Negotiating with Non-Attorneys

1. I’m the sole in-house attorney for my company, Little Guy, Inc. and I do it all, including negotiating all contracts. My client just told me Little Guy is providing goods and services to Big Corp and I’m to negotiate the terms of a contract, ASAP of course. I have an e-mail from Big Corp’s Contract Manager with a template attached, asking for my comments and to set up a negotiating session with her some time today. I know that Big Corp has an extensive legal department – I’ve worked with their attorneys on other matters – but the Contract Manager is my contact and we need to get the deal done today. Can I negotiate the terms of the contract directly with Big Corp’s Contract Manager? If not, with whom do I need to speak to get the deal done?

1. The “no contact” rule is set forth in Rule 4.2 of the Model Rules of Professional Conduct (“Model Rules”). It essentially precludes a lawyer from communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

The Rule traces its origins to the mid-19th century and is designed to prevent lawyers from eliciting confidential information from or otherwise taking unfair advantage of non-lawyers.

For purposes of the Rule, in-house counsel are treated no differently than outside counsel. In fact, the District of Columbia’s ethics committee recently opined that a lawyer may communicate with a corporate adversary’s in-house counsel even where the adversary is represented by outside counsel in the matter. (District of Columbia Bar Legal Ethics Comm., Op. 331, 10/05).

In the scenario presented, there is a threshold question of whether the in-house attorney for Little Guy knows that Big Corp. is represented by counsel in connection with the transaction in question. Does the fact that Big Corp. has an “extensive legal department” mean that Big Corp. is presumed to be represented in any matter of a legal nature, including the negotiation of contracts? Or does the fact that Big Corp. has a non-lawyer “Contract Manager” suggest that Big Corp. has consented to having its Contract Manager negotiate contracts with lawyers?

Little Guy’s in-house counsel surely should disclose the fact that he/she is a lawyer. The prudent course is to request consent from Big Corp.’s legal department to negotiate the deal with its Contract Manager. It is possible or even likely that after the contract is negotiated it will be subject to review by the Big Corp. legal department, so the policies
behind Rule 4.2 -- taking unfair advantage of a non-lawyer who is represented by counsel -- would not appear to be implicated. Moreover, an experienced Contract Manager for a large corporation is unlikely to be taken advantage of by in-house counsel for Little Guy. Nevertheless, as stated, the prudent course is to obtain consent to negotiate with the non-lawyer.

2a. What if I am negotiating with a company that does not have in-house counsel but definitely hires law firms to do work for them?

2a. Actual knowledge that the adversary is represented by counsel is required in order to implicate Rule 4.2. On the other hand, actual knowledge may be inferred from the circumstances. The fact that the adversary may hire outside counsel on occasion, or even regularly, does not mean that outside counsel has been retained in this particular matter.

2b. Do I always need to disclose that I am an attorney and they may wish to have their attorney present?

2b. Yes, it is probably deceptive not to disclose that you are an attorney. You should then inquire as to whether the company is represented by counsel in the matter. If not, I do not believe there is any obligation to go further and actually suggest that the company retain counsel to negotiate with you because you are an attorney.

2c. What if I am negotiating with an individual? For claims, I simply advise I am the attorney and negotiate. When contracts are signed multiple times by many people (contractors), they also sign an acknowledgement that they have read the document, understand it, and have been given the opportunity to discuss it with an attorney.

2c. In negotiating with an individual, you certainly should disclose that you are an attorney and whom you represent, and also inquire as to whether the individual is represented by counsel. If the individual asks whether he/she should retain counsel, you certainly should not say “no” but you can say “that’s up to you.” See Model Rule 4.3. The suggested acknowledgment that the individual has read and understands the document and has had the opportunity to consult with an attorney is good practice although not ethically mandated.

**Attorney Client Privilege**

1. My title is General Counsel and Secretary. At Board of Directors meetings I take extensive notes on all issues discussed, including recommendations for resolving pending litigation and then prepare minutes of the meeting. Are the minutes protected by the attorney-client privilege? Are my notes protected by the attorney-client privilege? What if I prepare an analysis of an ongoing government investigation into our company and recommended strategies for resolving it, and
provide that to the Board of Directors at a meeting. Is that analysis protected by the privilege?

1. Recommendations for resolving pending litigation reflected in the Board minutes clearly should be protected by the attorney-client privilege. These minute entries reflect communications for the purpose of securing legal advice. The attorney’s notes are almost certainly protected by the work product doctrine as well, as they likely include the attorney’s mental impressions and strategies.

An attorney’s analysis of an ongoing government investigation of the company likewise should be protected by the work product doctrine. To the extent it is communicated to the Board of Directors, it should be covered by the attorney client privilege as well.

