



Legal and Business Functions:

CORPORATE COUNSEL JUGGLING MULTIPLE ROLES

by John H. Ogden
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Expanding the Realm of Services and Value to the Client

Based on their particular blend of skills and experience, in-house attorneys are sometimes asked by their employers to perform either formal or informal business functions in addition to their corporate legal duties. This is not an isolated phenomenon, but rather the mainstream for today's practitioners. According to a recent Altman Weil Pensa survey,¹ 52% of General Counsel have non-legal executive duties (up from 47% in 1982). This percentage is independent of the 53% of respondents who hold the well-accepted, dual General Counsel/Corporate Secretary position (up from 47% in 1982).

As most of the ethical rules for professional responsibility were designed for application to outside counsel, there is not much traditional guidance on how and when corporate counsel must juggle their business and legal roles.

While this unique blending of business and legal functions is what attracts many corporate counsel to join the ranks of those "inside," it is a mistake to undertake business functions on behalf of a legal client without an adequate understanding of the effect such actions may have. This article will examine the legal issues which are raised when in-house counsel juggle both business and legal responsibilities on behalf of the client.²

Common Pitfalls

Some argue professional practice dictates that a lawyer simply should not perform business functions in addition to straight legal representation. Bob Banks, one of the founders of ACCA while serving as General Counsel of Xerox, is a very astute commentator on practice of corporate counselling. He argued in an early ACCA Docket article³ that in-house counsel should not mix business and legal roles: "We may well have better business answers than our clients, and we should not refrain from offering business advice so long as we identify it for what it is. But giving advice must be distinguished from the making of the business decision. From the professional viewpoint, the corporate lawyer should not make business decisions even with the consent of the client."⁴ He further addresses this topic, stating:

Below the Board level, the key to being a lawyer with additional business responsibility is to abstain from the legal role in the area where you purport to be making business decisions for the client. It is no different from where you are the direct beneficiary of that advice. But while dual roles are not illegal



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v three sound reasons for his advice: first, the lawyer may not be as competent in business as he or she thinks; second, business managers may resent intrusion by the lawyer; and third, identification with a business decision may cause the lawyer to lose the objectivity necessary for providing sound legal advice. Dual-role corporate counsel are well-advised to take heed of the first two points, particularly with regard to informal situations in which the law-

nor necessarily unprofessional, I think they are undesirable and risky in terms of our obligations to our client. They are clearly not a positive factor in performing the duties of general counsel. The more prudent course, in my view, is for law departments to eschew business responsibilities.”⁵

Likewise, in March of 1992, the ABA’s Section of Business Law published the inaugural issue of *Business Law Today*, featuring a lead article entitled, “What is a Business Lawyer?” by A. A. Somer, Jr. This well-conceived article applies to both in-house and retained counsel, and advises that the business lawyer function only as a lawyer and not as a business person. The author pro-

vider’s scope of responsibility and authority is not explicitly defined. Presumably, those concerns can be addressed in a more direct manner by a counsel who is given a formal assignment or appointment to a dual business function. The third factor — objectivity — is very important, and will be addressed in more detail later in this article. Another critical factor not directly cited by Mr. Somer — namely, work product and attorney-client privilege — will also be addressed in greater depth later in this article.

There are some dual functions or business roles that a corporate counsel should not undertake. For instance, if corporate counsel is asked to manage a business function that regularly or predictably gives rise to extensive



litigation, that counsel should expect to be called as a fact witness, and may wish to plan for an alternative litigation counsel or withdraw from the function entirely. (Many counsel would be troubled by ever subjecting the client to a situation which makes it possible for the client's attorney to be seated in the witness chair disclosing information about the client's business functions. This is a important point for the reader to carefully consider.)

It is the premise of this article, however, that corporate counsel should not feel obliged to issue blanket refusals, unless the situation is threatening to the client's interests or unless the client is not informed of the risks of assigning business functions to an in-house attorney. The first step to handling a request to perform a business function is to undertake an objective analysis of the risks and the benefits involved in a particular assignment or position. This analysis should be discussed in depth with management. Unless the risks are too great or the client blithely refuses to appreciate the possible complications (and is therefore unable to reasonably grasp the risk), corporate counsel should feel free to undertake a dual role. The remainder of this article will suggest methods of successfully managing concurrent legal and business roles.

