Why Your Firm Needs an Ethics Partner. Now.

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Recent changes in law make it a top priority

Recent legal developments dictate that every law firm in Minnesota should designate a firm ethics counsel. First and foremost, the law on in-firm attorney-client privilege has undergone a tectonic shift—but there are many vital reasons to take this step now if you haven't already.

Does your law firm have a designated ethics partner (or firm counsel, or in-house counsel, or general counsel)? You should. It's now more important than ever to have someone fill this critical role in every firm.

One ethics partner described the role this way:

The ethics nerd. Every law office has, or should have, at least one. You know, the guy or gal that other lawyers frantically descend on when they need to sue a company they represented last year, or when they really want to contact that former CFO of an opposing party. Yes, I know, the politically correct term these days is "firm counsel" or "ethics counsel," or, in larger firms, even "general counsel." But we're still ethics nerds.

Recent legal developments require that every law firm in Minnesota designate a firm ethics counsel, a partner responsible for (among many other things) (1) advising the firm and its lawyers about conflicts of interest and other ethics issues that arise every day in client intake and ongoing practice; (2) keeping current with trending issues related to law firm ethics and liability (see sidebar), and (3) effectively communicating those ethics and risk issues to the firm's partners and associates.[1]

Why designate an ethics partner? For several important reasons.

To protect the firm's privilege

First and foremost, the law on in-firm attorney-client privilege has recently undergone a tectonic shift; the prevailing case law now *requires* a designated firm ethics partner in order for the law firm to prevail on a claim of evidentiary privilege.

The in-firm privilege issue arises in this real-life context:

Firm attorney realizes that a serious ethics or malpractice issue has arisen in one of her client's cases. She consults with the firm's ethics partner about the mistake or violation and what to do now, whether disclosure or other action is required, etc. When the malpractice lawsuit is

eventually commenced, will those conversations be deemed privileged and therefore immune from discovery?

For many years, the majority view in case law across the country had rejected claims of firm privilege in this context. About three years ago, however, the law was flipped on its head. The recent case law overwhelmingly supports a claim of attorney-client privilege by the firm—if certain hoops are jumped through. And the very first hoop requires that a lawyer within the firm has been designated to serve as in-house or ethics counsel.[2]

Of course, protecting the firm's privilege is just one aspect of firm counsel's job. The much more time-consuming day-to-day tasks include identifying and resolving potential conflicts and other risk situations as they arise; creating and monitoring systems for dealing with such issues (conflicts, file opening, and trust account systems); and overseeing enforcement of important firm policies (no business with clients, never sue for unpaid fees, notarization standards) and forms (engagement and declination letters, conflicts waivers), and monitoring the ever-present ethics and risk problems that arise in ongoing litigation (sanctions and spoliation issues, disqualification motions, etc.).

To instill attitudes of ethical practice

Another big responsibility for firm ethics counsel is to train the firm's lawyers about ethical awareness and practice. One senior partner in a well-respected firm put it this way: "One of the difficult tasks facing law firm management is ensuring that the firm's attorneys learn, discuss, and implement legal ethics…. A firm must find a way to stress repeatedly the importance of a law firm philosophy regarding ethical standards, of the need for relationships with other professionals, and of our duties as officers of the court…. But ethics training frequently is expensive and cumbersome and often is ineffective."

Here is the big picture goal: To instill, to inculcate, the attitude *"this is how we practice here"* as an ethical imperative in all firm personnel, so that it becomes a recognizable part of the firm culture. It's easy enough to say, but it is a constant, repetitive process to make it work.

Perhaps the most important training lesson: Firm attorneys should consult with the designated firm ethics counsel as soon as the problem arises. These things usually don't get better with age.

Second most important lesson: Such ethics consults are always conducted in person or by phone – *never* by email. (You all know what the "e" in email stands for, right? "Exhibit.")

Because the rules require ensuring ethical practice

Minn. Rule of Prof. Cond. 5.1(a) imposes an affirmative ethical duty on all law firm partners to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." (Rule 5.3 extends the same ethical supervisory and training duties to nonlawyer employees of the firm.) One partner must oversee this responsibility—that's firm counsel.

Because it forestalls missteps

If your firm's attorneys are going to practice anywhere "close to the line," it wouldn't be a bad idea for them to have some sense of where the ethical line actually is—because it moves and changes over time. And as one ethics commentator put it, "When you come very close to the line, it's easy to commit a foot fault, and in our business, those foot faults create grave consequences."

Because it establishes a training record

It may occasionally prove critically important to be able to document the firm's ethics training record. In defending against legal malpractice claims and ethics complaints, for example, it can be worth its weight in gold if the firm can demonstrate a record of effectively training its lawyers about their pertinent ethical duties.

Because reputation is invaluable

The very best trial lawyers and litigators will tell you (off the record, of course) that reputational value—the ability to walk into a courtroom and immediately be accorded some modicum of presumptive credibility, of trust, by the judge—can be instrumental to effective advocacy. When a young associate who the judge has never heard of mentions her firm name while noting her appearance for the record, that judge may well impute to her the reputation for ethical practice long held by that distinguished firm.

