Your Clients

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HONING YOUR SKILLS TO AVOID ETHICAL PITFALLS

I. INTRODUCTION

In-house lawyers today provide a wide variety of services to their corporate clients, ranging from management of major disputes, to the negotiation and drafting of often-complex agreements, to navigating domestic and international compliance issues. Clients expect us to have the legal and negotiating skills to handle these broad portfolios seamlessly. We are also often sought out as business advisors and "sounding boards." Of course, we are called upon to provide these services in a time when budgets are being squeezed, staffing is lean, demands are growing, and deadlines are short, and everybody wants what they want "now." (Come to think of it, does it ever seem that there was a time when it was not that way?) In these respects, the demands placed on in-house counsel are quite similar to those faced by our outside counsel colleagues.

It is also important that we appreciate some important differences between in-house counsel and our brethren in outside law firms. These differences play a role in defining the ethical issues in-house counsel must deal with and include:

A. Though an in-house lawyer's duty is to the company, and not to an individual or a department, in practice it can be challenging to draw a distinction between the interests of the organization and the executive who believes his or her course of action is aligned with the organization's best interests.

B. We in-house lawyers only have one client, and we depend on that client's continued recognition of the value of our services for our livelihood.

C. Our clients often view us in-house lawyers, differently than outside lawyers. We are "members of the team," while outside counsel are often viewed as "objective" outside advisors who may not be as "committed" to the organization.

All of these factors present opportunities for ethical pitfalls for in-house counsel, and we need to have the skills necessary to manage the somewhat unique ethical challenges presented thereby. While my perspective is obviously that of an attorney in a large multinational corporation with a global law department of several hundred lawyers, I believe the observations and suggestions in this paper can apply to practitioners in nearly every kind of corporate environment, whether large or small, and whether your practice is exclusively domestic or global in nature, transaction or litigation-oriented. Hopefully, the suggestions and lessons described in the following pages, which are based on real-life experiences will provide some insight and tips useful to other in-house practitioners.

When clients are asked what they want in their in-house counsel, they often identify the following characteristics:

- Capable of providing top-quality legal advice
- Responsive and efficient
- Effective communicator
- Ability to act as a trusted and credible advisor
- Highly ethical
- Able to be a customer-focused member of the team

This list is not particularly surprising, but can be used to illustrate some of the skills to master and minefields to navigate to ensure we are the kinds of lawyers that avoid, and help our clients, avoid, ethical problems. For example, what sort of "effective communication" skills are needed to ensure your clients listen to and appreciate the legal advice you deliver? How do you balance your desire to be that "trusted and credible advisor" and "member of the team," but still be an effective and objective counselor and advocate of your corporate client?

This paper does not attempt to present an exhaustive checklist of the "skills needed to avoid ethical pitfalls" (assuming that such a listing is possible). Instead, it is my intent to provide what I think are some practical suggestions on how those of us in corporate counsel positions can do the best job in staying (and helping our clients stay) on the ethical high-road. Hopefully, it offers some useful guidance for those who may be new to in-house practice, and perhaps it will help to keep fresh the skills already developed by veteran in-house counsel.

The remainder of this paper will address in some more detail what I think are the main points to keep in mind. They are:

- Remember the Basics
- Understand the Clients, the Context, Your Limits, and the Stakes
- Be close (but not too close) to Your Clients
- Develop and Share "Lessons Learned"
- Use Training Effectively
- Emphasize Good Communications and Practice What You Preach
- Lead - Whether You Are in Front, Within, or Behind
A. Remember the Basic Rules of Law Practice (and Life)

The skills that every good lawyer needs - solid analytical skills, good judgment and perspective, strong communication skills, the ability to identify the right issues - will, if properly applied, help you counsel your clients effectively so that you avoid or successfully navigate ethical minefields. The following points may be obvious, and certainly aren't limited to the legal field, but they bear remembering, particularly when the pressure is on:

1. Investigate and know the facts
   If you get the facts wrong, your advice will not be as good as it needs to be, and your clients will stop listening
2. Do your homework and anticipate issues as much as possible
3. "No" does not mean "Maybe"
   But, is the answer really "No"? Explore alternative approaches to a problem
4. It's not always what you say, but how you say it
5. Listen before you speak!
6. Always ask the dumb questions, and be willing to ask the hard ones too
7. Understand your audience, the context, your limits, and the stakes
8. What is that little voice in the back of your head telling you?
9. What the client thinks they want may not be what they need
10. Make it clear if you do not have complete knowledge of the facts, are speculating, or are relying on assumptions
11. Would you be comfortable defending your advice publicly?