Achieving Objectivity

As mentioned earlier, an attorney's objectivity may be at great risk if he or she becomes too involved or vested in particular business decisions or functions. While this is not desirable in any corporate manager, it is a possible ethical conflict for an attorney-manager who may later be called upon to deliver legal advice in regard to or affecting that business operation. L. E. Birdzell identified this conflict as follows: "... the most important role distinction between executive and lawyer is not so much a distinction between who decides what to do and who draws up the papers, as it is who defines and points out the risks and who decides whether or not the risks are acceptable."⁶ Birdzell states further that:

To serve the corporation in the lawyer's traditional role, the lawyer needs something more than the business knowledge and imagination to see the risks and pitfalls and to point them out. He needs the objectivity that comes from not being himself the author of the transaction in hand, from not having a personal career interest in glossing over its risks and pitfalls in the hope of being remembered as an outstanding entrepreneur, and from not being himself obliged to weigh the risks he identifies and decides whether to accept them or reject them.⁷

Mr. Birdzell prefaces his argument with a very important phrase: "To serve the corporation in the traditional lawyer's role." Whatever such a "traditional role" may or may not have been, the previously-cited Altman Weil Pensa survey shows that a large and increasing number of General Counsel are changing the definition of a traditional lawyer's role serving in-house.

The higher a business position is in the organization, the more likely the attorney will become greatly identified with most, if not all, decisions taken in the department(s) for which he or she is responsible. Depending on the organization, several solutions may be possible. An attorney with the experience and background to be offered formal dual roles would be expected to have the judgment needed to identify those decisions or actions which should be reviewed by another attorney. In a company

with several attorneys, this can be relatively easy, although the objectivity of the review may still be open to question if the reviewing attorney reports directly or indirectly to the dual-role attorney. If a more junior attorney will be asked to "check" a senior attorney, or if the dual-role attorney is a sole in-house practitioner (the author's situation), pre-determined or crucial issues can be referred to retained counsel for objectivity. This approach entails otherwise unanticipated costs, which should be part of the analysis discussed with man-

agement before a dual role is undertaken.

Despite your checks and balances, it will be difficult to identify some situations that require review by outside counsel until a controversy is at hand. When such situations arise, certain aspects of the dual role scenario will be especially subject to challenge, and you should plan accordingly. In *Burlington Indust. v. Exxon Corp.*,⁸ the attorney-client privilege for communications to and from in-house patent attorneys who performed technical/business duties in addition to their legal responsibilities was challenged. It was argued that for purposes of the attorney-client privilege, one person cannot play a dual role, personifying the corporate client, in one instance, and acting as an attorney in another. The court disagreed, holding that:

[I]t is possible for 'in-house counsel' to be the sole counsel with respect to certain advisory communications, and co-counsel with outside attorneys for other communications. It is also possible for 'in-house' counsel . . . to personify the corporate client in seeking legal advice from 'outside' counsel. Whether viewed as communications between client and counsel or communications between



co-counsel, these communications which otherwise meet the privilege requirements do not lose that protection merely because they occur between 'in-house' and 'outside' counsel.⁹

It has been the personal observation (for approximately 10 years) of the author that situations requiring an outside counsel's review of such business function decisions averaged less than one a year.

In many ways, an attorney with a dual legal/business function is similar to a manager who has background and experience in a one area and undertakes responsibility for other areas. Viewed from this perspective, a dual-role attorney has many counterparts in his or her corporation. The attorney, however, has additional professional responsibilities that obligate him or her to behave in strict compliance with professional standards.

Since there is very little authority for the in-house counsel with a dual business function to rely upon to ensure objectivity, it is helpful to consider analogous situations that impact other professionals.¹⁰ For example, consider the obligations of other licensed professionals: a Certified Public Accountant (CPA) or a Professional Engineer (PE) has financial or engineering responsibilities and may undertake additional duties outside their profession. These individuals would be expected to identify situations in their business area which conflict with

CORPORATE ATTORNEY-CLIENT PRIVILEGE

Virtually all significant appellate decisions concerning attorney-client privilege identify factors which must exist in order for a communication to be privileged. The most useful listing of those factors affecting corporate counsel/client communications are found in *Upjohn* and summarized by Professor Gergacz as follows:

Were the communications made by corporate employees to corporate counsel as directed by superiors in order for the corporation to secure legal advice from counsel?

