

ETHICS: DEALING WITH FORMER EXECUTIVES ACCUSED OF WRONGDOING

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**ETHICAL CONSIDERATIONS IN DEALING WITH
FORMER CORPORATE CONSTITUENTS ACCUSED OF MISCONDUCT**

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Counsel representing corporate clients must always be cognizant of the particular ethical considerations and privilege issues that may attend their communications with “constituents,” i.e., officers, directors or employees, of the organization. These considerations are compounded when counsel represents a corporation embroiled in litigation arising from the alleged misconduct of management level former employees. This paper will focus upon the various ethical obligations, conflict considerations and privilege issues that counsel for a corporation must analyze prior to dealing with former executive employees whose interests may be adverse to those of the corporate client.

A. The Attorney-Client Relationship

Whenever a lawyer represents a corporate client, she may be faced with situations in which the rights of constituents of the corporation may be adversely impacted. Nonetheless, when a lawyer is retained to represent a corporation, the lawyer’s primary obligation is to represent the interests of the organization as defined by its responsible agents acting pursuant to the organization’s decision-making procedures.

In general, when undertaking the representation of a corporation, it is important that both the organization and the lawyer clarify whether the lawyer has been retained to represent the organization, a person or entity associated with it, or more than one such person and entities. Most ethical rules place the duty on the lawyer to clarify whom the lawyer intends to represent

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when the lawyer knows or reasonably should know that a constituent of the corporate client, i.e., an officer, director or employee, may reasonably rely on the lawyer to provide legal services to that person or entity. See generally, Restatement (Third) of the Law Governing Lawyers §14, comment (f).² Any failure to do so may result in the lawyer unintentionally assuming an attorney-client relationship with the constituent.

Whether a lawyer has formed an attorney-client relationship with such a person will be a question of fact to be determined based on reasonable expectations under the circumstances. An implication that such a relationship exists is more likely to be found when the lawyer performs personal legal services for the individual as well as the corporation. Id. However, a lawyer does not enter into an attorney-client relationship with a person associated with a corporate client solely because the person communicates with the lawyer on matters relevant to the organization that are also relevant to the personal situation of the person. In those circumstances, the question is one of fact, based on the reasonable and apparent expectations of the person or entity whose status as a client is in question. Id.³

Although not spelled out in either the Model Rules or the Restatement, it would seem that these same considerations and, importantly, the same fact-based analysis would apply to the

² Much of the discussion in this paper is taken from the Restatement (Third) of the Law Governing Lawyers and in some instances the Model Rules of Professional Conduct. The principles expressed in the Restatement or the Model Rules may differ from the particular ethical rules adopted by a jurisdiction and it is incumbent upon counsel to consult those rules in determining the manner in which he or she must deal with present or former corporate constituents.

³ The general rule is that a confidential communication between a lawyer for an organization and an employee or agent of the organization about a matter of interest to the organization does not thereby make the lawyer counsel for the associated person with respect to that person's own interest in the same matter. Thus, the organization may continue to employ the lawyer to oppose the person in the same or a substantially related matter. See, e.g., Kubin v. Miller, 801 F. Supp. 1101, 1116 (S.D. N.Y. 1992); Ferranti Intern. Plc. v. Clark, 767 F. Supp. 670 (E.D. Pa. 1991); Professional Serv. Indus., Inc. v. Kimbrell, 758 F. Supp. 676 (D. Kan. 1991); if, however, an officer or agent and the organization are co-clients, the normal rules of conflict of interest would preclude subsequent representation of the company against the officer or agent in a substantially related matter by the same firm.

formation of an attorney-client relationship with former constituents of the corporation.⁴ Thus, the more open and obvious the adversity of interest, the less reasonable any expectation on the part of the former constituent that the lawyer is protecting his interests. On the other hand, in situations where there could be a misunderstanding on the part of the former constituent, counsel for a corporation should consider whether he has an obligation to make a full, written disclosure of exactly whom he represents.

B. Confidentiality

In general, a lawyer's obligation to keep secret a client's confidential communications runs to a corporate client and attaches to communications with corporate agents acting on behalf of the organization with respect to the subject matter of the representation. The scope of this obligation may be called into question where a lawyer receives a communication from a constituent or a former constituent that discloses conduct that is likely to impact negatively on the organization.

Section 96 of the Restatement (Third) of the Law Governing Lawyers provides:

If a lawyer representing an organization knows of circumstances indicating that a constituent of the organization has engaged in actions or intends to act in a way that violates a legal obligation to the organization that will likely cause substantial injury to it, or that reasonably can be foreseen to be imputable to the organization and likely to result in substantial injury to it, the lawyer must proceed in what the lawyer reasonably believes to be the best interest of the organization.