The above points sound basic, but if kept in mind and applied where appropriate, can help counsel avoid major ethical issues. Each of us can no doubt recall a situation where, for example, we couldn't really put our finger on what was bothering us about a particular situation, but our gut just told us that something wasn't right. Whether or not we listened to that nagging little voice probably drives how good we feel about how that situation came out. And, all of us can probably think of a time or two where in retrospect we could have responded more effectively to an inquiry (or a shot across the bow). I believe that remembering these basic rules of life and legal practice will help us go a long way to staying out of ethical hot water.

B. Understand Your Clients, the Context, Your Limits, and the Stakes

The way you approach an ethical issue and how you communicate with internal or external audiences should take into account the overall context of the situation. For example, you need to understand the following:

1. Your Clients
   Yes, your "client" is the corporation, but you need to understand the humans who are involved - what are their drivers, concerns, work styles, personalities? In both large and small organizations, there may be only one "client," but there are often lots of different constituencies, and if you do not understand what is driving them you will not be able to provide effective counsel. For example, if you have a new "up and comer" who has all the technical skills and believes he has the boss' ear, how do you effectively give advice that he may see as needlessly holding him back, but which you feel is critical to helping him (and the company) avoid going down a path that leads to trouble? You may need to adapt your style to the particular individual in question.

2. Expectations
   What is expected of you and the law department, and are those expectations reasonable? Do you need to manage those expectations? For example, if you have been asked on Friday afternoon to deliver by Monday morning definitive advice on a complex issue, and the deadline is simply not reasonable you need to first test whether what is being requested is really what is needed (do they need a "final" opinion, or just your initial informed judgment?), and if indeed the demand seems unreasonable you need to step up and make clear what can and cannot be achieved and what is needed to achieve the desired result. Often, a key need is more facts from the clients and when you point that out to them their demands tend to moderate somewhat. It is also sometimes very useful to clarify advice which was quickly given with a follow-up memo or email.

3. Context
   Who is asking the question? Who is "really" asking the question? What is the legal issue? Is there a legal issue? Is there litigation, enforcement, reputation risk involved? This can be a critical area - often the most innocuous sounding question reveals, when the onion is peeled back a bit, a potentially dangerous legal issue. Always be wary of the "Hey, I just wanted to run this by you real quick" kind of question. On the other side of the coin, make sure you don't take on issues that need the input of others - for example, the tax or Sarbanes-Oxley experts. The suggestion is not to avoid work that the legal department is responsible for, but make sure you understand if there is a legal issue (and if so, what it is), and/or whether you need to be getting other groups involved.
4. Your limits

Be honest about what you can do. Your length of service with the company and your professional background; your familiarity with the business, and the business clients; the strength of your staff and outside counsel, and the culture of your department and company all need to be kept in mind. If you're the junior lawyer on the team and senior VP is standing in your doorway telling you he needs an answer in an hour you need to seriously weigh the "opportunity" of impressing him with your brilliance against the very real benefits of securing the insights and advice of more senior colleagues who may have a better grasp of the law and the internal politics that may be at play. Also, don't try to give advice where you are simply not qualified to do so. If you are not an expert on Nigerian contract law make it clear to the client that you are going to have to find somebody who is - trust me, they want the right answer. Fast advice is great, but not if it's wrong.

Other limits you want to keep in mind are, of course, the applicable law and company policies (Does your company have certain requirements in terms of approvals and endorsements? You'll want to know that before you sign off on something for the Legal Department). And, of course, you need to keep in mind that Code of Professional Responsibility.