The bad partner: Firm counsel's worst nightmare

Perhaps the most harrowing issue firm counsel might ever have to deal with is the "bad partner." Ethics nerds talk about "cowboys" or "lone wolves." The prospect that one of your own partners could go completely off the rails ethically is probably the worst case for a law firm.

Remember James O'Hagan? David Moskal? Aaron Biber? Michael Margulies? In each case a prominent and respected Minneapolis law firm learned that one of its name partners, or the head of one of its practice groups, or a partner who was a respected leader in the bar, had been engaging in horrible criminal misconduct. When the news breaks, it is headline news—*and the fact that he is a partner in your firm is part of the headline.*

As a practical matter, you normally have a limited amount of time to get out in front of this kind of disaster. These situations often start with a suspect event or document in the law firm, allowing firm counsel to conduct and paper an internal investigation. It all goes quickly once the suspicion turns out to be credible, because suddenly there are implicit deadlines for mandatory reporting: notifying malpractice carriers, disclosure to affected clients, reporting to the Lawyers Board (probably in that order).

All of this happens before it goes public, by which point you will have drafted the firm's statement for the press, explaining your shock, sadness, and sense of betrayal, noting that any loss by clients has of course been made whole by the firm, etc. (Oh, and remember to pull down the attorney's webpage—you know, where the firm extolls his/her wonder and virtue. The TV news folks love to show glowing web pages about disgraced lawyers.)

Trending issues in law firm ethics and liability

Law firm counsel must continually be aware of new issues and problems in the practice. Here is a snapshot of the hottest legal ethics and risk issues as of fall 2016, gleaned from some very recent and reputable sources.[3]

- **Cyber-liability/data breach**: The received wisdom is crystal clear: All law firms should now be thinking in terms of when they will have to deal with a data breach emergency, not if they will. The April 2016 Panama Papers disaster is a great horror story to keep firm management up at night—2.6 terabytes of extremely confidential law firm client information, all posted on the internet. The size and scope of the Panama Papers leak is mind-boggling: more than 320,000 text documents, 1.1 million images, 2.15 million PDF files, 3 million database excerpts and 4.8 million emails. It's been called "an unprecedented event—the largest leak in history."[4]

Imagine the potential claims and the PR nightmares (in a worst-case scenario, it will hit the press—ask the folks at Target about that), not to mention the legally required public disclosures and colossal expense attendant to remedying such a disaster.

Wholly aside from the disastrous embarrassment and the ghastly PR problems this would create for any law firm, there is an increasingly serious ethics issue lurking here. Last year Rule 1.6 was amended by adding a new section (c) requiring that "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." The Comments to the new Rule suggest that the ethical standard may well require much more than some law firms are currently doing. Watch for it: Someday, some local lawyer will bereprimanded because of a computer hack or data breach at his or her firm.

Some big firms are already adding new management-level personnel to deal with these issues: for example, a CIO (chief information officer) charged with monitoring and protecting firm data. An emergency plan is highly recommended for all firms. And whether firm insurance even covers such claims and expense is another huge issue.[5]

- **Client-imposed retainer provisions:** This one is primarily a big-firm problem, at least for now. It comes up like this: Large corporate client, with a lot of excellent billable work, wants to retain you, but there's a catch: The client wants your retainer agreement to incorporate some special new provisions, such as sweeping definitions of client identity to include numerous corporate affiliates uninvolved in the matter; redefining conflicts of interest more broadly than the ethics rules, including positional conflicts of interest; and provisions claiming client ownership and copyright protection for the firm's work product, indemnification provisions, authority to conduct internal audits, and security requirements. Most recently, some clients have even sought to require advance waivers of any law firm privilege.
- **Lawyer mobility:** As memorably said in *Blazing Saddles,* "They're always coming and going, and going and coming." And every lateral move can create potential ethics or

liability problems, either for the departed firm or for the new firm or both. Nowadays, it's hard to find a national ethics program that does not have a program addressing the details of this thorny topic. "Disqualification motions arising out of lateral moves" is unquestionably an increasingly predominant theme in the DQ reportage and developments.[6]

- **Joint representation conflicts:** When a lawyer represents multiple clients in a single matter, it can raise some serious and difficult problems of conflict of interest, confidentiality, and other professional responsibility issues. When is consent ever sufficiently "informed" in this context? And what happens when things fall apart down the road—do you necessarily have to withdraw from representing both clients? The Comments to Rule 1.7 go on at length about the especially problematic aspects of "common representation." Some experts are now counseling firms that, simply as a matter of risk management, certain joint representations should not be entertained at all (even where the rules would allow it). Conflicts are now the single leading cause of legal malpractice claims, per some recent insurer surveys, and claims arising out of joint representations are often the most dangerous and hardest to defend.
- **#SocialMediaEthics:** Another frequent subject at national ethics programs lately; a list of recently trending topics vividly illustrates the newest risks attendant to law practice—risks that didn't even exist five or 10 years ago: social media communications with represented parties or unrepresented third parties, unauthorized practice by social media, "friending" judges, inadvertently created attorney-client relationships, disclosure of confidential information via social media, mining social media for information about parties and witnesses, and use of social media at trial.

