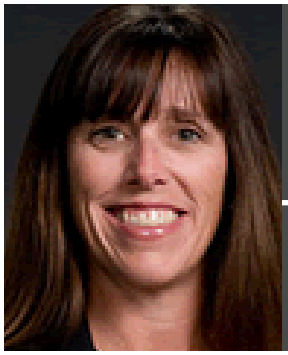

LESSONS LEARNED (OR TO BE LEARNED) FROM THE MICHAEL COHEN FIASCO

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Forced with a Hobson's Choice - It Shouldn't Be That Hard
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He sat closer to more of his client's personal and business dealings than many in history, shielding the most sensitive parts of his client's life. And then, when faced with his own demise, spilled most, if not, all of it – some say he violated his duty of confidentiality and perhaps, the attorney-client privilege. At best, he chose not to keep his mouth shut in what amounts to a very gray area. Guess who?

Michael Cohen's fiasco is an extreme but cautionary tale to all lawyers, everywhere, but particularly to in-house lawyers who have a single client and one group of professionals they guide and advise. Because they generally report to a single person in the C-Suite whose focus is on the bottom line – and who most often does not have a law degree or legal training – strategic differences, professional ambition and ethical conduct, often clash. While Cohen's plight played out under the public watch, there are real, not often so public, consequences to that kind of unethical conduct.

Every day, in-house/corporate counsel works hard to ensure the organization's success and plays a part in shaping its image and reputation. Not only does what counsel do matters, but also how he/she overcomes challenges, contribute to success. Therefore, the organization and its constituents – all of them - need to bear in mind that it and they are judged by the means employed to achieve results. In that vein, in-house counsel's client needs to consciously and continuously balance economic, industry, social and other considerations when making business decisions, and to do so with a high level of integrity and trustworthiness.

So what can you do when your client directs you to violate the law, commit fraud, or cross ethical lines? And when are you ethically required or permitted to resign? This problem arises most often when corporate counsel has advised the entity against misconduct (or has counseled strongly that there are serious risks and that the company may want to consider it), and the corporate client (or its constituent(s)) still intends to proceed.[1]

Consider these examples:

- Your client manufacturers and sells $500,000 of a product line in a particular state. To do so, it should have a contractor's license – but that licensing costs $350,000 annually and your client has chosen to take the risk of a fine because the reward is not high enough.
- Company A, your employer, has an affiliate in a jurisdiction in which corporate officers and management can be held criminally liable for certain safety violations. Your client has considered, but ultimately rejected for cost reasons, a new safety program that would substantially reduce the risk of a

1 Do not confuse that situation with that in which you are asked to analyze the limits of lawful conduct as that is clearly permissible, even if your client later decides against your advice to proceed. See Model Rules of Professional Conduct (ABA) Rule 1.2(d): "[A] lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." Of course, if the client then decides to take an action that the lawyer "knows" is criminal, fraudulent or a violation of law, then he/she cannot counsel or assist the client any further on that matter. Rule 1.2(c) and 1.2(d). Separately, the prohibition on assisting a client in the perpetration of a crime or fraud does not extend to past conduct. Model Rules of Professional Conduct 1.13(d) ("Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.") Nevertheless, the lawyer and client cannot engage in activity that could be construed as covering up the criminal conduct.

particularly awful injury.

- Your chief executive officer schedules a meeting with just the two of you. At that meeting, he tells you that he has accepted a monetary gift from a foreign company in exchange for reduced pricing on a significant product line. He tells you to "keep it between us."

While the best place to start a discussion about how to deal with any of those situations is with the Model Rules of Professional Conduct, they aren't always the model of clarity, and leave open judgment calls. Indeed, harmonizing Model Rules 1.2, 1.6, 1.13 and 1.16 is a difficult task. But before we even get there, who is the in-house lawyer's client in those, and every situation?

While it should be obvious, Model Rule 1.13(a) makes it clear that a "lawyer employed . . . by an organization represents the organization acting through its duly authorized constituents." Ethical Consideration 5-18 likewise provides that "[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. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization." Said otherwise, your client is the organization itself, not its constituents. But, because the entity is a legal fiction, it can only act through its constituents. In practice, that distinction is more theoretical than actual, particularly from management's perspective who naturally consider corporate counsel as one of their own. Consequently, in-house counsel serves the organization through interaction with, and directives from, individuals who are not his actual client. You know it, your leadership knows it, and yet, that line gets blurred and crossed all the time, which is problematic when the attorney believes that decisions of corporate management are not in the company's best interest, or when the organization's' interest becomes adverse to those of a constituent.