5. The Stakes

Do your best to find out what is really at stake here. As noted above, this is not always apparent, so you may need to probe. Do you really have a "deal-killer" issue here? How much money is at stake? Is there potential litigation risk if things go bad? What about the potential for government enforcement action or risk to the company's reputation? You can likely do little to avoid such risks, but identifying them will help you counsel your clients on the best strategies to anticipate and mitigate them.

C. Be Close, but Not Too Close to Your Clients

You'll want (and need) to be a valued member of the business team and to have your opinion sought from your business clients. You cannot be an effective counsel and help your clients avoid problems if they do not seek out your advice. So, you must market yourself, even in the in-house setting. Visit your clients, be glad when they visit you, attend staff meetings and at least act interested in what the clients are doing; share information about relevant recent legal developments, and try (as hard as it may be) to be a person your clients like to interact with.

All the above being said, it is important that in-house lawyers not lose their objectivity and ability to render balanced and sound legal advice. We cannot let our desire to be seen as a member of the team to outweigh our professional judgment and instincts. A certain degree of detachment (in the professional, not necessarily the interpersonal) sense is critical. Many of the ethical issues we have read about in recent years involving in-house counsel seem to have among their root causes lawyers who may have simply gotten so close to their clients and/or their clients' business objectives that they lost their own sense of objectivity. Recognize that your business clients may have other agendas or drivers, such as getting that bonus for bringing in the big deal, and we need to stay sufficiently separate from any personal agendas that may not necessarily align with the company's best interests. We do ourselves and our clients a grave disservice if we become too aligned with their goals and business drivers and do not give them our unbiased and considered legal advice.

1. "No" does not mean "Maybe," but is the Answer Really "No?"

All of us have faced (or at some point will face) the situation where a client's proposed course of action has raised some hair on the back of the legal neck, and we're faced with the sometimes difficult decision on how to handle the matter. Of course, where a client is proposing something that is clearly illegal or otherwise breaches a basic duty one would hope counsel does not agonize long, but where the issue is a close one, or there is concern but some uncertainty, counsel may struggle with how to handle the matter. Certainly, sometimes we just have to say "No," but there are ways to handle this that can enhance, rather than harm, our credibility and our relationship with our clients, which will in the long term help counsel and client avoid falling off the ethical cliff.

Some suggestions on what to do before delivering the "NO" response to a client proposal follow. Before you say "NO," make sure:

- you listen to and understand the question
- you know all (or as many as possible) of the facts before you answer
- you understand the business objective
- you have explored whether there are any alternatives available to meet that objective (assuming it is a legitimate objective)
- that you are the right person to be answering the question
- that indeed the time to give an answer is now - do you need to further study the question? Should you consult with someone more expert in the area than you? Is there another group in the company (e.g. HR) that you really ought to consult with, or punt the question to?

2 It's worth noting that many of these suggestions also apply before you just say "Yes."
g. to the extent you can, that you have enlisted allies by working with other functions (Tax, Treasurers) to make sure they are on board
h. that you have a good sense whether your boss in the Law Department is going to back you up if a client unhappy with your advice goes over your head
i. you build up goodwill by having delivered high quality legal services to your clients on prior occasions, so that they respect that your opinion is a measured and considered one

While in-house lawyers should strive to find ways to help clients by identifying alternative approaches to just "No," sometimes that is the only answer. When faced with situations presenting clear violations of the law such as price-fixing or insider trading, ignoring clear permit requirements or regulatory directives, or situations that clearly suggest breaches of fiduciary responsibilities, you need to be willing to firmly and unequivocally put a stop to the situation. You need to also consider the fallout and act accordingly, whether that be up-the-line reporting, additional training or counseling, or a combination of corrective actions.