The attorney client privilege is governed by state law and there can be significant variations from state to state. For example, in some states only the communications from the client are privileged. In those states a communication from the attorney is privileged only to the extent it incorporates the client’s communication. On the other hand, the communication from the attorney -- here the analysis of the government investigation -- would likely be protected by the work product doctrine in any event.

As a cautionary note, the attorney client privilege has not been extended to in-house counsel in EU proceedings. Hence, communications that may be privileged in the US may be discoverable in the EU. In-house counsel need to be aware of this possibility before sending privileged communications abroad.

Finally, to the extent Board meetings address privileged subjects, non-lawyer Board members need to exercise care with their own notes. They either should refrain from taking notes or should designate their notes as “privileged” to avoid inadvertent disclosure in any subsequent legal proceedings.

2a. As Vice President and General Counsel (and internal auditor, unofficial inspector, unofficial advisor to various department heads, and the regular go-to person), I have many duties, some of which are clearly legal, some of which are clearly not legal but business, and some of which fall in that grey area in between the two. How can I determine what is privileged and what is not? Is there a litmus test? Is there anything I can do, if the issue were ever litigated, to help the court in determining what I worked on was privileged?

I routinely delete the attorney-client privilege footer from my emails when it does not apply and stamp documents I want to remain privileged as such or as Attorney Work Product.

2a. The attorney client privilege applies to: (1) communications; (2) between privileged persons (i.e. an attorney admitted to practice and a client); (3) made in confidence; (4) for the purpose of obtaining legal advice or services. Business advice is not privileged, but a communication should be considered privileged where the advice is “predominantly”
legal, even if some business advice is involved. Intent is important, so designating communications “confidential and privileged” will assist the court in upholding the privilege.

As a practical matter, the privilege should be asserted in borderline cases because of the risk of a subject matter waiver if privileged material is produced in litigation. Also, given the burdens of electronic discovery, it is important to designate material as “privileged” in machine-readable form (i.e. not just stamped) so that such material can be located and segregated for analysis in the course of document production.

2b. One of the principals in my office, Little Guy, Inc. (although he is thinking of creating a d/b/a of either Know it All or Large Minded) likes to discuss various personal thoughts he has with me, including business strategy, thoughts behind reasoning for distributing or not distributing dividends, what he does not like about certain employees. Are all or even any of these issues privileged, simply because he is telling me, as the Little Guy’s attorney?

2b. Arguably all of these communications could relate to current or prospective legal problems, so I would take the position that these communications are privileged. Background information is necessary for the attorney to formulate sound legal advice. Moreover, the wiser course is always to be somewhat over inclusive in assertions of privilege because of the risk of waiver. Provided that the claim of privilege is not patently frivolous, the only risk of claiming privilege is that material will have to be produced later on if the court does not sustain the privilege in the context of a motion to compel.

2c. Simple, but always a problem…the CEO likes to discuss issues that would otherwise be attorney-client privilege, except that he likes to have the discussions with other employees in the room. Sometimes they are officers and sometimes they are not. Is the conversation privileged as long as the individuals are employees, since I represent the corporation?

2c. One of the requirements for privilege to apply is that the communication must be made “in confidence.” Thus, the privilege may be lost if the communication is made in front of non-privileged persons (e.g. non-clients) or is disseminated to third parties. The question raised here is whether the other employees who are present have some role with respect to the subject matter underlying the communication. If so, the privilege applies. On the other hand, if a communication is widely disseminated to non-legal personnel within the corporation, that may suggest that the communication relates primarily to business matters and not to legal matters.
Who Is The Client?

1a. My company is doing an internal investigation of potential accounting fraud. The Board has hired its own independent law firm to conduct the investigation. The Board’s law firm has scheduled several interviews of current and former employees and, as in-house counsel, they have asked me to sit in on these interviews. Do I need to say anything to these current or former employees at the interview? If so, what should I say.

1a. The employees should be generally advised of the nature of the investigation (although the level of detail may vary significantly based on confidentiality concerns). They should be told that the interview is privileged and therefore they should not discuss the substance of the interview with anyone else or the privilege may be lost. They also should be advised that the privilege belongs to the corporation and it is possible that the corporation may elect to waive the privilege in the future. You should explain that the outside attorneys represent the corporation, and do not represent them personally, and the same applies to you, i.e. as in-house counsel you represent the corporation and not any employees individually. Whether you or outside counsel convey this introductory advice is not material, although the message may be better received from you than from strangers.

The tricky part is when (or if) employees ask whether they should have their own counsel. You can never comfortably say no, particularly before the interview has taken place. See Model Rule 4.3. On the other hand, the corporation surely wants the employees to cooperate with the investigation and there is a risk that employees who obtain their own counsel may choose not to cooperate. (Of course, failure to cooperate may have employment consequences). You might respond that it is too early to tell whether they need separate counsel or it is up to them. You may then be asked whether the corporation will pay for separate counsel. It is obviously best to think through these issues before commencing the investigation.

