16

IDENTITY CRISIS: NAVIGATING THE ETHICAL CHALLENGES OF MULTIPLE REPRESENTATION IN AN INTERNAL INVESTIGATION

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Biographical Information

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Corporate Counsel who chooses to represent multiple parties in an internal investigation must be mindful of the risks. When board members, directors and employees hear the word "lawyer", there is often confusion as to whether the lawyer represents the company or the individual. Indeed, the corporate counsel can often experience an "Identity Crisis" wondering who the actual client is and whether representation of more than one party is feasible and ethical. Things become tricky for corporate counsel during an internal investigation because a corporation and its directors, officers, or other corporate individuals typically have a common interest in benefiting the corporate structure. These interests may diverge during an internal investigation, however, resulting in ethical dilemmas for corporate lawyers. Operating under the mistaken belief that they are consulting legal counsel, corporate officers and employees may disclose information to corporate lawyers during the course of an internal investigation with the expectation that such communication be kept confidential. Conflicts of interest may also arise when there are differing degrees of culpability between the corporation and its employees. Illinois ethical rules and case law make clear that, in the absence of a joint-representation agreement, the corporate lawyer's allegiance runs with the corporation and not with its officers or employees. To avoid violating ethical obligations to the client and the court, practitioners are well-advised to "Mirandize" corporate individuals regarding the nature of the lawyer's representation in an internal investigation.[1] This outline provides practical advice for corporate lawyers faced with the identity crisis that may arise during multiple representation in an internal investigation.

I. THE HAND THAT FEEDS YOU: ACTING IN THE BEST INTEREST OF THE CORPORATION DURING AN INTERNAL INVESTIGATION

A. The Rules of Professional Conduct

As the experienced practitioner well knows, the primary objective of an internal investigation is to determine whether and, in some instances, to what extent the corporation or its employees have engaged in wrongdoing. That means that you cannot simply shrug off gossip or

1. The colloquial term "Mirandize" refers to the United States Supreme Court's decision in *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602 (1966), in which the Court held that criminal suspects must be informed of their constitutional right to consult with an attorney and of their right against self-incrimination prior to police interrogation.

rumors and hope that they will go away. The discovery of information during an internal investigation is often key to subsequent corporate defense efforts. Although acquiring information is important to any internal investigation, the sophisticated corporate lawyer knows that it is equally important to abide by the ethical standards set forth in pertinent rules of professional conduct. Rule 1.13 of the Illinois Rules of Professional Conduct provides, in relevant part, as follows:[2]

> If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, **the lawyer shall proceed as is reasonably necessary in the best interest of the organization.**

In the midst of the internal investigation, it is easy to forget that the lawyer should give due consideration to the following factors also found in Rule 1.13:

> (1) the seriousness of the violation and its consequences,
>
> (2) the scope and nature of the lawyer's representation,
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> (3) the responsibility in the organization and the apparent motivation of the person involved,
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> (4) the policies of the organization concerning such matters, and
>
> (5) any other relevant considerations.

Under Rule 1.13, when dealing with an organization's directors, officers, employees, members, shareholders or other constituents, corporate counsel should fully disclose that his or her fiduciary duty is to the corporation. Counsel's response to actual or anticipated misconduct should be tempered by a desire to "minimize disruption of the organization" and to restrain from engaging in or perpetuating the misconduct. ILCS S. Ct. Rules of Prof. Conduct, RPC Rule 1.13.

Further still, operating under the mistaken belief that they are consulting legal counsel, corporate officers and employees may disclose information to corporate lawyers during the course of an internal investigation with the expectation that such communication is privileged or otherwise

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2. Rule 1.13 of the Illinois Rules of Professional Conduct is substantially modeled after Rule 1.13 of the American Bar Association's *Model Rules of Professional Conduct*, Model Rules of Prof'l Conduct R. 1.13 (2007).

will be kept confidential. When dealing with an organization's directors, officers, employees, members, shareholders or other constituents, corporate counsel should fully disclose that communications with corporate employees are not necessarily privileged and may be disclosed at the corporation's discretion.

