

Conflicts of Interest In Corporate Representation

By the NHBA Ethics Committee

Practical Ethics Article: April 14, 1999

Presented to the Board of Governors May 20, 1999

Inadvertent representation is a problem with serious ethical ramifications that can plague any practitioner who fails to exercise special care in potentially ambiguous situations. Although such situations may occur in any area of practice, and whenever multiple representation is undertaken, the identity of the client may be ambiguous most frequently when representing entities, such as corporations and partnerships. The danger resulting from inadvertent representation, of course, is the precarious conflicts of interests that can result—a danger that can only be avoided through clarification of the nature and scope of an attorney's representation at the outset.

The potential for inadvertent representation is compounded in the case of smaller organizations, such as closely held corporations and partnerships, where an attorney may represent both the entity and one or more of the officers, whose interests may appear to be parallel with those of the entity. However, in any corporation, large or small, the relationship of the entity's attorney to the officers, directors, or employees--the individual "constituents"--can increase the difficulties of properly prioritizing the interests of the corporation as required by Rule 1.13(a):

1.13(a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents.

As straightforward as this rule may appear, it is the structure and daily practices of the corporation itself that can lead to client ambiguity. The ABA Model Code Comments state: "[i]n transactions between an organization and its lawyers...the organization can speak and decide only through agents, such as its officers and employees. In effect, the client-lawyer relationship is maintained through an intermediary between the client and the lawyer." In a properly functioning corporation, close relationships are formed and a network of communication exists, resulting in frequent and direct contact between corporate officers and in-house counsel. Management runs the company and makes the decisions; entity attorneys are consulted to ensure compliance with the law and to help accomplish business objectives and must be responsive to management's goals and concerns. Yet, at the same time, the entity attorney has the burden of protecting the corporation; ideally, this can be accomplished through the implementation of management's vision.

Another layer that further complicates the entity attorney's role is the attorney's working relationship with the employees of the corporation, who generally constitute the day-to-day clients of the in-house counsel. The employees may be legitimately confused about the in-house counsel's role and have expectations about counsel's representation of their interests, particularly after revealing confidential information to counsel.

Clearly, not only the corporate officers, who may sincerely believe their philosophy and directives epitomize the best interests of the corporation, but employees as well, may develop certain expectations of the attorney's role. The attorney, when aware of such expectations, must explain that the attorney's role is to represent the corporation's interests. In certain situations, where the attorney neglects to clarify that role to an individual constituent, an attorney-client relationship may have been established, even though the attorney had no intention of doing so. The officer or employee may have shared sensitive and confidential information with the attorney, believing the attorney represented his or her best interests as well as the corporation's; the problem occurs when those interests diverge.

For example, while discussing a business issue with the corporate attorney, an employee refers to problems she is having with her supervisor. The attorney, who has a long-standing relationship with the employee and knows she is an experienced and honest worker, is startled by the employee's revelations which are intertwined with the facts of the business issue being discussed. During the course of the meeting, the employee's comments and explanations reveal a pattern of incidents that demonstrate the employee is being subjected to overtly hostile behavior by the supervisor. For instance, repeatedly, the employee has been singled out for unpleasant tasks; high visibility (and well-handled) assignments and responsibilities have been taken away from the employee and delegated to an inexperienced male newcomer. The supervisor is rude and abrasive to the female employee and has threatened her with undesirable job assignments. Overall, the supervisor's behavior demonstrates a disturbing pattern that has the

potential to be considered gender discrimination. At the end of the meeting, the employee asks the attorney's advice and asks if she has any recourse.

In this situation, after sharing sensitive information with the attorney, the employee most likely believes that there is an attorney-client relationship and that the attorney will represent her best interests. To a point, this is true. In responding to her query, the attorney will discuss the employee's rights and options with her, inform her of the established in-house procedure for such grievances, and perhaps allay her fears of repercussions. However, if the employees' problems are not resolved satisfactorily or promptly, the employee could decide to sue her employer, the corporation, creating a possible conflict-of-interest situation for the attorney.

The point of the example is the subtlety with which the representation developed. Unfortunately, there are no consistent signals to help the in-house counsel determine when an attorney-client relationship has been entered into with a corporate employee or officer. Only a careful analysis of the facts of each situation will determine whether such a relationship has been established with its ensuing responsibilities. "In a strict sense, the test in the entity representation cases would be whether individual constituents reasonably believed that the entity lawyer was representing them as well as the entity, regardless of the lawyer's intent or belief, under circumstances in which such reliance was reasonably foreseeable."¹

An entity attorney must keep in mind the requirements of Rule 4.3 when dealing with individual constituents:

4.3 In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

The ABA Model Code Comments go on to say that "[a]n unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client."

It has been suggested, in fact, that when an ambiguous situation arises, an attorney go so far as to present a corporate variation of the Miranda warning.² This is certainly not required by the Rules of Professional Conduct and is a rather extreme tactic but does illustrate the importance of clear and consistent communication with would-be clients.

The ethical obligations of Rule 1.13(a) do not preclude an entity attorney from representing both the corporation and an individual constituent. Paragraph (e) of Rule 1.13 allows such representation subject to the provisions of Rule 1.7:

1.13(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7.

