Litigation Ethics:
Representing Corporations and Other Organizational Clients

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INTRODUCTION

Representing corporations is not easy. A company’s legal problems can be complex. But solving them is often not the biggest challenge. Legal problems aside, lawyers who represent corporations practice in an ethics minefield. If you don’t watch out, you can easily step on an ethics issue buried just beneath the surface. Even if you’re very careful, these ethics landmines can still explode. The dilemmas may not be of your own making. Sometimes we inherit them. Sometimes our clients, our partners, our associates, or circumstances beyond our control impose them on us. Sometimes we simply fail to recognize them, either because we’re not fully aware or because they do not trigger a red flag.

The corporate quandary

Handling a corporation’s legal work is particularly risky. Because corporations are inanimate and can only act through agents, the lawyer may be unable to recognize which constituents embody the client. Is the corporate client the directors, the officers, the employees, or the shareholders? What if their interests are not aligned? Does the corporation itself have interests different from those expressed by the constituents from whom the lawyer takes direction? How does the lawyer recognize and deal with these potentially divergent interests? To whom does the lawyer owe the duty of loyalty or the duty of disclosure? Whose confidences must the lawyer protect? What should be done when the lawyer’s view of the corporation’s best interest conflicts with the views of the constituents who engaged the lawyer?

Corporations are often members of a corporate family. They have parent and grandparent companies, sister companies, and subsidiaries. Some corporate clients are from mixed families, not wholly belonging to a single parent. What does the lawyer do when a corporate client is adverse to a company
related to another client? Does the nature of the relationship between the companies matter and, if so, how do we know when the relationship is so attenuated that the conflict issue disappears?

Corporations face legal and business issues that, by their nature, seem to entangle their lawyers in ethics issues. For example, to control expenses, a company asks its lawyer to provide an alternative fee agreement in which the lawyer gets a fixed fee, regardless of how much or how little work the lawyer performs. Do ethics issues lurk in this arrangement? Or say a corporate client puts pressure on its lawyer to resolve a pending dispute. The lawyer suggests that the client deal directly with the opposing party, but the client asks the lawyer to ghostwrite a letter for the client’s signature to kick off the negotiations and bypass the opposing party’s lawyer. What do the rules of professional responsibility say about that?

**Model Rule 1.13**

The Model Rules of Professional Conduct have a separate rule – 1.13 – devoted entirely to representing organizational clients. One chief purpose of the rule is to give guidance when, in the course of a representation, the lawyer learns that someone in the company is about to violate a legal obligation. This circumstance puts the lawyer in the crosshairs between the duty of loyalty, duty of care, and duty of confidentiality. The rule attempts to put these into balance by discussing when the lawyer is either required or permitted to disclose the information or take other action. In one section, for example, the rule states:

> 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.

Unfortunately, the rule exposes the lawyer to the risk of being second guessed, with potential disciplinary consequences for making a move someone else, in hindsight, concludes was wrong. For example, the rule imposes a standard that depends on what the lawyer “knows” about the constituent’s actions or intended actions, when the line between what the lawyer “knows” and what the lawyer merely has “reason to believe” may not be so clear and when the lawyer may be unaware of all the facts, including some that might put the conduct in a different light. And before the lawyer’s duty to act is triggered or before the lawyer’s response is shielded by the rule, the lawyer must know that the constituent’s conduct violates a legal obligation, even though the question of a violation is often subject to great debate and disagreement. Further, the lawyer must know that the conduct is “likely” to result in “substantial” injury to the organization, requiring the lawyer to separate the probable from the possible and to know when a quantum of likely injury qualifies as substantial.

Then, once the lawyer has concluded these circumstances exist, the lawyer is required “to proceed as is reasonably necessary in the best interest of the organization.” The rule does not identify what those steps might be, leaving it to the lawyer’s judgment – measured against a vague standard of reasonable
necessity – to decide what to do. If the lawyer were to report the conduct, say, to the FBI, the lawyer could potentially be disciplined if a bar overseer later concludes that such reporting was not reasonably necessary. The rule’s very next sentence requires the lawyer to take the specific step of reporting the conduct to a higher authority in the organization, a duty excused only if the lawyer reasonably believes – again the same vague standard – that such reporting is unnecessary.