Was the information needed by corporate counsel in order to formulate legal advice and was the information not available to senior management? (Note: this factor specifically applies to communications from mid- or lower-level officials to counsel, and is included to overrule the previous "control group" test)

Was the information communicated concerning matters within the scope of the employee's corporate duties?

Were the employees aware that the reason for communication with counsel was so that the corporation could obtain legal advice?

Communications were ordered to be kept confidential and they remained confidential.

Identity and resources of the opposing party: In *Upjohn*, the corporation's opponent was the United States government. As Professor Gergacz, at p. 3-77, notes "[i]t would seem that a party lacking the means to obtain information for its case could present more compelling need for disclosure than the Government did in *Upjohn*." Since *Upjohn* concerned an interpretation of the Federal Rules of Evidence, it is not binding on state rules. Currently, eight states (Alaska, Arkansas, Maine, Nevada, North Dakota, Oklahoma, Oregon and South Dakota) continue to use the "control group" test, and therefore, these states afford the privilege only to corporate communications between lawyers and senior management who are in control of the operations of the corporation.

their professional obligations. To illustrate: if either person undertakes responsibility for a marketing or distribution function, the CPA might identify sales tax discrepancies and the PE might identify products dangerously divergent from technical or regulatory requirements. Just as the company should not expect the CPA or the PE to turn a blind eye to those potential problems, the company should similarly not expect an attorney to ignore the legal ramifications of a business action.

Indeed, it is likely that in assigning the licensed professional to the dual role the company expected the incumbent to bring his or her professional insight to bear on business issues. Any company that expects an employee to ignore professional responsibilities is likely to expect such behavior regardless of whether the employee holds a

dual role.

That said, achieving objectivity requires more than applying professional standards to business issues. It also requires a certain distance from the business decision-making. But "distancing" does not necessarily mean deferring to another's opinion, especially if the dual role attorney is best-positioned or able to make the decision. Good managers and good lawyers are required every day to step back, pause and reflect, and make qualified and objectively supportable decisions.

Other methods to achieve objectivity are available. In the vernacular, performing dual roles is frequently



referred to as “wearing two (or more) hats.” It can be surprisingly easy to consciously take off one hat and put on another. Remember the earlier premises: a dual role is not accepted if the risk is too great, and another attorney is brought in for those few decisions which require a formal arm’s-length analysis. If you find that outside counsel’s “objectivity” is called upon too often, then you should reconsider the correctness of accepting responsibility for a business function, and may wish to vacate the dual role.

A final word about objectivity: too often objectivity is mistakenly equated as a synonym for aloofness. The major advantage to corporations of employed (rather than retained) counsel is regular benefit of legal counsel and representation by lawyers extremely knowledgeable about the client and the its business operations, history, and goals.¹¹ In-house lawyers who abstain from attendance or participation in business functions for fear of association with the decision-making are lawyers who sit and wait for the client to come to them with carefully crafted requests for legal assistance. Such a posture deprives the corporation of the type of counselling and representation for which it pays. Seen in this light, corporate counsel who perform dual roles are a natural and valuable extension of the essential nature of in-house practice. Indeed, there is an additional advantage

for a corporation using dual-role attorneys. It is virtually impossible for a single-role attorney to bring his or her legal judgment to bear on the myriad decisions and actions being taken by a manager. This becomes a constant process for the dual-role attorney. So long as corporate counsel pay meticulous attention to the obligations which bind them as professionals to their obligations to the client, objectivity can be achieved.

Privilege and Corporate Counsel — Background

All corporate counsel, whether performing single, dual or even multiple roles, must be very well versed in the privileges which attach to an attorney’s communication and work product.¹² (See inserts, pp. 28, 30) The dual-role corporate counsel must be particularly vigilant since his or her conduct of the business role could threaten those privileges. It is the purpose of this section to show how dual business and legal roles can be performed while maintaining the privileges.

The application of the attorney-client privilege to in-house counsel is well-established. In an early federal court ruling, *United States v. United Shoe*, Judge Wyzanski stated the argument most succinctly:

The apparent factual differences between those house counsel and outside counsel are that the



former are paid annual salaries, occupy offices in the corporation's buildings and are employees rather than independent contractors. These are not sufficient differences to distinguish the two types of counsel for purposes of the attorney-client privilege. And this is apparent when attention is paid to the realities of modern corporate law practice. The type of service performed by house counsel is substantially like that performed by many members of large urban law firms. The distinction is chiefly that the house counsel gives advice to one regular client, the outside counsel to several regular clients.¹³

United Shoe is also useful in analyzing dual-role attorney situations because a later section of the decision differentiates, based on the specific facts, the essentially business nature of the work performed by attorneys in the patent office of the defendant.