Interviews with former employees may not be privileged unless counsel for the corporation undertakes to represent the former employees as well. There is some authority for the proposition that discussions relating to the former employee’s period of employment may be privileged. Note that opposing counsel would not be permitted to inquire into the former employee’s discussions with corporate counsel during his or her period of employment. If the former employee is separately represented by counsel at the interview, you may be able to claim that the discussion is derivatively privileged under a common interest or joint defense agreement with the former employee’s separate counsel. Counsel’s notes of the interviews should be protected under the work product doctrine.

1b. Is the situation different for investigation of a pending or potential EEOC complaint? Can I handle it myself (and keep it privileged) or does it need to be done by an outside attorney?
1b. The privilege should apply to the same extent whether in-house counsel handles the EEOC Complaint investigation or it is handled by outside counsel. There is little risk that this activity will be confused with any non-legal responsibilities that in-house counsel may have. The only caveat is that non-US jurisdictions, specifically the EU, draw a distinction between in-house counsel and outside counsel for privilege purposes. This would not appear to be a problem in connection with an EEOC matter.

1c. Another principal of the company has asked me to assist with a transfer of Little Guy stock he is selling at a discount to another family member and then work on his will once the first task is completed. I know there is a potential conflict in the first issue, but how do I address it and do I need to get permission from the entire board? Can I work on his will or do I need permission for that as well, since he is my boss and it is just a family owned company anyway? If not, how do I tell him I can’t do the will and still keep my job?

1c. Taking the easier question first, I assume that the principal of the company has substantial assets and, if I were in-house counsel, I would be very reluctant to draft a will for a person with substantial assets unless my practice was concentrated in trusts & estates law, which is probably not the case with in-house counsel. So I would plead my lack of professional expertise to a request that I draft the will. (You also should check whether your malpractice insurance covers such assignments outside the scope of your normal employment). Apart from that, performing this unrelated task for a principal of my corporate employer would not necessarily be a conflict of interest. It is permissible for an attorney for the corporation to also represent officers, directors, shareholders, or employees, subject to the normal conflict of interest rules. See Model Rule 1.13(g).

I am not certain why assisting with a private sale of stock from the principal to a family member necessarily requires Board approval, but there may be facts of which I am unaware. To the extent there is a conflict, the corporation’s consent must be secured from an appropriate corporate official other than the principal who is selling his stock to a family member. See Model Rule 1.13(g).

1d. Those questions were simple, but what about this…an owner of Little Guy, Inc. has asked me to form his own company, My Own Company, LLC. He then wants me to assist with the purchase of some assets that My Own Company will lease to Little Guy. I think I may represent all three, but that does not seem right…who do I represent and how do I handle it? (Just to keep me on my toes, after I draft the lease, he also wants me to sign it on behalf of Little Guy, since I am an officer of the corporation.)

1d. This scenario does not indicate how many shareholders Little Guy, Inc. has. If it is wholly-owned by one person, the conflict issues are easier to resolve. There is nothing problematic about forming My Own Company, LLC (assuming you have malpractice coverage for such assignments unrelated to your normal corporate responsibilities). Likewise, the purchase of assets for that company does not raise any issues, except perhaps whether the principal is appropriating a corporate opportunity from Little Guy,
Inc. The fact that these assets will be leased to Little Guy, Inc. suggests that these assets are useful for Little Guy’s business. The lease from My Own Company to Little Guy clearly raises conflict of interest issues and, at least as a matter of corporate law, the informed consent from an appropriate disinterested corporate official of Little Guy should be secured for this transaction. See Model Rule 1.13(g). Again, if My Own Company and Little Guy are commonly owned by the same individual, the conflict issue is less acute.

2. We just fired an employee and he has now filed a complaint with the EEOC (and will eventually sue us pro se in federal court as well). The charge of harassment and discrimination lists witnesses who still work for the company as well as some who do not. With whom can I speak and keep the conversation privileged? Can I contact the fired employee if he is not represented by an attorney?

2. Certainly discussions with current employees concerning the substance of the EEOC complaint should be protected by the attorney-client privilege because they involve communications for the purpose of providing legal advice to the corporation. Memoranda which you prepare concerning these discussions should also be protected under the work product doctrine. Discussions with former employees may not be covered by the attorney-client privilege unless you undertake to represent the former employees. (Whether you can do this will depend on whether there is or may be a conflict of interest between the former employees and the corporation). There is an argument that the discussions should be privileged to the extent it relates to the former employee’s period of employment. Clearly counsel’s notes and memoranda from discussions with former employees should be protected under the work product doctrine. Regardless of whether a privilege applies, the current and former employees will have to testify about the underlying facts of the dispute either in depositions or at trial. The only issue is whether in-house counsel’s communications with the former employee are protected. Finally, counsel’s selection of documents shown to the former employees as part of these witness interviews may be protected under the work product doctrine because the selection of documents indicates what counsel thinks is important or relevant and therefore discloses the attorney’s thought processes.