When that conflict of interest (or the potential for one) arises, the in-house lawyer must expressly advise the constituent of the conflict, that the lawyer is counsel for the organization, not the individual, that such individual may want independent counsel, and that discussions between the lawyer and the individual may not be privileged. Model Rules of Professional Conduct (ABA) 1.13(f) ("In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.")[2]

Once the identity of your client has been made clear, the starting place for the analysis of the entity's potential misconduct is Rule 1.2(d), which expressly prohibits a lawyer from assisting a client in the perpetration of a crime or fraud.[3] While it is an exaggeration to conclude that any violation of law constitutes criminal conduct, counsel must carefully examine the broad reach of criminal sanctions before dismissing that option. As well, because Rule 1.2 prohibits a lawyer's assistance or counsel only if he or she "knows" that the conduct is criminal or fraudulent, a high level of certainty of the facts is required. In that vein, the lawyer is not generally required to investigate the accuracy of the client's report of the relevant facts, which ordinarily may be accepted as true. However if the lawyer is aware of facts or evidence that indicates that such corporate representative's rendition is inaccurate, he/she cannot turn a blind eye and must investigate further (i.e., contacting other officers with no reason to provide false information).

The next step in the analysis, then, is Model Rule of Professional Conduct (ABA) 1.13, which states, in relevant part:

> (b) 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 that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.
>
> (c) Except as provided in paragraph (d), if

2 Your primary role is to provide your client with the legal risks and alternatives, not to make the business decision, nor to be the fixer. So make it somewhat easier on yourself and the entity. Prepare, circulate and have all employees and executives review and sign a robust Code of Conduct. It should be substantial and comprehensive – and certainly, not just a check-the-box exercise, but one that is embraced by everyone all the way through the C-Suite. The Code should set out clearly what is expected from employees and people acting on behalf of your client, and set clear standards for what is acceptable behavior from its employees and people acting on its behalf. The Code of Conduct describes how the company should behave in uncomfortable situations or moral dilemmas which call for support and clarification. It also sets out the framework for discretionary decisions. And as a result, it provides you, as the legal advisor to the entity, the fall back protection you need when you are in the gray area.

3 "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is fraudulent or criminal…." Model Rules of Professional Conduct (ABA) Rule 1.2(d).

> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
>
> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization. . . .
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> Model Rules of Professional Conduct (ABA) 1.13.

Counsel is cautioned that there are corporate decisions and conduct that, although they may subject the entity to risk, and even though they may not be in the best interests of the corporate client, do not implicate corporate counsel's ethical obligations. In fact, the comments to Model Rule 1.13 states that, "[w]hen constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not such in the lawyer's province." Comment 3, Model Rule 1.13.

Different considerations arise, of course, when the organization has engaged, or is contemplating engaging, in illegal or fraudulent conduct. In that case, in-house counsel has few choices, none of which are palatable, but all of which may be required, after giving strong consideration to the following: (1) the seriousness of the violation of law and the possible consequences; (2) the scope and nature of the lawyer's representation; (3) the responsibility of the organization and the apparent motivation of the person involved; and (4) the policies of the organization concerning such matters. Model Rules of Professional Conduct (ABA) 1.13(b).

If you conclude that action is required to comply with your ethical obligations, generally speaking, you have four options. First, you must urge those individuals with control over the decision or activity to reconsider their actions. Second, you should obtain a separate, independent legal opinion from outside counsel to present to the appropriate constituent in the organization. Third, if the constituents will not reconsider their decision, you should elevate the matter up the corporate ladder to "higher authority within the organization," in all likelihood, the CEO or board of directors.

As well, in this brave new world, in-house lawyers no longer fit the traditional mold of acting as a conduit between the entity and outside counsel. Instead, most in-house attorneys are not only doing significant legal work, but also taking on a larger advisory and compliance role, anticipating potential legal problems, advising on possible solutions, and generally assisting in achieving their clients' business goals. Because of the various hats they wear, then, in-house counsel may, and often do, have a duty to make disclosures that are not imposed on other non-lawyer corporate representatives – and may be forced to resign if the company acts illegally or fraudulently, or in a manner that violates the lawyers' professional responsibilities and oath under the Model Rules. So when do you have to resign?

While Model Rules of Professional Conduct (ABA) Rule 1.2(d) applies to the client's conduct, Rule 1.16(a) addresses whether the continued representation will cause the lawyer to violate the law. It goes without saying that, confronted with ongoing or intended criminal or fraudulent conduct that the entity's "highest authority" has refused to abandon, corporate counsel is in a pickle and may have no choice but to resign: "[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law." Said otherwise, a lawyer is required to withdraw from representation when his/her services further criminal or fraudulent conduct if continued participation could be deemed to be engaging in illegal conduct.

On the other hand, a lawyer may withdraw from representing a client if, among other things: "(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (3) the client has used the lawyer's services to perpetrate a crime or fraud. . . ." Model Rules of Professional Conduct (ABA) Rule 1.16(b). In other words, permissive withdrawal under (b)(1) requires only that the client's illegal or fraudulent actions involve the lawyer's services, even if it does not further the unlawful or fraudulent conduct.