Id. §96(2). This section is substantially similar to Model Rule 1.13(b) which go on to state that, in determining how to proceed, a lawyer must consider the seriousness of the violation and its consequences, the scope of the representation, the responsibility within the organization and the

⁴ See **Brown v. St. Joseph County**, 148 F.R.D. 246 (N.D. Ind. 1993) (analyzing the establishment of an attorney-client relationship between an entity's former employees and the law firm hired by the entity to defend it.)

apparent motivation of the person involved and the organization's policies concerning such matters. Any measures taken by the lawyer must minimize the risk of revealing information relating to the organization to persons outside the organization.

In Comment (b) of Section 96, the drafters of the Restatement set forth the rationale for this directive. A lawyer who has been retained to represent a corporation as a client owes professional duties of loyalty and competence to the organization. By representing the organization, a lawyer does not thereby also form a client-lawyer relationship with all or any individuals employed by it or who direct its operations or who have an ownership or other beneficial interest in it, such as shareholders. Accordingly, the lawyer representing the corporation does not owe duties of care, diligence or confidentiality to the constituents of the organization, although he may regularly deal with them on matters of interest to the corporation. Id. Thus, a lawyer is not prevented by rules of confidentiality from acting to protect the interest of the corporation by disclosing within the corporation communications gained from constituents who are not themselves clients, even if the disclosure is against the interest of the communicating party, of another constituent whose breach of duty is at issue, or of other constituents. Id. at comment (e).

Again, these considerations must apply with even greater force to situations involving former constituents of a corporation, assuming that the lawyer has not, through his words or conduct, created any reasonable expectation on the part of the former constituent that the lawyer is acting on his or her behalf. Accordingly, there is no restriction on the lawyer's ability to disclose to the corporate client any communication with the former constituent. Likewise, however, no attorney-client privilege will attach to communication with the former constituent

and it will not be protected from disclosure to opposing parties in discovery on the basis of privilege, although it may be subject to work product protection in appropriate circumstances.

C. Ethical Obligations in Communicating with Non-Client Former Employees.

As a general rule, when dealing with present or former constituents of the corporate client with whom a lawyer has no attorney-client relationship, the lawyer is bound by the rules which govern attorney contacts with represented and unrepresented non-clients. Accordingly, a lawyer representing a corporate client in a matter may not communicate about the subject of the representation with a non-client or a representative of a corporate non-client whom the lawyer knows to be represented in the matter by another lawyer. See generally, Restatement (Third) of the Law Governing Lawyers §99. **See also Model Rule 4.2.** A “represented non-client” includes a natural person represented by a lawyer and a current employee or other agent of an organization represented by a lawyer if the employee or agent supervises, directs or regularly consults with the lawyer concerning the matter; or if the acts or omissions of the employee or other agent may be imputed to the organization for purposes of civil or criminal liability in the matter; or if the statement of the employee or other agent, under applicable rules of evidence, would have the effect of binding the organization with respect to the matter. Id. at §100. Accordingly, a lawyer who is handling a matter in litigation for a corporate client may not engage in ex parte communications with a former employee of his corporate client if the former employee is represented by counsel or is employed by another corporation, which is represented by counsel with respect to the subject of the litigation.⁵ In most circumstances, this proscription will limit a lawyer’s communications with the former employee to those permitted by his counsel. Correspondingly, it relieves the corporation’s lawyer of many of the ethical obligations

⁵ See Benjamin J. Verina, *Right Of Attorney To Conduct Ex Parte Interviews With Former Corporate Employees*, 57 A.L.R. 633, §3 (1998).

and constraints that would otherwise attach to his communications with the former employee if the former employee was unrepresented.

In the latter situation, a lawyer must act in accordance with the Rules of Professional Conduct that govern communications with unrepresented parties. In general, in dealing with a non-client who is not represented by a lawyer:

- (1) A lawyer may not mislead the non-client, to the prejudice of the non-client, concerning the identity and interest of the person the lawyer represents; and
- (2) When the lawyer knows or reasonably should know that the unrepresented non-client misunderstands the lawyer's role in the matter, the lawyer must make reasonable efforts to correct the misunderstanding when failure to do so would materially prejudice the client.

Restatement (Third) of the Law Governing Lawyers §103. This rule is drawn primarily from the various codes of Professional Conduct governing lawyers, except that these codes typically do not require the element of prejudice to the non-client. Id. comment (a). Indeed, Model Rule 1.13 states that:

In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it appears that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Model Rule of Professional Conduct 1.13(d).