The U.S. Supreme Court clearly (and unanimously) established that attorney-client privilege applies to communications between clients and employed (as well as r counsel in the Court even recognized the broad range of corporate employees with whom in-house counsel can consult in confidence (i.e., beyond the previously defined "control group" composed only of senior decision-makers) in establishing the information necessary for in-house counsel to provide legal advice. Corporate counsel should be conscious of the many internal contacts, which require special attention if the attorney wishes to help preserve the privilege.

The most important rule to remember with regard to p is that the privilege belongs to the client, and not t the attorney. This must be carefully explained to corpor management before undertaking a formal or informal dual role. The in-house attorney, whether in a singular or dual role, has a duty to take whatever steps are required to preserve privilege for communications between the lawyer and the client. The most common threat to privilege — regardless of whether the attorney practices in

ATTORNEY WORK-PRODUCT DOCTRINE

The major foundations for the attorney work-product doctrine are found in the U.S. Supreme Court case which established it: *Hickman v. Taylor*, 329 U.W. 495 (1947), and Rule 26(b)(3) of the Federal Rules of Civil Procedure which codified it. The doctrine states, in part, that an adversary can obtain otherwise discoverable documents and tangible things prepared on behalf of a client (by representatives, including attorneys, consultants, sureties, indemnitors, insurers or agents), prepared in anticipation of litigation or trial "only upon showing that the party seeking discovery has substantial need of the materials in preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of materials by other means." The rule further goes on to state that upon finding that the requesting party has made the appropriate showing "the court shall protect against disclosure of the mental impression, conclusion, opinions or legal theories of an attorney or other representative of a party concerning the litigation."

a dual capacity — is inadvertent disclosure. Assuming that the lawyer knows what must be done to insure confidentiality, it is vitally important to educate the client about disclosing information too extensively or not according communications — written, verbal and electronic — the attention and security they require to stand up to a challenge to their true "confidentiality."¹⁵

However, the dual-role attorney must cope with a second level of risk. As seen in an analysis of the case law outlined below, dual-role attorneys cannot assert protection over communications with the client that may be viewed by the court as fundamentally "business" in nature. This can happen to an attorney in a singular role who gratuitously provides business advice just as readily as it can to an attorney with formal business titles and functions.¹⁶ Indeed, it is arguably easier for the dual role attorney to avoid confusion between business and legal advice since the attorney must be regularly conscious of the need to "switch hats" before performing legal functions which entail the privilege.

Privilege and Dual-Role Corporate Counsel — Case Law

A substantial body of case law exists to guide the dual-role in-house counsel in protecting the attorney-client privilege and the attorney work-product doctrine.¹⁷ Corporate counsel performing dual roles must be especially careful in jurisdictions that use a relatively rare and narrowly applied test which denies the privilege for communications which could have been performed by a lay person. This would include situations in which the attorney serves as merely a business adviser,¹⁸ or a scrivener,¹⁹ or when the subject information forwarded to an attorney is in anticipation of preparing a tax return.²⁰

An example of a corporate counsel who served in various roles at various times and was able to successfully assert both attorney-client and work-product privileges on behalf of his employer against a most formidable adversary with broad discovery rights — the Internal Revenue Service — can be found in *U.S. v. Smith & Lipshy*.²¹ Mr. Lipshy was Senior Vice President of a corporation under IRS investigation. He received an IRS summons relating to an internal investigation he performed during his tenure



as Acting General Counsel. The investigation report was signed by him as "Senior Vice President." The government unsuccessfully attempted to argue that this showed he was working in a business, rather than a legal, role. Although one would assume that, in retrospect, Mr. Lipshy wished had taken the time to add his other title of "Acting General Counsel" to the report, he nevertheless convinced the court on the merit of the facts that he was acting as an attorney and did not take any action which would forfeit the privilege.