**D. Develop and Share Lessons Learned**

"Those who cannot remember the past are condemned to repeat it"3

As in-house counsel, we juggle many competing projects and priorities, and are often rushing to put out one fire or another or participate in a crisis management situation. Often, we have little time to catch our breath before rushing off to the next "opportunity to enhance shareholder value." I would suggest, however, that adoption of a somewhat formal "after action" review process following at least the more substantial or high-profile projects, suits, or crises, is well worth your time and effort. Such a process will help you identify where you and your team have performed well, where you can enhance your performance, and what tools or resources you have or need to develop to function more effectively the next time.

A critical part of this "after action" report is to get the input of key business clients or other persons with a stake or interest in the issue and get their candid feedback of how the Law Department performed and where performance can be improved. The point of this is NOT to get feedback on individual performance (though that of course is certainly welcomed) but rather to look at the legal department's processes and practices as a whole. As an example, we recently went through a significant matter involving one of our affiliates in another country. After the matter was resolved we asked senior affiliate and corporate managers for their feedback on the Law Department's performance. Individual lawyers were praised for the quality of their legal work, their dedication and commitment, their long hours, etc., but the most useful feedback was a comment that Law's performance would have been enhanced by better coordination of the overall work of the lawyers - clients suggested that the Law Department designate a "Chief of Staff" to perform that coordination function in the future (while one might think the affiliate's General Counsel would serve that role, in many situations he is called upon to be actively involved in high-level negotiations, so he may not in fact be able to oversee the day-to-day legal work).

Below is a simple agenda that can be used in holding "after action" conference calls. Again, the focus ought not be about critiquing individual performance, but focusing on what the Law Department has done well and what it can do better.

**Sample Lessons Learned Meeting Agenda**

1. Introduce Participants
2. Background of Issue
3. Identify key Legal Issues and Strategies
4. Key challenges (logistics, infrastructure, technology, etc.)
5. What worked well
6. What could be improved
7. What tools were developed that should be preserved/enhanced
   a. Action plan
8. What tools need to be developed for possible future use
   a. Action plan
9. How should tools be stored/shared for appropriate access
   a. Action plan
10. Review Client Feedback/Discuss
    a. Reaction/Action plan

Learning from past experience helps you to build on your strengths and identify areas for improvement, which makes your lawyers and your department stronger.

**E. Use Training Effectively**

This paper does not discuss in detail the oft-explored topic of what makes a corporate training and compliance program effective (or not) and how that plays into corporate prosecution and sentencing guidelines, etc. Instead, the point here is that one important way for corporate lawyers to help our clients avoid problems and ethical issues is for us to be active participants in developing, implementing,
and evaluating compliance programs and training initiatives.

Some of the issues and concerns that merit discussion in connection with corporate compliance and training programs are briefly discussed below.

1. Who is the Compliance Officer?

A 2005 survey on corporate compliance commissioned by the Corporate Counsel Section of the State Bar of Texas made some interesting observations about the ethical issues which can arise from in-house counsel also serving as their organization's compliance officer. In the survey, over 40% of respondents indicated that the CO was also a lawyer, and 1/3 reported that their CO was also General Counsel. Potential conflicts issues are raised since, as the article points out, the CO "is supposed to provide objective, independent advice regarding the strengths and weaknesses of the compliance program," while the lawyer's job is to zealously advocate on behalf of his or her client. Query whether there is a potential conflict when one combines the need for objective independent assessment of a compliance program with the need to zealously advocate on behalf of the program's sponsor? The survey article notes the particular conflict issue posed in the context of sexual harassment compliance programs where the General Counsel is called upon to review the work of the CO in determining whether the program designed by the CO is sufficiently robust so as to permit the company to take advantage of affirmative defenses to a sexual harassment claim. The conflict seems to have squarely arisen in that situation where the CO and the General Counsel are the same person. A solution may be to have outside counsel perform the needed assessment.

Lawyers' analytical and other skills make them well-suited to being active members of the compliance team, but consider conflicts issues when you designate a Chief Compliance Officer. You may find that your in-house lawyers' skills are more effectively and appropriately brought to bear in helping to develop and execute the compliance program, and in providing legal advice and counsel to a Compliance Officer who is not also the General Counsel.