If the fired employee is not represented by counsel in the matter, in-house counsel may contact him or her. However, contacts with an unrepresented adversary are subject to the restrictions set forth in Model Rule 4.3.

Reporting Up the Ladder

I’m the Assistant GC in a publicly traded company; our legal department consists of me and the General Counsel. I pretty much handle complex licensing agreements, although sometimes I help the GC on overflow work. Yesterday in the mail room, I overheard two people in the accounting department carping about the CFO and the entries he directs them to make at the end of each fiscal year. Also, one of them left a piece of paper in the copier – it’s a spreadsheet that shows guidance numbers and
various ways to “hit the numbers.” I’m no accounting expert but it all looks kind of fishy. What should I do?

What should the AGC do; what should the GC do; what happens if nobody does any follow-up; once the AGC reports, does that person need to do anything further? Do the rules change if it’s a privately held firm (and everyone wants to keep their jobs)?

As Assistant GC in a publicly-traded company, your obligations must conform to the requirements of Section 307 of the Sarbanes-Oxley law (“SOX”). That Section requires an attorney to report "evidence of a material violation" by an issuer to the issuer’s chief legal officer ("CLO") and CEO. The issuer’s CLO must inquire into the evidence of the misconduct and unless he or she believes that no misconduct has occurred, is ongoing or is about to occur, he or she must take reasonable steps to cause the issuer to adopt an appropriate response to the attorney’s report. Unless the reporting attorney reasonably believes that the CLO or CEO has provided an appropriate and timely response to his or her report, the reporting attorney shall explain to the CLO and CEO why he or she is not satisfied with the response and report the misconduct "up the ladder" to the audit committee or another appropriate committee of the issuer’s board of directors consisting solely of independent directors or to the whole board of directors.

In the scenario presented, there is a threshold issue as to whether the Assistant GC renders legal services to an issuer in connection with SEC matters and therefore is subject to Section 307. Although the Assistant GC primarily handles licensing matters, he or she also handles overflow work for the GC, which could include securities matters. The definition of SEC matters is sufficiently broad that the Assistant GC should assume that he or she is covered. For example, if any of the licenses are exhibits to SEC filings, that might be sufficient.

The next question is whether the Assistant GC has received “evidence of a material violation.” "Evidence of a material violation" means "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing or is about to occur." To be "reasonably likely" a material violation must be more than a mere possibility but it need not be more likely than not. Here, the Assistant GC overheard a conversation in the mail room and found a piece of paper left in the copier. There is a real question whether these facts rise to the level of “evidence of a material violation.” On the other hand, given the ambiguity of the statute and the potential professional consequences of ignoring such problems in the post-Enron corporate world, it would be hard to advise the Assistant GC that he need not report these facts to the GC. At that point, it is up to the GC to make further inquiries. After that the Assistant GC’s obligation will be governed by the credibility of the GC’s response.

Under certain extreme circumstances, the in-house attorney may (but is not obligated to) report outside the corporation confidential information concerning a material violation of securities law, breach of fiduciary duty, or similar violation. See SOX Section 205. There is some authority that because SOX preempts state law, an attorney may “report
out" confidential information even if doing so would violate state ethics rules. *See, e.g.*, North Carolina State Bar, 2005 Ethics Opinion 9. However, there is also an argument that because “reporting out” is permissive, there is no inconsistency with state ethics rules that preclude disclosure of confidential information under such circumstances and therefore the state ethics rules must be followed. An attorney who is considering reporting confidential information outside the corporation would be well-served to obtain his or her own legal advice before doing so.

In a privately-held company, the Assistant’s GC’s responsibilities are governed by general corporate law and the ethics rules of the relevant jurisdiction -- probably where the Assistant GC is admitted to practice. These typically would impose similar “up the ladder” reporting obligations, subject to the obligation to minimize disruption to the corporation and to preserve confidences and secrets of the corporate client. *See, e.g.*, Model Rule 1.13(b) and comment [4]. Short of reporting the matter up the ladder, potentially to the highest authority that can act on behalf of the corporation, in-house counsel may ask a potential wrongdoer to reconsider his or her actions or, if there is disagreement as to the lawfulness of certain conduct, ask that the corporation get a second opinion on the matter from another lawyer. *See* Model Rule 1.13(b), comment [4].