B. Illinois Case Law and Bar Opinions

Illinois case law and bar opinions also make clear that, as a general matter, an entity's lawyer is not the lawyer for the entity's constituents. "A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity." *Bobbitt v. Victorian House, Inc.,* 545 F. Supp. 1124, 1126 (N.D. Ill. 1982). *See also, ABC Trans National Transport, Inc. v. Aeronautics Forwarders, Inc.,* 90 Ill.App.3d 817, 413 N.E.2d 1299 (Ill. App. Ct. 1980) ("[A]n attorney for a corporate client owes his duty to the corporate entity rather than a particular officer, director, or shareholder."). This is particularly true during an internal investigation where the lawyer's fiduciary duty runs with the corporation rather than any individual officer, director, or corporate employee. Ill Adv. Op. 95-15, 1996 WL 478489 (Ill. St. Bar Assn. 1996); *see also*, Ill Adv. Op. 95-1, 1995 WL 874713 (Ill. St. Bar Assn. 1995) ("Rule 1.13. . .makes it clear that a lawyer who is employed by a corporation, represents the corporation acting through its duly authorized constituents."). Therefore, in the absence of a joint-representation agreement, it is important for the corporate lawyer to hold the corporation's interests paramount during an internal investigation where conflicts of interest and confidentiality questions may present particularly sticky ethical dilemmas.

C. Using the *Upjohn* Warnings During an Internal Investigation

As attentive corporate practitioners know, the Supreme Court's decision in *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L.Ed.2d 584 (1981), altered the landscape of corporate attorney-client privilege. In *Upjohn*, general counsel conducted an internal investigation into allegations that company employees had bribed government officials to secure business. To investigate the allegations, corporate counsel prepared a questionnaire that included a cover letter explaining the matter and seeking information from corporate managerial employees. When the Internal Revenue Service subse-

quently sought the production of the questionnaires, the Supreme Court held that the questionnaires were protected by the attorney-client privilege as communications to an attorney acting as such so that the company could obtain legal advice. *Id.*

Although courts have since interpreted *Upjohn* in varying and sometimes inconsistent ways, some valuable practice pointers resonate in the opinion. *Upjohn* and its progeny advise that counsel should convey the following information to avoid conflicting obligations and ethical impropriety:[3]

(1) corporate counsel is conducting an internal investigation on behalf of the corporation;

(2) the purpose of the interview is to gather facts in order to render legal advice to the corporation;

(3) corporate counsel represents the corporation and not any individual employee. The corporate counsel's role is not to render personal legal advice to the employee;

(4) a corporate employee may seek independent legal representation during the internal investigation;

(5) information disclosed to corporate counsel may not be protected under attorney-client privilege; and

(6) information disclosed to corporate counsel may be disclosed to third parties at the corporation's discretion.

II. PLAYING FAVORITES: ETHICAL CONSIDERATIONS IN JOINT REPRESENTATION IN AN INTERNAL INVESTIGATION

When considering representing multiple defendants, the savvy corporate lawyer must assess whether the benefits of representing both a corporation (as a legal "person") and corporate individuals outweigh the risks. A best practice is to assess the representation from a disinterested lawyer's perspective. Hence, if a disinterested lawyer would conclude that a client should not agree to the representation under the circumstances, the attorney may not represent both clients, and should refrain from seeking the clients' consent to the joint representation.

3. See also Nancy J. Moore, *Conflicts of Interest for In-House Counsel*, 39 S.Tex. L. Rev. 497, 503 (March 1998).

As most corporate lawyers know, joint representation is a double-edged sword. On the one hand, joint representation may be cost efficient; it may enhance the overall quality of representation by promoting the exchange of information between employees and the corporation; and it casts a broader net for asserting attorney-client privilege. On the other hand, the potential pitfalls may counsel against joint representation. When deciding to represent both a corporation and its employees, for instance, the attorney must look at whether one party's interests will likely commandeer the representation at the expense of another. This is particularly problematic when a party (usually the corporation) agrees to pay the attorneys' fees associated with the representation because then, the opinion of the party holding the purse strings trumps all.

