ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I just left a position at a large law firm to start work as an in-house attorney for a well-known multinational conglomerate. I am curious about the ground rules that apply to lawyers who make the switch from law firm practice to in-house counsel. Are there any particular ethical rules that I should be concerned with as I am transitioning to this new position? Have there been any recent developments applicable to in-house lawyers that I should know about?

Sincerely,

Moving Inside

Dear Moving Inside:

Your question gives us an opportunity to review the basic ground rules that all in-house counsel must know in order to comply with their ethical obligations under New York's Rules of Professional Conduct (the RPC).

Initially, we see that you have not disclosed the location of your previous job or where you are admitted to practice. If you are working as an in-house counsel in New York and are not admitted to practice here, you should know that an in-house attorney working in New York and who is licensed in another state must register with the local Appellate Division in order to practice as an in-house attorney in our jurisdiction. *See* 22 N.Y.C.R.R. § 522 (Part 522).

Under Part 522, an in-house counsel is defined as:

> an attorney who is employed full time in this State by a non-governmental corporation, partnership, association, or other legal entity, including its subsidiaries and organizational affiliates, that is not itself engaged in the practice of law or the rendering of legal services outside such organization.

See 22 N.Y.C.R.R. § 522.1(a).

The scope of services that an in-house counsel registered (but not admitted) in New York may provide is stated in § 522.4:

> An attorney registered as in-house counsel under this Part shall:
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> (a) provide legal services in this State only to the single employer entity or its organizational affiliates, including entities that control, are controlled by, or are under common control with the employer entity, and to employees, officers and directors of such entities, but only on matters directly related to the attorney's work for the employer entity, and to the extent consistent with the New York Rules of Professional Conduct;
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> (b) not make appearances in this State before a tribunal, as that term is defined in [RPC Rule 1.0(w)] or engage in any activity for which pro hac vice admission would be required if engaged in by an attorney who is not admitted to the practice of law in this State;
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> (c) not provide personal or individual legal services to any customers, shareholders, owners, partners, officers, employees or agents of the identified employer; and
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> (d) not hold oneself out as an attorney admitted to practice in this State except on the employer's letterhead with a limiting designation.

Id.

The quoted subsection provides guidance as to what in-house attorneys who are not admitted in New York can and cannot do. The catch is that Part 522 creates a relatively short window (30 days from the commencement of employment in New York) for a new in-house counsel to register with the local Appellate Division. *See* 22 N.Y.C.R.R. § 522.7(a). Failure to register is professional misconduct, but "the Appellate Division may upon application of the attorney grant an extension upon good cause shown." *See* 22 N.Y.C.R.R. § 522.7(b). Therefore, if in fact you are not admitted in New York and you begin working as an in-house counsel in New York, we strongly recommend that you register with the Appellate Division almost immediately after you begin your job.

Part 522's registration requirements were designed to permit in-house attorneys who are not admitted in New York to lawfully work here. In a previous Forum, we explored the dangers arising from the unauthorized practice of law (UPL). *See* Vincent J. Syracuse and Matthew R. Maron, *Attorney Professionalism Forum: Must (should) attorneys engage local counsel when they represent clients in out-of-state matters and venture outside their home waters?*, New York State Bar Association Journal, Vol. 86, No. 3, March/April 2014). This is especially pertinent since the UPL can result in criminal charges against those who violate the relevant statutes. *See* Judiciary Law §§ 478 and 484. In addition, the requirements of Part 522 are meant to prevent any potential violation of Rule 5.5(a) of the RPC, which states that "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction."

As previously noted in our earlier Forum (*see supra* Syracuse and Maron, *Attorney Professionalism Forum*, March/April 2014), when the RPC was enacted in April 2009, New York did not incorporate many of the "safe

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.**

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harbor" provisions in Rule 5.5 of the American Bar Association's Model Rules of Professional Conduct (the Model Rules) that permit lawyers to do work outside the jurisdiction where they are admitted. Therefore, the enactment of Part 522 was, to a lesser degree, a mechanism to allow attorneys who are admitted outside of New York to practice here, especially in the in-house realm, and brought New York in line with many other states that had enacted the Model Rules to lower any hurdles for out-of-state attorneys to work in a particular state.

Identification of the client is another issue that in-house counsel must address. Is it the company? Is it the company's officers, directors and/or the shareholders? Or is it a joint representation? Rule 1.13 is instructive in this regard.

The pertinent sections of the Rule provide:

> (a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.
>
> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. . . . Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include . . . referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

The Comments to Rule 1.13 are extensive, and space does not allow us to repeat them all here. However, for purposes of convenience, we believe that the following excerpts from the Comments to the Rule are the most applicable to you as a new in-house attorney. They include

- that the organizational client "is a legal entity, but it cannot act except through its officers, directors, employees, members, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. . . ." *See* Rule 1.13, Comment [1];
- that communications between a constituent and the organization's attorney when conducted "in that [constituent's] organizational capacity" are protected by the confidentiality provisions of Rule 1.6. *See id.*, Comment [2]; and
- that "[t]here are times when the organization's interests may differ from those of one or more of its constituents . . . [and] any attorney-client privilege that applies to discussions between the lawyer and the constituent belongs to the organization and may be waived by the organization." *See id.*, Comment [2A].