And then, if corporate counsel does in fact, resign or withdraw, should he do so quietly or with a bang? Of course, there is real social value in the attorney-client privilege in order to allow full candor and honest disclosure and discourse, without fear that others will learn their secrets, their strategies, their mistakes. Clients have a right to expect and rely on confidentiality, even if their ideas are stupid or even borderline fraudulent or criminal,

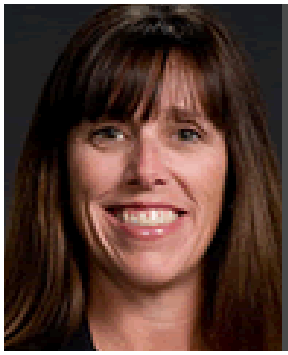
so long as they adhere to their lawyers' rejection of those ideas.

On the other hand, under Model Rule of Professional Conduct (ABA) 1.13(e), "[a] lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal."[4]

That decision requires a very careful balancing of the duty of confidentiality and the prohibitions against furthering a crime or fraud – with the overall goal favoring withdrawal without adversely affecting the client. Specifically, counsel is bound to protect his client's (the entity) confidences, "not to reveal information relating to the representation of a client, Model Rules of Professional Conduct (ABA) 1.6(a), unless the lawyer "reasonably believes necessary: . . . (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services. . . ." Model Rules of Professional Conduct (ABA) 1.6. In the end, in-house counsel who is faced with his client's misconduct may not really have a choice but to disclose confidential information in order to avoid personal liability, notwithstanding the lawyer's ethical obligations to the contrary.

In conclusion, while glamourous at times, in-house counsel can be placed in the unenviable position of making a Hobson's choice between the lesser of two evils: comply with the client/employer's wishes and risk both the loss of your professional license and exposure to civil and criminal penalties and sanctions, or refuse to comply and risk the loss of employment. Said otherwise, corporate counsel may be tempted to refrain from challenging unethical or illegal conduct by management for fear of placing his livelihood at risk. That choice should not be so difficult – you do not have a choice of whether to follow your ethical obligations as attorneys licensed to practice law, or comply with the unethical demands of your clients. While in the past, a lawyer's obligation to blow the whistle on his corporate client's misconduct was more often viewed as a matter of ethics and professional conduct, today, a failure to speak out in the face of such misconduct may also be viewed as a basis of personal civil and/or criminal liability. The bottom line is this: the stakes are high. Do the right thing, ethically and legally, to advise your client, and to protect the organization, but also your law license. Anything less, well, just ask Michael.

4 While the issue is beyond the scope of this article, in-house counsel who must withdraw or resign in order to comply with his or her ethical obligations - -and to avoid the potential for personal culpability – may rightfully believe that it is not a voluntary act, and was instead, compelled by his or her employer, amounting to a wrongful or constructive discharge in violation of public policy. Presently, the prevailing view is that a lawyer's employment is at will and therefore, there is no recourse. Nevertheless, an emerging line of cases hold that the loss of employment as a result of compliance with ethical obligations can result in damages.



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Tammy Westerberg has nearly 20 years of experience helping clients resolve complex commercial litigation through trials, arbitrations, and negotiations. Tammy represents Fortune 500 companies, small businesses, and individuals in complex commercial litigation, including employment, construction defect, securities, and class action matters in federal and state courts. Her industry experience includes oil and gas, consumer goods, construction and engineering, and financial services.

Early in her career, Tammy spent several years handling M&A and other corporate matters. Clients appreciate her first-hand experience and familiarity with the transactional and related issues that lie at the heart of many commercial and professional malpractice lawsuits.

Additionally, Tammy's experience includes corporate governance matters, contract and partnership disputes, internal investigations, and litigation and counseling related to consumer protection issues. In this capacity, she advises clients on quasi criminal litigation and investigations with an eye toward potential civil litigation that could follow.

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- Employment
- Investigations & Compliance
- Professional Liability

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- Financial Services
- Construction & Engineering
- Professional Services
- Oil & Gas
- Consumer Products & Services
- Legal Services
- Real Estate

Honors and Awards
- The Best Lawyers in America - Commercial Litigation, 2017-2020; Legal Malpractice Law - Defendants, 2020
- Colorado Super Lawyers - Business Litigation, 2017-2019; Top 50 Women, 2015-2019; Top 100, 2018-2019; Professional Liability Defense, 2013-2016
- Benchmark Litigation - Future Star - Colorado, 2015-2018
- Colorado Rising Stars - Business Litigation, 2009-2011
- Law Week Colorado - One of Six Top Women Lawyers of 2015

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- University of Denver Sturm College of Law, J.D., 1998 - Law Review, General Editor; American Jurisprudence Award, Constitutional Law I & II
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