A less successful effort by a dual-role in-house attorney can be seen in *Hardy v. New York News I*

by the defendant as Vice President and Director of Employee Relations, testified that he also served as in-house counsel. The controversy arose from a court order to produce documents sent to and by the attorney under the theory that they were not marked as confidential or privileged. The documents did not in any way identify the employee as counsel, nor did the court find sufficient evidence that he was acting as a legal advisor and not an executive. The court stated:

Moreover, in a situation where the author or recipient of allegedly privileged documents functions as a corporate manager as well as an attorney, efforts must include clear designation of those communications sent or received in his capacity as a legal advisor.²³

Both *Hardy* and *Lipshy* show the particular need for dual-role attorneys to identify themselves as attorneys in all appropriate communication and to mark documents as privileged and confidential as necessary.

Of course, mere labelling is not sufficient to redeem the underlying conduct or document if it is not otherwise qualified to support an assertion of the privilege. The U.S. District Court for the Northern District of New York, faced with documents marked "PRIVILEGED AND CONFIDENTIAL" and "Advice of Counsel" found that, in fact, they contained only business advice and had been prepared by the attorney in his role as claims manag-

er.²⁴ Similarly, the court found that the advice given in *Teltron Inc. v. Alexander*,²⁵ was not deserving of privileged status either. *Teltron* involved a breach of contract action arising from a contract negotiated by an outside attorney when he was retained by a corporation. (See also the Negotiation section of this article.) He subsequently became Executive Vice President and in-house Counsel, then President. Despite an affidavit from the company's CEO that the attorney in question served as Counsel during his entire term of employment, the court denied the privilege, stating:

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When a corporation seeks to protect communications made by an attorney who serves the corporation in a legal and business capacity the 'corporation must clearly demonstrate that the advice to be protected was given in a professional legal capacity.' This showing is necessary to prevent corporations from 'shielding their business transactions from discovery simply by funneling their communications through a licensed attorney.'²⁶

In *Computer Network Corp. v. Spohler*,²⁷ the court found that the alleged privileged information was discoverable, stating that the Executive Vice President, General Counsel and Secretary could not assert privilege over factual information gathered for an SEC filing because the information was received and transmitted in his capacity as Secretary rather than for use in the provision of legal advice.

In *In re Sealed Case*,²⁸ the former vice president and general counsel of a target company called before a grand jury, asserted the attorney-client privilege as to certain conversations and "hunches" he formed. The district court partially granted and partially denied the privilege. The circuit court, after taking note that the counsel's status as an in-house counsel "alone does not dilute the privilege," further stated that the court was mindful that the attorney was "a Company Vice President and had certain responsibilities outside the lawyer's sphere" and that therefore the company could assert the privilege only "upon clear showing" the communication was rendered "in a professional legal capacity."²⁹ The company was successful on appeal.

*CUNO, Inc. v. Pall Corp.*³⁰ is not a typical dual-role case, as it involves both in-house patent attorneys and patent agents, as well as the communication of technical and business information mixed with legal advice and requests for legal advice. The last three pages of the opinion contain a chart listing 64 documents (many apparently running to thousands of pages), the magistrate's characterization of each, and a ruling on the privilege with regard to each. Many of these rulings redacted portions of documents. While one admires the tenacity of the magistrate who goes to such lengths to insure that each document receives consideration, one is inclined to learn the lesson of never mixing business, technical and legal information in the same documents.

Time and Resource Management — A Professional Responsibility

In addition to his or her concern with objectivity and

maintaining the privilege, a dual-role corporate counsel must also be very conscious of a proper allocation of time and resources to each function. In all but the most usual situation, arrangements must be made to ensure that appropriate time and resources are allocated primarily to the legal role. Without intending to in any way slight our business colleagues or our own business responsibilities, it must be remembered that the law is a profession with obligations beyond the corporation and an extensive system of rules and law that require considerable and continuous attention. Further, attorneys are sworn officers of the legal system. Attorneys should not accept business responsibilities which hinder the attorney in performing to the profession's legal and ethical standards; if you do so, you risk disservice to yourself, the in-house bar, and most importantly, your corporate client.

This sentiment was summed up very well by Randy Ayre:

Corporate lawyers have the opportunity to wear many hats. This can be a challenge and a motivator, if handled properly. Because of their skills and aspirations, lawyers are a valuable corporate asset. The danger, though, is that the lawyer or legal department, in discharging those other duties, may lose track of its primary responsibility, which is to provide effective, responsive legal services.³¹

Therefore, an attorney must decline any dual role assignment which does not provide sufficient opportunity to properly practice his or her profession while also fulfilling business duties.