These constraints may significantly impact the manner in which a lawyer for a corporate client, whether inside or outside counsel, conducts an investigation of facts relevant to allegations of violations by agents of the corporation. In any such investigation, the lawyers for the organization may wish to interview present or former constituents of the organization, who in some instances might have interests that differ from those of the organization and who might be at personal risk of criminal prosecution or civil penalties. In the case of present constituents, the

drafters of the Restatement recognized that the constituent may mistakenly assume that the lawyer will act to further the constituent's personal interest, particularly if the constituent is asked to work with the lawyers on matters of common interest over an extended period of time, or if the lawyer has formerly provided personal counsel to the constituent. When the interest of the corporation and the constituent materially conflict, the lawyer's failure to warn the constituent of the nature of the lawyer's role may prejudicially mislead the constituent, impair the interest of the organization, or both. Id. at comment (e). Failing to clarify the lawyer's role and the client's interest may cause the lawyer to undertake concurrent representation of both the organization and the constituent, albeit, unintentionally. Such a result could obtain where a lawyer's silence had reasonably induced the constituent to believe that the lawyer also represented the constituent's interest.

Although subsection (d) of Model Rule 1.13 could be read to require a warning in every instance in which there is an adversity of interest between an organization and a constituent, the comment to the Rule provides:

There are times when the organization's may be or become adverse to those of one or more of its constituents. In such circumstances, the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for the constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Comment to Model Rule of Professional Conduct 1.13(d).

The Restatement takes the position that the last paragraph of this comment implies that Rule 1.13(d) does not require a warning in all instances of adversity of interest, and that such a

warning is required only when the lawyer is or reasonably should be aware that the constituent mistakenly assumes that the lawyer is protecting his interests. Restatement (3d) of the Law Governing Lawyers § 103, Reporter's Note to Comment e. Pursuant to the Restatement, a lawyer may deal with the unrepresented constituent without warning provided the lawyer reasonably believes, based on information available to the lawyer at the time, that the constituent understands that lawyer represents the interest of the organization and not the individual interest of the constituent. In such a situation, no warning to the non-client constituent is required even if the constituent provides information or takes other steps against the constituent's own apparent best interest and even if the lawyer, where the lawyer representing only the constituent, would advise the constituent to be more guarded. The absence of a warning in such a situation will often be in the interest of the client organization in assuring that the flow of information and decision-making is not impaired by needless warnings to constituents with important responsibilities or information. Id. Comment e.

Notwithstanding the position taken by the Restatement, counsel for an organization must consult the particular ethical rules adopted by the governing jurisdiction and the cases construing those rules, to ascertain how the jurisdiction has regarded contacts with former employees of the corporate client where there is an adversity of interest.

D. Shareholders Derivative Actions

Shareholders derivative actions, where shareholders bring suit to compel the directors to perform their legal obligations to the corporation, are generally deemed to be a legal controversy over management of the organization. Because such actions are generally brought in the name of the corporation itself, a question can arise as to whether counsel for the organization may defend such action. In general, most derivative actions are a normal incident of an organization's

affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. See Comments to Model Rule of Professional Conduct 1.13.

E. Conclusion

Although the ethical rules discussed above govern a lawyer's dealings with unrepresented "constituents," of a corporation, i.e., current directors, officers, or employees of a corporation, it would seem they would apply with at least equal force to dealings with unrepresented former constituents. In such situations, the adversity between the organization and the former constituent may be apparent enough that the lawyer has no duty to clarify that he is not representing the interest of the former constituent. However, in cases where the interest of the organization and the former constituent are in part coextensive, or where the former constituent is asked to work closely with the organization's lawyer or there is some indicia that the former constituent misunderstands the nature of the relationship, a lawyer well advised to make a well-documented disclosure of exactly whose interest he or she is protecting at the outset of any contact with the former employee. A lawyer is free to share information obtained from a former constituent with the litigation control group within the organization. However, in all instances, the lawyer for the corporation should assume that his communications with the former constituent are not subject to the attorney-client privilege and, consequently, not protected on this basis from disclosure in the discovery process.