2. Developing and Delivering Training

In-house counsel need to assist their clients in developing and implementing employee training programs. Counsel ought to strive to be involved not only in those programs that are clearly linked closely to legal compliance, such as antitrust or anti-corruption training, but also programs that may pose more subtle legal issues, such as financial reports, technical writing, protection of company assets, good communications practices, etc. The lawyer's participation often adds a perspective that can pay dividends down the road, and is often surprising how many legal questions get asked when a lawyer is an active participant in company training. Certainly resources and time are limited, but in-house counsel who make the effort to help in developing and delivering training programs never regret it (nor do their clients).

3. Assessing Employee Training

Many companies that have created employee training programs do not have adequate systems in place to actually determine if employees understand and apply what they have heard. This can pose serious legal risks for the company. The 2005 Compliance Survey referred to earlier indicated that 36% of respondents indicated that they did NOT test employees’ comprehension of compliance training. And, those that did say they tested comprehension, usually through the use of graded or ungraded quizzes, generally didn't seem to have a process that actually tested whether employees took and applied the information as they actually did their jobs - only 21% had some kind of down-the-road auditing or monitoring of testing's application.

The ethical issue this poses for in-house counsel is that if a training program isn't developed and executed in such a way that counsel can be confident that attendees are actually paying attention and learning something then how can counsel legitimately have an expectation that the training program is anything other than a paper program?

There are many possible approaches to "livening up" compliance training, but strategies for the in-house practitioner to consider include combining the increasingly popular computer-based training with "live" training that combines "real-world" scenarios with questions and answers in real-time. Such live training not only can be very effective in terms of audience attention and participation, it has the benefit of demonstrating in a tangible way that company management is committed enough to having a strong training program that it is willing to spend the money and resources to get trainers and trainees together for some period of the work day to actually do the training. This can be a very powerful tool for both internal and external audiences, and also gives in-house counsel increased confidence that training is actually going on!

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4 See Paul E. McGreal, Best Practices in Corporate Compliance: Survey Results and Analysis, State Bar of Texas Corporate Counsel Review (May 2006)
5 See id. at p. 49.
6 Id. at p. 57
F. Emphasize Effective and Appropriate Communication and Practice What You Preach

Effective communication with business clients requires somewhat different skills and approaches than those often emphasized in law firms. Clients are simply not likely to read that cogent three page memo, and increasingly want complex legal advice distilled to a one page PowerPoint slide. In today's 24-7 business world, in-house counsel need to communicate clearly, concisely, and immediately, and do so using tools (BlackBerry™, texting, cell phone) that are often not particularly well-suited to providing detailed legal advice on complex or sensitive legal issues - tapping out a memo to a client on a BlackBerry™ can be a very frustrating task, and can often lead to unsatisfying results. The challenge this poses from an "ethical pitfalls" perspective is that often the need for quick and concise communication challenges the in-house practitioner to make sure he or she is giving the client the advice they need in the time and way that they want. Nuances get missed in the rush to meet deadlines or to dash off a quick reply to an email, for example. And, advice that is given to a client can be too easily forwarded to others, often accompanied by email comments that misconstrue and/or mis-apply the advice given.

Many of our clients and colleagues have grown up in a world of instant electronic communication, and are, at least in their own opinion, quite adept at communicating nearly entirely via text or email. They are comfortable with sharing information with a wide variety of people, and some of the "old-fashioned" notions of confidentiality and privileged communications (i.e., the waiver of privilege which can occur if privileged memos are forwarded) are often lost on them. This new generation of clients needs counsel to help train them in good communications practices. This sort of training can be particularly entertaining and enlightening for clients, and may be one of the more valuable training programs in-house counsel can deliver. Some suggestions for achieving more effective and appropriate communications practices are:

1. **Edit**

   Take the time to review and edit your work. Email and text communications are particularly susceptible to sloppy writing and thus the potential for miscues. Taking a minute to reflect and review your electronic communications can avoid confusing or incorrect advice. We tell our clients all the time to stop treating emails as phone conversations and more like business letters, but do we follow our own advice and take the time to make sure our electronic communications are in good shape?