The rule is a strange combination of commands to take action and safe harbors for either acting or not acting. To be sure, the rule’s adoption of reasonableness standards – e.g., reasonable necessity and reasonable belief – undoubtedly gives the lawyer some discretion in deciding what to do. But what might appear reasonable in foresight or from the lawyer’s perspective might be unreasonable from hindsight or the perspective of someone else. It is difficult to tell whether the rule was intended to protect the client or the well meaning lawyer, although one could argue it was meant to do both. One thing is clear however. The rule illustrates why representing corporations is hard. There are serious ethical obligations and equally serious risks, while the path to the correct outcome is often poorly lit.

**Flavors and stripes**

What follows are illustrative ethical dilemmas a lawyer can easily confront when representing corporations and other organizational clients. These dilemmas show not only the many flavors and stripes in which ethical quandaries appear, but why their resolution is so difficult. There seldom is an easy answer. The problems are typically enshrouded in gray and bathed in nuance.

Each of these dilemmas tees up an ethics issue and presents an analysis, based on the assumption the ABA Model Rules of Professional Conduct govern. The arguments on either side of the question are meant to identify issues and risks in an even handed way, highlight some of the more obvious matters that need to be considered, and show the difficulty in determining the proper result. In some instances, there is a discussion of how a bar ethics opinion or court has addressed the issue. Until there is a consensus, however, the result in one jurisdiction may not foretell the result in another. Further, the governing rules may vary from state to state, as the ABA Model Rules have not been adopted verbatim in all states.

**DILEMMA: COMMUNICATING WITH A REPRESENTED OPPONENT**

Frustrated by the pace of settlement negotiations, the client urges the lawyer to wrap things up by year’s end. The lawyer explains that opposing counsel is unreasonable and that the client would be better off negotiating directly with the opposing party because the clients on both sides have an incentive to settle not shared by opposing counsel. When the client expresses a lack of confidence in writing a letter directly to the opposing party to begin negotiations, the lawyer offers to ghostwrite the letter for the client to sign and send on company letterhead, noting that bypassing the opposing lawyer in this way may be just what is needed to get the deal done.

**Discussion**

Many believe that a lawyer may not ghostwrite a letter for the client to send to a represented adversary. Model Rule 4.2 provides that a lawyer may not communicate with a represented party on the subject matter of the representation without the opposing attorney’s consent, and Rule 8.4 provides
that lawyers may not attempt to violate the rules through the acts of another or engage in dishonest or fraudulent conduct. Those who hold this view believe that ghostwriting a letter to the party on the other side and having the client sign and send it is an attempt to violate Rule 4.2 through the client and is dishonest in violation of Rule 8.4.

On the other hand, a client has the right to write to an opposing party directly, even if the party is represented by counsel. Those who believe a lawyer may ghostwrite such a letter argue that counseling a client on whether to exercise this right and how to do so is what lawyers do and is part of the duty of diligent and competent representation. Further, if the client were to write to the opposing party without any help from the lawyer, the client might say the wrong thing, which would prejudice the client and be a disservice. Rule 4.2 is meant to prevent lawyers from taking unfair advantage of represented parties or from soliciting admissions from them. Those who find no ethical issue argue that these concerns are not presented by ghostwriting such a letter because the opposing party is simply receiving the letter and is free to discuss it with the opposing attorney.

In 2011, the ABA issued Formal Opinion 11-461, which holds that “Parties to a legal matter have the right to communicate directly with each other. A lawyer may advise a client of that right and may assist the client regarding the substance of any proposed communication. The lawyer’s assistance need not be prompted by a request from the client. Such assistance may not, however, result in overreaching by the lawyer.”