A. Defining the Limits of Attorney-Client Privilege in Joint Representation

Attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." *Upjohn,* 449 U.S. at 389. Attorney-client privilege "encourage[s] full and frank communication between attorneys and their clients and thereby promotes broader public interests in the observance of law and administration of justice." *Id.* Because attorney-client privilege necessarily interferes with the "truth-seeking mission of the legal process," *United States v. Tedder,* 801 F.2d 1437, 1441 (4th Cir. 1986), it has been "strictly confined within the narrowest possible limits consistent with the logic of its principle." *In re Grand Jury Proceedings,* 727 F.2d 1352, 1355 (4th Cir. 1984).

Delineating the limits of attorney-client privilege in an internal investigation presents important ethical concerns for the corporate lawyer. "The professional relationship. . .hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice." *United States v. Evans,* 113 F.3d 1457, 1465 (7th Cir. 1997). Problems pertaining to attorney-client privilege may be particularly acute in the context of settlement. One client may wish to settle the litigation in exchange for full disclosure of information that is otherwise protected by the attorney-client privilege. Settlement disclosures may be problematic when the disclosed material is shared client confidences. When initially obtaining the clients' informed consent to joint representation, an attentive corporate lawyer should fully disclose that potential conflicts may affect or even lead to the termination of the representation. Even after agreeing to represent

both parties, the corporate lawyer should still make affirmative steps to educate client about the scope of attorney-client privilege and how privilege may be waived during the course of the joint representation.

B. Addressing Conflicts of Interest in Joint Representation

Unfortunately, sometimes, we cannot "all just get along." Conflicts of interest may also arise during the course of a joint representation. In such instances, what is in the best interest of the corporation is not necessarily in the best interest of the corporate individual, and vice versa. When the clients' interests diverge, counsel must determine whether continued representation of both parties is ethical and practical. Rule 1.7 of the Illinois Rules of Professional Conduct provides important guidance to lawyers facing conflicts of interest in these scenarios, stating that a lawyer shall not represent multiple parties where the lawyer's representation "may be materially limited by the lawyer's responsibilities to another client or to a third person." ILCS S. Ct. Rules of Prof. Conduct, RPC Rule 1.7.[4] As a general rule, when dealing with an organization's directors, officers, employees, members, shareholders or other constituents, corporate counsel should explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Corporate counsel may ethically embark on multiple representation under Rule 1.7 when (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after the lawyer discloses the implications of the common representation and the advantages and risks involved. *Id.* In some instances, a corporation and its employees may initially agree to joint representation. Under Rule 1.7, if an attorney realizes an unanticipated conflict of interest will likely compromise the representation, she must fully disclose the conflict to the client and obtain consent to continue with the representation. Such written disclosure should include the following:

(1) Joint representation allows the attorney to disclose to the corporation information the employee has told to the attorney.

4. Rule 1.7 of the Illinois Rules of Professional Conduct is substantially modeled after Rule 1.7 of the American Bar Association's *Model Rules of Professional Conduct*, Model Rules of Prof'l Conduct R. 1.7 (2007).

(2) Should a conflict of interest ethically prevent counsel's continued representation of both parties, the lawyer may withdraw from representing the employee but continue advocating for the corporation.

(3) The range of possible claims and defenses may narrow when jointly represented clients agree not to take conflicting positions.

(4) The confidentiality of work-product information must be maintained, even after a party withdraws from joint representation.

Depending on the materiality of the conflict, an attorney can be faced with the difficult decision of withdrawing from the representation, risking disqualification, or incurring liability for legal malpractice.

III. CONCLUSION

In sum, an internal investigation is a balancing act for corporate counsel. In internal investigations, corporate lawyers must balance the competing interests of the corporation and its employees, as well as ethical obligations of the profession. In deciding how to proceed in an internal investigation, the prudent corporate lawyer must ascertain whether she can maintain both client relationships without jeopardizing their interests and must make a full disclosure of both her role as well as any actual or anticipated impediments to her representation. By following the disclosure practice pointers outlined herein, corporate lawyers are better prepared to navigate the ethical dilemmas that may lead to trouble for the lawyer and client down the road.