2. **How to communicate?**

   Consider whether to communicate certain advice via email - particularly if the advice is complex or sensitive, you may wish to resist the request to send an email "summarizing" your advice and instead suggest to the client that you meet face-to-face to discuss. Often you can do your client and yourself a lot of good by being the one to cut off the email chain.

3. **Get to the point**

   Yes, many issues are complex and many answers are not clear, but to keep the client's focus you need to be efficient. Give the conclusion first, and then get to the analysis. Use active voice in your communication and streamline as much as possible. Make it clear if you are providing a high-level summary and really feel that you need to meet with the client to discuss in more detail.

4. **Communicate appropriately for the context**

   This is probably reflected in the above three suggestions to an extent, but the point here is that consider if the situation calls for precision or whether there is sufficient uncertainty that you ought be a bit vague. Having to explain after the fact what you intended to say is often a very unpleasant and usually unsatisfying situation.

5. **Follow-up**

   Too often, counsel may not follow-up to ensure that advice given is understood and followed. Query whether the Arthur Andersen case might have had a different outcome if Nancy Temple had followed up her email "that it might be useful to consider reminding the engagement team of our documentation and retention policy" with a short meeting to make sure people understood exactly what she was saying.

6. **Train your clients on good communications practices**

   It is often stunning to realize how even very sophisticated business persons have an incredibly poor understanding of good communications practices and how they should (and shouldn't) communicate with their colleagues and their counsel. You will do them a world of good by developing and delivering training on effective business communications.

G. Lead From In Front, From Within and Behind

In-house counsel need to be seen as leaders and champions of ethical behavior. We need to be able to be counted on to advise not just what is "legal", but also what is the right thing to do. Unless we are dealing with major litigation or investigation, the lawyer is rarely "in charge" of the business team
working an issue. Thus, we need to have good influencing skills and be capable of constructively leading clients, partners, those with whom you are negotiating. During our annual client feedback process I often see clients comment (favorably or otherwise) on their assigned counsel's ability to be a leader in the appropriate circumstances. This certainly suggests that clients want their in-house counsel to lead on legal and ethical issues, and we need to take advantage of this opportunity. Build your leadership and influencing skills and you will be a more effective counselor and advocate, and you will keep your clients out of trouble because they will rely on you and listen to you when it is crunch time. Some suggestions along these lines are:

1. **Develop your own style**
   
   You don't have to be a strong personality to be an effective leader or influencer. Build on the skills you have and use them to your advantage. A quiet, thoughtful approach can be very effective, and often is appreciated much more by clients than the lawyer who regularly "shoots from the hip" without considering alternatives or the big picture.

2. **Build consensus where possible**
   
   There is nearly always some common ground; be the one to step back and point it out. In dealing with different internal groups, take the initiative to ensure that departments who should be involved in working an issue are brought to the table. This may not be our job as lawyers, but if it helps get the right answer for the client it is something we should readily do.

3. **Stay attuned to group dynamics**
   
   It's easy and all too frequent for people in tense business situations to get caught up in the moment; be the one who stays a little bit above it all and surveys the bigger picture. One of the most effective lawyers I've ever known generally says little in negotiations or group settings, but ALWAYS has the best feel for the undercurrents and hidden issues, and offers terrific insights to his clients outside the negotiating room which often help advance issues to resolution.

4. **Engage with "difficult" clients.**
   
   We all have them - the ones who are just hard or unpleasant to deal with. So, we likely try to find ways not to deal with them. This is often a mistake. The client who doesn't get sufficient attention often is the one who ends up causing major legal problems for the company.

5. **Don't give up**
   
   You can't be the conscience of the group if you disengage.

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**II. CONCLUSION**

At the end of the day, in-house lawyers can do their clients the most good, and help keep themselves out of ethical hot water, by honing those skills that made them good lawyers in the first place - honesty and integrity, good communications skills, appropriate willingness to lead, an ability to see the big picture, and a healthy dose of common sense.