DILEMMA: DISCLOSING PUBLICLY AVAILABLE INFORMATION

In the course of defending a high profile client in a well publicized securities fraud suit, the client tells the lawyer that the client was sued 10 years earlier in a securities fraud class action and paid $20 million in a court-approved settlement. Later, as a panelist on a CLE program discussing his experience in the just-concluded suit, the lawyer reveals that his work in that matter was complicated because of the earlier litigation that the client settled for $20 million. The lawyer adds that he is not telling tales out of school because the $20 million settlement is a matter of public record, as it was approved in open court ten years ago after an evidentiary hearing that was open to the public, and that the terms of the settlement can be obtained in a Google or PACER search.

Discussion

With certain inapplicable exceptions, Model Rule 1.6 provides: “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized in order to carry out the representation.” Those who believe the lawyer committed no ethical violation would note that the purpose of the rule is to keep a client’s information confidential, and the rule itself is entitled “Confidentiality.” They would point out that the information is already in the public domain and easily obtainable through an internet search. Because any other lawyer on the CLE panel could have gotten the same information and discussed it at that CLE program, it would be an anomaly if all the other lawyers were free to discuss this public information but not the one lawyer who represented the client. Interpreting the rule to bar the lawyer from discussing this information, so the argument goes, would be unreasonable, inconsistent with common sense, and excessively literal. The lawyer should not be penalized for discussing information that was
freely available to the public, particularly when the purpose of the discussion was to improve the legal profession.

Those who believe the lawyer was wrong to discuss the ten year old settlement would point out that the rule is not limited to information the client communicates to the lawyer in confidence but covers any “information relating to the representation.” They would argue that this ten year old information is obviously related to the representation, and, although it might be publicly available to anyone who is of a mind to search for it, the client is entitled to have the lawyer not publicize the information and increase the level of public awareness. In this instance, the lawyer made a disclosure of the information for his own benefit and not for the benefit of his client, when the client was entitled to the lawyer’s silence.

In *Attorney Disciplinary Bd. v. Marzen*, (Iowa, No. 08-1546, 3/19/10), the Iowa Supreme Court sided with the view that the disclosure of client information is not excused simply because the same information could be obtained from publicly available court records. In that case, a client accused her former lawyer of sexual misconduct, an accusation that received a great deal of public attention as the lawyer was running for a county office. To defend his reputation, the lawyer pointed out that his client had brought an earlier proceeding in which she accused her probation officer of sexual misconduct. The Iowa Supreme Court held that “the rule of confidentiality is breached when an attorney discloses information learned through the attorney-client relationship even if that information is otherwise publicly available.”

Some states take a more moderate approach. In Massachusetts for example, an advisory comment to Rule 1.6 states that “widely available” or “generally known” information is not protected by the rule:

> [N]ot every piece of information that a lawyer obtains relating to a representation is protected confidential information. While this understanding may be difficult to apply in some cases, some information is so widely available or generally known that it need not be treated as confidential. The lawyer’s discovery that there was dense fog at the airport at a particular time does not fall within the rule. Such information is readily available. While a client’s disclosure of the fact of infidelity to a spouse is protected information, it normally would not be after the client publically discloses such information on television and in newspaper interviews. On the other hand, the mere fact that information disclosed by a client to a lawyer is a matter of public record does not mean that it may not fall within the protection of this rule. A client’s disclosure of conviction of a crime in a different state a long time ago or disclosure of a secret marriage would be protected even if a matter of public record because such information was not generally known.