Negotiations: Ethical Considerations

Another business/legal activity giving rise to concern for dual-role attorneys is negotiation. Some commentators object to the dual business and legal role because that individual has a potential conflict of interest when attempting to evaluate — as a lawyer — the legal risks of a business position he or she adopted as a matter of business judgment.

According to Birdzell:

Negotiation consists in the development of business positions the negotiator is prepared to recommend to his principal. The internal conflict the negotiator may experience in evaluating the legal risks in these positions is compounded, in the negotiation process, by an element of third party obligation: one who has reached agreement

with the other side's negotiator is in good faith bound to try to persuade one's principal to accept the negotiated outcome.³²

The art of negotiation consists of developing business positions prepared for recommendation and "sale" both to the client and the party on the other side of the table. The internal conflict of the lawyer-business person, compounded by a third party obligation to the other side, may lead to a jumbled line of reasoning and confused priorities.

Since negotiation — by its very nature — involves voluntary disclosures to the other side, privilege is typically not an especially troublesome issue for dual-role negotiators. Caution is nonetheless advisable, as shown in the case of *J.P. Foley & Co. v. Vanderbilt*,³³ where an attorney who negotiated on behalf of the client was found to have at least partially taken on the role of "business agent" for the client/principal and to that extent lost the privilege.

Another negotiation case re-emphasizes the need to clearly identify legal actions and documents as distinct from business actions and documents. In *Rutter Associates, Inc. v. Anchor National Life Ins. Co.*,³⁴ two memoranda prepared by in-house counsel (who also served as corporate secretary) were claimed to be privileged. The Appellate Court indicated:

The documents, prepared more than six months prior to the instant action, concern *both the business and legal aspects* of defendant's ongoing negotiations with the plaintiff with respect to the business transaction out of which the underlying lawsuit ultimately arose. *As such the documents were not primarily of a legal character* but expressed substantial non-legal concerns.³⁵ (emphasis added)

Note that here, unlike other cases discussed, the appellate court held that the memoranda had both business and legal content, but nonetheless found that the documents were "not primarily of a legal character" which could give rise to privileged protection.

Negotiations pose potential ethical problems for dual role corporate counsel, particularly if he or she wishes to negotiate "wearing only the business hat." The ABA's Model Rules of Professional Conduct state at Rule 4.2 that absent a specific authorization by law, a lawyer can communicate with another party only through counsel with regard to the matters about which that party is being represented by counsel. When corporations form in-house law departments, it would seem the intention is for this department to represent the corporation in virtually all legal matters. A

dual-role attorney conducting business with a non-legal colleague at another company could run afoul of the Model Rules if permission is not secured from the other company's legal counsel. With regard to corporations without an in-house legal department or counsel specifically retained for the matters under negotiation, Model Rule 4.2 states: if any unrepresented person "misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." Not knowing that a negotiator is also a lawyer could certainly be argued to constitute a misunderstanding.

At least one commentator has suggested that Model Rule 4.1, entitled, "Truthfulness in Statements to Others," might be "incompatible with a lawyer's service as an effective business negotiator."³⁶ In fact, the Model Rule addresses false statements of material fact or law and failure to disclose a material fact needed to avoid a criminal or fraudulent act.

The author has conducted many negotiations in both a business and legal capacity, and based on that experience asserts that virtually no negotiation would be successful if either a business person or an attorney engaged in deceptive practices about material facts (if "successful" is understood to mean reaching an agreement with which all parties will comply). Therefore, it would not appear that the Bar's rules of professional conduct truly hamper

the corporate counsel's role as an effective negotiator; they merely require disclosure of your legal status and training.

Negotiation: Strategy and Tactics

As a practical matter, the far greater risk for dual-role attorneys acting as a negotiator for the company concerns negotiation strategy and tactics, rather than ethics or privilege issues. As a general rule, it is not productive for a negotiator to come to the table with "full authority." Frequently, in business negotiations, the lawyer needs to check with the business person and vice versa. If they are the same person, an extremely critical dynamic in the negotiation process will be unfavorably altered.