What about solos and small firms?

Much of the advice in this article is directed to firms of some size—say, 10 to 45 attorneys—firms that may not yet have a well-developed ethics counsel function. But sole practitioners and very small firms can and should adapt these suggestions as well: There is no solo/small firm exception to Rule 5.1's affirmative duty to make reasonable efforts to ensure that all lawyers in a firm conform to ethical standards. Here are some ideas directed at the smallest law firms.

- **Designate someone:** If you're a solo, I guess you're it; you are the firm's ethics partner by default. If there are two or more lawyers in your firm, one of you must be designated as the responsible ethics partner.
- **Keep current:** Make it a point to follow new ethical developments. The OLPR writes a professional responsibility column in this magazine every single month. Read it religiously. And there are many other free resources to track new developments in legal ethics. For example, go to the ABA Journal website (*www.abajournal.com*) and enter l*egal ethics* or *malpractice* in the search bar. Even better, download Wernz, *Minnesota Legal Ethics*, an extraordinary 1400-page online treatise—free to all Minnesota attorneys at *www.mnbar.org/ethics*—covering all aspects of this topic, with monthly updates and commentary. Any ethics partner should have *Freivogel on Conflicts* bookmarked, both for its astonishing immediacy (it's updated weekly) and its breadth of coverage. And Minnesota CLE's annual Legal Ethics Summit in June is a must-attend for ethics nerds.
- **Consult an ethics lawyer:** Identify an ethics expert who you can consult if necessary when an issue arises. I regularly take calls from lawyers who just want to buy an hour of

my time to help them think through a particularly thorny ethics or malpractice issue. Noted ethics maven Eric Cooperstein *(ethicsmaven.com/practice/)* does this all the time. And there are many other knowledgeable attorneys who would be willing to consult with you. No matter where in the state you practice, there is someone in your county or judicial district who has served on the local District Ethics Committee or the Lawyers Board, who knows the lay of the land, how the rules are applied, etc. Particularly where there is a lot riding on the issue, a formal opinion letter from an ethics expert supporting the proposed conduct can be worth its weight in gold if a lawyer's decision on an arguable issue is subsequently questioned.

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Notes

[1] The big firms have this well-covered. The 20 or 25 largest firms in Minnesota all have experienced general counsel who spend all or most of their time representing and advising the law firm. This group meets regularly to discuss breaking or troublesome ethics or risk issues, as part of firm counsel discussion roundtables organized in cities across the country by the ABA Firm Counsel Project (now the Firm Counsel Connection Subcommittee of the Business Law Section).

[2] The recent revolution in the law of in-firm attorney-client privilege nationally has been discussed at length on the Minnesota Legal Ethics blog. See Lundberg and Desteian, *New Developments in the Law Governing Privilege for Communications with Firm Counsel (2013).* *http://my.mnbar.org/blogs/william-wernz/2013/11/01/november-2013-developments-in-intra-firm-privilege*
In addition, Minnesota state and federal trial courts have now recognized the in-firm privilege. See Lundberg and Desteian, *Update on the In-Firm Privilege (2014)* *http://my.mnbar.org/blogs/william-wernz/2014/12/04/update-on-the-in-firm-privilege*
This summer, an important New York appellate decision endorsed the new privilege analysis. *Stock v. Schnader Harrison Segal & Lewis LLP*, 35 N.Y.S.3d 31 (1st Dept. 2016) *http://www.bna.com/ny-court-endorses-n73014444651/*

[3] This list was compiled from a review of topics addressed (and to be addressed) at several recent (and future) national conferences on legal ethics and malpractice (where firm counsel from across the country gather to learn about the newest law firm exposure areas); from recent postings on national ethics listservs and blogs; from the advance sheets of specialized reporters and press that track current developments in the law of lawyering; and from a very recent national survey of law firm counsel, the Aon 2016 General Counsel Survey.

[4] *http://www.livescience.com/54348-how-big-is-panama-papers-leak.html*

[5] Law firms would be well advised to consider whether they are adequately insured against the substantial damage exposure and cost of a data breach. Likely, many such claims are expressly excluded from coverage by most legal malpractice and CGL policies.
Responding to this problem, the ABA Standing Committee on Lawyers Professional Liability recently published a very handy guide to insuring against this exposure, "Protecting Against Cyber Threats: A Lawyer's Guide to Choosing a Cyber-Liability Insurance Policy" This 32-page paperback book, retailing for $19.95, has been described as "extremely useful for law firms that are looking to purchase a cyber liability policy" and "a must read for any law firm that recognizes that it's not a matter of 'if' but 'when' a data breach happens; (and) how a cyber policy can protect the firm and effectively manage the breach." See "ABA offers lawyers guide to evaluate, obtain cyber-liability insurance coverage"
at *http://www.americanbar.org/news/abanews/aba-news-archives/2016/05/aba_offers_lawyersg.html.*

[6] For a summary of the many potential issues arising out of lawyer mobility, see Lundberg and Desteian, "How to Leave Your Law Firm and Live to Tell the Tale," Bench & Bar of Minnesota (Sept. 2015).

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