See also Restatement of the Law Governing Lawyers §59 (2000) (information learned from a client is confidential unless it is “generally known in the relevant sector of the public”). Yet in an apparent departure from the Massachusetts rule, which recognizes an exception for generally known information but holds that information is not generally known simply because it is in the public record, the Restatement states that “[i]nformation contained in books or records in public libraries, public-record depositaries such as government offices, or in publicly accessible electronic-data storage is generally known if the information is obtainable through publicly available indexes and similar methods of access.” *Id.* § 59 cmt. d. The Model Rules appear to take the most conservative approach, as they make no mention of generally known or available information.
DILEMMA: TECHNOLOGICAL COMPETENCE

A junior lawyer comes to her supervising senior partner and asks whether the client’s electronically stored information should be produced in native format or in single page TIFFs. The senior lawyer, who has difficulty with emails and does not use a computer except to send an occasional email, does not know the difference between a native production and a TIFF production and is not in a position to advise the associate. The senior lawyer does however remark that it is comforting to have the junior lawyer on the case and will defer to her on this issue because of her superior knowledge about computers.

Discussion

Has the senior lawyer breached the duty to provide competent representation? Model Rule 1.1 says that “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” It says nothing about technological capabilities. The comment to the rule says that, in determining whether a lawyer is providing competent representation, factors to consider include “whether it is feasible to . . . associate or consult with a lawyer of established competence in the field in question.”

Those who argue that the senior lawyer need not develop any technical proficiency would say that the lawyer has an associate who is abreast of the latest technological developments, and it is therefore not “reasonably necessary” for the senior lawyer to understand the nuances of electronic discovery.

The contrary argument recognizes that this is a changing world where skills that would suffice in an earlier day are no longer adequate. Given that, by some accounts, 95% of all information is stored electronically, that clients can lose cases if electronically stored evidence is mishandled, and that the cost to the client of waging litigation is a direct function of how electronically stored information is handled, one might argue that a working familiarity of how electronic evidence is stored and produced is an occupational necessity for trial lawyers. Those who hold this view would argue that the associate asked the senior lawyer to make a decision on this question arguably shows that, if the senior lawyer knows so little that he has to defer to the associate who sought the senior lawyer’s advice on this very question, the senior lawyer’s technological illiteracy violates the duty to provide competent representation “necessary for the representation.”

In August 2012, the ABA amended the official comments to Rule 1.1, to add the following italicized words: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”

DILEMMA: CONFLICTING DUTIES – RESPECT FOR RIGHTS OF THIRD PARTIES VS. DILIGENT REPRESENTATION

A lawyer receives an email from opposing counsel, stating: “I am attaching a revised draft of the settlement agreement in Word format. Note that this has ‘tracked changes’ so you can see how we changed the last draft. Please review and send me your comments. Let’s try to wrap this up.” In moving the mouse over the document, the lawyer notices embedded comments hidden from view until they are opened. Opening one of them, the lawyer sees a note that says “Cave on this if they give us
push back.” The lawyer then finds another hidden comment that says, “I’ll go to 10 million if necessary.”

**Discussion**

This dilemma raises questions as to whether the lawyer free (or required) to review the embedded comments after discovering the first one and whether the lawyer was free (or required) to inform his client about them? There are two potentially conflicting obligations here: the lawyer’s duty under Model Rule 1.3 to “act with reasonable diligence in representing a client” and the lawyer’s duty under Model Rule 4.4 not to obtain evidence in violation of the rights of third parties. The comment to Rule 4.4 states that a lawyer may not engage “in unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.”

There seems to be no question the lawyer was permitted to open the first comment. According to the comments to the model rules, Rule 1.3 requires the lawyer to “take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor” and “act with commitment and dedication to the interests of the client.” The lawyer who sent the document is the gatekeeper of his or her client’s information. Presumably, the sending lawyer knew or ought to have known about track changes and comments. The sending lawyer wanted the receiving lawyer to see the changes, which was why the track changes feature was used. Very often when the track changes feature is used, the sending lawyer also puts comments into the document as well, as these explain the sending lawyer’s position. In opening the first comment, the receiving lawyer had every right to believe that the comment was meant to be opened and read. The receiving lawyer might argue that it was fair to assume the first comment was the only unintended comment, until opening the second one. As between the sending lawyer, who sent the document intending the receiving lawyer to read it carefully, and the receiving lawyer, whose job was to review it carefully and who had a right to assume that the sending lawyer weeded out any client confidences, the receiving lawyer would argue it was permissible to read both the first and second hidden comment.