It is fair to say that Rule 1.13 sets forth a fairly straightforward blueprint for in-house counsel to comply with their ethical obligations in order to properly act on behalf of their respective organizations. Of particular note is the fact that that subdivision (b) of Rule 1.13 provides for an "up the ladder" reporting requirement. *See supra*.

The issue of the necessity for "up the ladder" reporting was recently on full display – involving the legal department of one of the most recognized companies in the world. Although ethical lapses by attorneys are not often front-page news for those outside of the legal profession, the necessity of compliance with Rule 1.13 was recently highlighted in connection with the massive recall by General Motors (GM) of millions of its vehicles which fell victim to ignition problems that resulted in 13 deaths and hundreds of injuries. *See* Jeff Bennett, *GM Recalls More Cars Over Ignition Switch Issues*, Wall Street Journal, June 16, 2014. As a result of GM's failure to have in place an "up the ladder" reporting policy to handle the fatal defects in their vehicles as well as the company's pervasive culture, which could be described simply as "hear no evil, see no evil," at least three members of GM's in-house counsel team were fired. This included the company's counsel in charge of in-house investigations and legal strategy for a variety of inactions including, but not limited to, failing to advise GM's general counsel about the fatalities resulting from the defective ignitions. *See* Bill Vlasic, *GM Lawyers Hid Fatal Flaw, From Critics and One Another*, N.Y. Times, June 6, 2014. The fallout at GM should serve as a cautionary tale for you or any attorney working for a large organization. Simply put, there needs to be clear lines of communication within an organization's legal department, especially when the company is subject to lawsuits that may result in significant liability. Indeed, the termination of these in-house counsel from the employ of GM is probably just the beginning of the problems for these terminated attorneys as there is a strong likelihood that disciplinary action will be commenced in the jurisdictions where they are admitted to practice as a result of violations of Rule 1.13, as enacted in their states, as well as other ethics rules.

Attorney-client privilege is another important issue for in-house counsel. Although it might seem obvious to say this, protection of the privilege in communications with company

employees should be of paramount concern to in-house counsel. First, we would strongly recommend that, if you are admitted outside of New York, you maintain your bar memberships in other states. The failure of one in-house attorney to maintain a bar registration resulted in a series of publicized decisions which discussed at length its effect on a claim of privilege by a person purporting to act as an in-house counsel. In *Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58 (S.D.N.Y. 2010), the plaintiff submitted a privilege log and asserted the attorney-client privilege as a basis for withholding numerous communications with its in-house counsel. When the in-house counsel was deposed in the case, he revealed that he was an "inactive" member of the California Bar. The defendant demanded that the communications be produced since this individual was not an attorney because of his inactive bar status. Thereafter, the plaintiff moved for a protective order. The magistrate judge denied the plaintiff's motion and found that the communications were not protected by the attorney-client privilege. *Id.* However, the district court judge overseeing the case set aside the magistrate judge's order and granted the plaintiff's protective order on the grounds that the plaintiff demonstrated a "reasonable belief" that its in-house lawyer was an attorney when it communicated with him. *See Gucci America, Inc. v. Guess?, Inc.*, 2011 WL 9375 (S.D.N.Y. Jan. 3, 2011). Irrespective of the rulings in *Gucci*, we believe that the best practice for in-house counsel is to always maintain their law license and for employers to make sure that their in-house attorneys keep their law licenses active. Failure to do so exposes both the company and its counsel to drastic consequences.

Continuing with the privilege question, it is also important to note that not all communications with company personnel are privileged since many times, as an in-house attorney, you may wear both legal and business hats either separately or at the same time. The protection given to these communications depends on the context in which they are made. For example, if a company employee communicates with you on a non-legal matter, the communication may not necessarily be privileged. *Doe v. Poe*, 92 N.Y.2d 864 (1998). However, if someone in the organization is coming to you seeking legal advice, then the communication would be deemed privileged. *New York Times Newspaper Div. of New York Times Co. v. Lehrer McGovern Bovis, Inc.*, 300 A.D.2d 169 (1st Dep't 2002).

In order to protect the potentially privileged nature of a particular communication with company personnel, we recommend (1) that there be a clear paper trail of the nature of the communication, and (2) that you clearly identify your role in the communication in question (especially if it involves someone in the company seeking legal advice).

Your role as an in-house counsel places you in the unique position of being on the front line when company management has legal issues to confront. Therefore, it is critical that you comply not only with the RPC as a whole but also pay particular attention to the specific ethical provisions discussed here.

Sincerely,
The Forum by
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I am a partner in a 20-attorney firm that handles litigation and transactional matters. Most, if not all, of our work for our clients is done on a billable hour basis. My fellow partners have given me the task of improving our accounts receivable because we are finding that collecting fees from clients has become more and more difficult as time goes on. One of the suggestions made by the managing partner of my firm is to begin accepting credit card payments from clients both for retainer fees and charges for ongoing services. This sounds like a very practical way to get our fees paid. However, I am concerned about any ethical considerations that may arise if my firm begins accepting credit card payments from clients. What ethical considerations should I be aware of if we begin accepting credit card payments from clients? In addition, if we have a client's credit card number on file, what are the circumstances that would allow our firm to take automatic payment deductions from a client's credit card? And if we do take automatic payment deductions from a credit card, are they considered client funds? Last, what if a dispute over the bill ensues?

Sincerely,
Charlie Cautious