It is always useful to have to "check with the client" about accepting a point, if only to allow for an opportunity to re-group and re-assess your position, or re-focus attention on open issues. In some situations, it may be important to negotiate while wearing a "business hat." If you prefer to appear as a business person (rather than as a lawyer), you may wish to state that you must check with "senior management" before a decision can be made.

Whether one is a business person, an attorney, or both, negotiation should be approached as a discipline



not unlike, for example, budgeting or motions practice, except the rules are less codified. A successful negotiator has a conscious structure to his or her method of negotiation. Several excellent programs exist to develop that structure. One of the best is the Harvard Negotiation Project founded by Professor Roger Fisher. In the seminal book, *Getting to Yes*, Fisher (and co-author William Ury) state that:

[a] good negotiator rarely makes an important decision on the spot . . .

and further, that

[a] little time and distance help separate the people from the problem. A good negotiator comes to the table with a credible reason in his pocket for leaving when he wants. Such a reason should not indicate passivity or inability to make a decision.”³⁷

A decade later, William Ury noted:

Negotiations are more productive when they are broken up by frequent time outs. You might be afraid that calling for a break will be interpreted as a sign of indecisiveness or weakness, as if you couldn't take the heat. The solution is to find a natural excuse. Such an excuse may be as simple as 'we've been talking for some time now. Before continuing, let me suggest a quick coffee break,' or 'That's a good question. Let me find out and get back to you right away.' It helps to have a ready excuse. One of the best excuses is to call a caucus with your negotiating team. You might be worried about looking conspiratorial, but calling a caucus is perfectly legitimate; your opponent has just offered new information or made a new proposal and you need a chance to discuss it among yourselves.

Dr. Ury later suggests, “[i]f you are negotiating by yourself, caucus on the phone with a colleague, boss or friend.”³⁸

Finally, the dual-role attorney should virtually always make the legal role known when negotiating in a business capacity, even in the rare circumstance when it might not be strictly required from an ethical point of view. The other party would be rightfully distressed to find that they had unknowingly been negotiating with an attorney if the matter has any possible legal ramifications (and how many negotiations don't?).

Conclusion

Corporate counsel serving in dual business and legal

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roles bring enhanced value to their clients. Serving a dual role can be most rewarding and interesting for the attorney involved, as well. While this article can help counsel identify some of the concerns which arise from carrying both business and legal responsibilities, and while the author believes that most dual-role attorneys can address both functions in a manner which is consistent with all attorneys' professional obligations, there are no guarantees that unanticipated conflicts will not arise. Counsel must therefore be always sensitive to these concerns, and seek — through client education, preventive measures, office practices and full disclosure — to anticipate problems by carefully separating business and legal activities and responsibilities. When such cautionary measures do not appear adequate to preserve the client's rights and the attorney's professional responsibilities, corporate counsel must be cognizant and mature enough to identify and remedy the problem by stepping back from the business function in question, or by recommending the retention of an additional attorney (who can be objective) to ensure appropriate legal review and remedies are available to the client.