However, the ABA Model Code Comments from the 1981 final draft warn that "[s]uch common representation, although often undertaken in practice, can entail serious potential conflicts of interest."³

In ABA Formal Opinion No. 91-361, Representation of a Partnership (July 12, 1991), the Committee considered the conflicts of interest that can confront an attorney when representing both a smaller entity and an individual constituent. "Because Rule 1.13(e) authorizes a lawyer to represent both an organization and one or more of its representatives or owners, the difficulties inherent in multiple representation are close to the surface for a lawyer who undertakes to advise both a partnership and one or more of its partners. Thus, before accepting the representation of one or more partners individually in addition to the partnership, a lawyer should consider whether it would be possible to discharge his or her responsibilities to the partnership under rule 1.13(b)(requiring disclosure to the entity of acts of individual officer, employee or other agent that may harm the entity), if an individual partner client were to take or contemplate taking action adverse to the partnership."

The role of the entity attorney may become further clouded when in-house counsel relies on the services of outside counsel. The nature and scope of outside counsel's role and intended relationship with any corporate constituents must be clearly delineated at the outset to avoid conflicts of interest from arising.

All of these elements were illustrated in the following situation described by an out-of-state counsel for a large multi-national corporation, a speaker at a nationally televised CLE program. The corporate counsel's experience demonstrates how easily and rapidly what may appear to be a straightforward client relationship can escalate into an ethical crisis. The corporate counsel had requested outside counsel to determine the best immigration strategy for one of the foreign officers of the corporation who would be coming to this country to manage a subsidiary. Specifically, the lawyer was asked to investigate visa options and application requirements and procedures. The lawyer hired by the corporation completed his investigation and, after discussing the results with corporate counsel, proceeded to work with the foreign officer to obtain the visa. The type of visa the officer applied for required a significant amount of confidential information to be provided to the outside counsel as part of the application process. The visa was obtained. Several months later, however, the officer was terminated and returned to meet with outside counsel for advice on maintaining his legal status. Shortly thereafter, both the corporation and the former officer demanded a copy of the former officer's file for litigation purposes. Belatedly, the outside counsel queried: Who is the client? Who owns the file?

At this point, when both parties, now adversarial, have requested the file in preparation for litigation, the failure to address the issue of client identity at the outset has resulted in an ethically treacherous situation. One of the purposes of the initial discussion between corporate counsel and outside counsel is to consider the likelihood that a conflict of interest may arise and to identify any potential conflicts. Certainly, in the fact pattern, once the outside counsel had completed his research and determined that the most appropriate type of visa would, in fact, require obtaining a significant amount of personal information from the foreign officer, the issue of potential conflicts of interest should have been revisited with the corporate counsel and decisions about the proper representation of both the corporate interests and those of the foreign officer should have been addressed. At that point, the corporate counsel should have assumed the responsibility to discuss representation and its implications with the foreign officer. Unfortunately, none of this timely communication took place, and, judging from the officer's return to the outside counsel's office for consultation following his termination, it is clear that an expectation of representation had been created.

Following the foreign officer's termination, outside counsel should have refused to meet with the officer and urged the officer to see another attorney. By failing to do so, outside counsel's ethical dilemma became one with no clear resolution in light of the fundamental dictates of Rule 1.6, which require that the attorney maintain the confidentiality of information relating to the representation of a client.

The lesson for all practitioners to glean from this example is the necessity of practicing defensively and the importance of taking precautionary steps at the outset of any representation involving multiple parties, however unnecessary those steps may seem. For instance, in this situation, outside counsel could have issued a letter to both the foreign officer and the corporate counsel delineating his or her role and responsibilities in relation to both corporate counsel and the foreign officer.

Inadvertent representation may be difficult for the unwary practitioner to foresee. Only thoughtful precautionary measures at the outset of representation and an ongoing analysis of relationships and expectations during the course of representation can prevent such a problem from occurring.⁴

¹ Nancy J. Moore, Expanding Duties of Attorneys to "Non-clients," 45 S.C. L. Rev.687 (Summer 1994).

² One version of this "Miranda" warning quoted in Nancy J. Moore, Conflicts of Interest for In-House Counsel, 39 S.Tex. L. Rev. 497, 503 (March 1998), citing Marc Steinberg, The Role of Inside Counsel in the 1990s, 9 SMU Law Rev. 483, 491-92 (1996) : "(a) [counsel's] role is to represent the organization, (b) an actual or potential conflict of interest may exist between the organization and the individual, (c) [counsel] cannot represent the individual, (d) their conversation may not be confidential and any information the individual provides may be used against [such individual], and (e) that he [or she] may wish to retain independent counsel."

³ N.H. Rule 1.13(a)-(c) incorporates the language from the 1981 ABA proposed final draft. Subsequent ABA amendments to model Rule 1.13 have been rejected in this State "because they appear to provide for dual loyalty to both the organization and individuals within the organization." N.H. Comments to Rule 1.13. Paragraph (d) of the rules reflects the language of the 1983 ABA changes. Paragraph (e) has remained unchanged since the 1981 final draft. See N.H. Comments, Rule 1.13, 1994 edition.

⁴ Numerous law review articles have been written on this subject. The following articles were particularly helpful in writing this article: Geoffrey C. Hazard, Jr., Triangular Lawyer Relationships, 1 Geo.J.Legal Ethics 15 (Summer 1987); Nancy J. Moore, Conflicts of Interest for In-House Counsel, 39 S. Tex. L. Rev. 497 (March 1998); Nancy J. Moore, Expanding Duties of Attorneys to "Non-Clients," 45 S.C. L. Rev. 659 (Summer 1994).