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Linda Woolf is a partner of the firm and one of its founding members. Ms. Woolf's practice is devoted to the representation of clients in complex commercial, insurance coverage and employment litigation. Ms. Woolf is a member of the Federation of Defense and Corporate Counsel and a past Chair of the Network of Trial Law Firms, Inc. (1999-2000). The Network is a non-profit corporation comprised of 23 independent law firms nationally recognized for their trial and litigation experience. Member firms maintain offices in more than 67 cities staffed by more than 2,500 lawyers who represent clients in litigation across the country. The Network assists its member firms through various activities, including the sponsorship of continuing legal education seminars for senior corporate attorneys and their outside counsel. As Chair, Ms. Woolf presided over the Network's Board and Executive Committee, as well as its ongoing continuing legal education activities. In 2002, Ms. Woolf named to the Executive Board of the Md. Association of Defense Counsel, where she is Co-Chair of its Appellate Committee.

COMMERCIAL AND BUSINESS TORT LITIGATION

Has represented national and local corporations at the trial and appellate levels in state and federal courts in matters involving the defense of federal and state antitrust violations, the prosecution of claims arising from non-competition agreements and the misappropriation of technology, and the defense and prosecution of claims for breach of contract and misrepresentation contractual and arising from the sale of subsidiaries. Represented regional hospital system in cases involving breach of service agreements and other contracts. Represented a surety in protracted litigation with the Resolution Trust Corporation arising from the failure of a savings and loan institution. Represented the majority shareholders of two thoroughbred racing corporations in derivative lawsuits filed by minority shareholders, successfully retaining control of nationally known racetracks. Has represented corporate directors and officers, trustees and other fiduciaries in various litigation including claims for diversion of corporate opportunity, claims under ERISA for alleged breaches of fiduciary duty, shareholder derivative claims. Defeated proposed class certification in two companion ERISA cases brought by retirees of non-for-profit health insurer seeking enforcement of former welfare benefit plan and damages for breach of fiduciary duty.

INSURANCE COVERAGE LITIGATION

Has represented insurers in various complex insurance coverage disputes, including:

Mayor & City Council of Baltimore v. Ulica Mutual Ins. Co. Represented primary and umbrella insurers in coverage litigation brought by municipality to recover damages allegedly incurred as a result of asbestos-containing building materials in public buildings. Obtained summary judgment in favor of insurers on basis of products risk exclusion which was affirmed on appeal in a case of first impression in Maryland.

CSX Transportation, Inc. v. Continental Ins. Co., 343 Md. 216, 680 A.2d 1082 (1996). Represented national insurer in major declaratory judgment action concerning coverage for occupational noise-induced hearing loss claims brought by 30,000 former and present railroad workers, member of lead trial team for a group of 19 insurers, obtaining a jury verdict for the insurers which was affirmed by the Court of Appeals of Maryland.

Nationwide Mutual Insurance Company v. Lafarge Corp. Represented Travelers Indemnity Company in protracted coverage litigation arising from the premature deterioration of concrete railroad cross-ties throughout the northeast corridor, successfully defending claims of statutory and common law bad faith and obtaining a jury verdict which substantially reduced the policyholders' claimed losses.

Has represented international insurance carrier in federal and state court coverage litigation arising from asbestos bodily injury and asbestos property damage claims.

REPRESENTATION OF LOCAL GOVERNMENTS AND MUNICIPALITIES

Substantial experience representing local governments in employment and land use litigation, and law enforcement and correctional agencies and their employees in connection with claims for excessive force, false arrest, assault and battery, malicious prosecution and related constitutional claims. Has represented numerous counties, towns and other local governments in governmental liability cases, including claims for wrongful death and injuries arising from negligent design, maintenance or repair of roadways, sidewalks, administration of recreational programs, auto torts and negligent hiring.

EMPLOYMENT LITIGATION

Has defended national and local, private and public employers in employment-related claims in federal and state courts and at the administrative level. Has obtained numerous summary judgments in favor of private sector and government employers arising from claimed violations of federal and state employment statutes, including claims under Title VII of the Civil Rights Act for wrongful termination, disparate promotion and training opportunities, disparate disciplinary measures, and retaliation based on race, religion, sex and disability. Has defended claims asserted under the ADA, the FMLA, the Equal Pay Act of 1963, the ADEA, COBRA, the FLSA and state wage and hour laws.

ENVIRONMENTAL

Has represented a publicly owned waste water treatment plant in a series of cases brought by a citizens' group under the federal Clean Water Act and state statutes, alleging violations of the plant's National Pollution Discharge Elimination System Permit.

GENERAL LIABILITY DEFENSE

Representation of companies providing security services and business and property owners against serious personal injury claims arising from the criminal acts of third parties. Substantial experience in the defense of product liability claims, defending manufacturers of construction equipment, abrasive products, high pressure hoses, exterior building panels, construction materials and drug testing kits against claims of negligence, strict liability and breach of warranty.