Footnotes

1. *1992 Law Department Functions and Expenditures Report*.
2. Even though the above-cited Altman Weil Pensa survey indicates that 13% of corporate counsel respondents sit on their company's (or their company's affiliate or subsidiary's) Board of Directors, this article will not address the unique nature of questions and potential conflicts raised by this dual capacity. Additionally, this article will not address the potential impact on counsel of accepting a business function position which does not include a formal role as an attorney. These issues take us too far afield of the issues addressed by this article, and must be saved for a discussion at another time.
3. Banks, Robert S., Professionalism in the Corporate Environment, *ACCA Docket*, Vol. 4, No. 3, Summer, 1986, pp. 6-9.
4. *Id.*, p. 7.
5. *Id.*, pp. 7-8. Also, among the program materials at ACCA's first annual meeting was an article from the *Harvard Business Review* which took the position that in-house attorneys should not participate in the company's strategic planning because it harmed the attorney's ability to provide effective advice. Auerbach, Joseph, "Can Inside Counsel Wear Two Hats?" September - October, 1984, *Harvard Business Review*. It is interesting to note that another author, himself an experienced in-house counsel, quotes Professor Auerbach and agrees that the dangers exist but argues that the benefits are significant enough that the risks should be assumed. Ayre, J. Randolph, *Corporate Legal Department Strategies for the 1990s*, Second Edition, (Practicing Law Institute 1990), p. 486.
6. Birdzell, L.E., "Ethical Problems of Inside Counsel," *Business Law Monographs* (1990, Matthew Bender), p. 6-1.
7. *Id.*, p. 6-2.
8. 65 F.R.D. 26 (D. Md. 1974)
9. *Id.*, pp. 7-8, LEXIS
10. Of course, it must be recognized that an attorney is licensed by the court and has rights and responsibilities others do not have, and that many obligations imposed on attorneys require a higher standard of behavior than those obligations imposed on other professionals.
11. In this regard, the ABA's Model Rules of Professional Conduct 2.1 states: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."
12. Gergacz, John William, *Attorney-Corporate Client Privilege, Second Edition* (Garland Law Publishing, 1990); see especially Chapter 3, pp. 33-58.
13. 89 F. Supp. 357, 360 (D. Mass., 1950).
14. 449 U.S. 383 (1981).
15. Corporate counsel — and especially counsel with dual functions — must be assertive in educating clients about proper procedure to ensure the privilege. ACCA has a number of resources — both written and videotape — that help corporate counsel train clients to understand and protect their privilege rights, by explaining what kind of communications can be privileged, and how any disclosure or sloppiness in document control can obviate future assertions of privilege. Call 202/296-4522 to request an ACCA Press brochure.
16. *See U.S. v. Davis*, 132 F.R.D. 12 (S.D.N.Y. 1990), in which documents drafted by a General Counsel were ruled not privileged because they were primarily business-related.
17. Additionally, several authors have addressed the subject in *The Attorney-Client Privilege Under Siege—Preserving and Protecting It in Civil Cases*, originally presented at the ABA's Tort and Insurance Practice Section Spring Meeting, May 10-14, 1989; see the above-mentioned program materials, in particular, those authored by Nonna & Knoerzer, pp. 414 *et seq.*, and particularly the section entitled, "Lawyers as Corporate Officers — Are Two Hats Better than One?" at p. 424. Another helpful guide is Gergacz, John William, *Attorney Corporate Client Privilege, supra* at page 3-14, covering the "Multiple Roles of In-House Counsel."
18. *Colton v. United States*, 306 F.2d 633, 638 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963).
19. *Canady v. United States*, 354 F.2d 849, 857 (8th Cir. 1966).
20. *In re Grand Jury Investigation*, 842 F.2d 1223, 1224-25 (11th Cir. 1987); *United States v. Lawless*, 709 F.2d 485,



- 487-88 (7th Cir. 1983); *United States v. El Paso*, 682 F.2d 530, 539 (5th Cir. 1982), *cert denied*, 466 U.S. 944 (1984).
21. 492 F. Supp. 35 (N.D. Tex. 1979)
22. 114 F.R.D. 633 (S.D.N.Y. 1987)
23. *Hardy, supra*, at page 644.
24. *California Union v. National Union*, (1989 U.S. Dist. LEXIS 4996).
25. 132 F.R.D. 394 (E.D. Pa. 1990)
26. Citing, *Avianca*, 705 F.Supp at 676, and *In re Sealed Case*, 737 F.2d 99 (D.C. Cir. 1984).
27. 96 F.R.D. 500 (D.C. Cir. 1982).
28. 737 F.2d 94 (D.C. Cir. 1984).
29. *Id.* at 99, citing *United Shoe* and *Upjohn*, cited *supra*.
30. 121 F.R.D. 198 (E.D.N.Y. 1988).
31. *Ayre, supra* 245.
32. *See generally*, Birdzell, *supra* at 6.04.
33. 65 F.R.D. 523 (S.D.N.Y. 1974).
34. 168 A.D. 2d 663 (NY App. Div. 1990).
35. *Id.*, at 664; citing *Rossi v. Blue Cross & Blue Shield*, 73 N.Y.2d 588 (N.Y. Ct. of App. 1989); *Bekins Record Storage Co. (In re Grand Jury Subpoena)*, 62 N.Y.2d 324 (N.Y. Ct. of App. 1984); and 5 Weinstein, Korn, & Miller, N.Y. Civ. Prac. at 4053.05.
36. Birdzell, *supra*, at pp. 6 - 9.
37. Fisher, Roger and Ury, William, *Getting to Yes*, (Houghton Mifflin Company, 1981), p. 129
38. Ury, William, *Getting Past No*, (Bantam Books 1991), p. 31.

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