The sending lawyer would see this differently. Once the receiving lawyer saw that the first comment was obviously written by the opposing party and intended as a confidential communication to the opposing party’s counsel, the lawyer should have realized the document, in that form, was inadvertently sent, as no lawyer would knowingly send such a document to an opposing attorney with the client’s confidential comments included. Rule 4.4 speaks to this. It states: “A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.” Not having notified opposing counsel, the receiving lawyer had no right to continue reading the document, for there may well have been other inadvertently included attorney-client communications. Further, Rule 8.4(c) bars a lawyer from engaging in conduct involving dishonesty. The sending lawyer would say it was dishonest for the lawyer to continue reading these confidential comments and to justify the behavior by arguing that the sending lawyer wanted the entire document to be read.

Bar opinions on the subject are somewhat more forgiving than the sending lawyer might have hoped. The ABA’s Formal Opinion 06-442 states that “The Model Rules of Professional Conduct do not contain any specific prohibition against a lawyer's reviewing and using embedded information in electronic documents, whether received from opposing counsel, an adverse party, or an agent of an adverse party.” It goes on to say, however, that if the lawyer knows or reasonably should know that
metadata was inadvertently sent, then the lawyer has a duty to notify the other lawyer, but is not obligated to return it or to refrain from reading it. In a similar ethics opinion issued last year, the Washington State Bar Association (Informal Opinion 2216) said that, in circumstances like these, the lawyer who receives a document with confidential notes is under a duty to notify the sender, but is not ethically obligated to stop reading it or to return it. In contrast, the District of Columbia Bar’s Ethics Opinion 341 (Sept. 2007) says that if the lawyer has actual knowledge that the metadata was inadvertently provided, the lawyer must find out from the sending lawyer whether the metadata contains privileged information. If the sending lawyer says yes, then the receiving lawyer must follow the sending lawyer’s instructions. But if the receiving lawyer is uncertain about whether the metadata was inadvertently provided, the receiving lawyer may read the metadata, apparently without having to notify the sending lawyer. This different approach might be explained by slight differences between the District of Columbia’s version of Rule 4.4 and the ABA Model Rules.

The Minnesota Lawyer’s Professional Responsibility Board issued an opinion (No. 22) in 2010 saying that the sending lawyer has an ethical responsibility to scrub an electronic document of all metadata that that lawyer is obligated to keep confidential. Under such an ethics opinion, a receiving lawyer might argue that all hidden comments, including comments from the opposing party to the opposing lawyer, were reviewable on the presumption that, in tendering the document, the sending lawyer scrubbed the document of any metadata intended to be confidential.

**DILEMMA: ALTERNATIVE FEE AGREEMENTS**

A lawyer and client enter into a flat fee agreement by which the client agrees to pay the lawyer $100,000 for all legal advice requested by the client for the next 12 months, regardless of how much or how little advice the client seeks. The client is very glad to have this agreement, knowing its legal fees for the year are fixed, and pays the $100,000 in advance.

**Discussion**

The issue is whether a lawyer may enter into a pre-paid flat fee arrangement regardless of how much or how little time is expended. While flat fee agreements are permissible in many instances, one issue is whether they are permissible when the agreement allows the lawyer to keep the fee even if no services are provided. Rule 1.5 states: “A lawyer shall not make an agreement for . . . an unreasonable fee. The factors to be considered in determining the reasonableness of a fee include the following: (1) the time and labor required....” If the lawyer ends up doing no work, can the agreement ethically permit the lawyer to keep the six figure fee? Some may argue that, to be reasonable, the agreement must have provisions that relate the fee to some level of service.

The contrary view recognizes that this arrangement was sought by the client, not the lawyer, and that each side was taking a reasonable risk. If the client wanted to consume $300,000 of legal time, the bargain would have been a great benefit to the client at the lawyer’s expense. We don’t accuse insurance companies of engaging in unfair practices for charging premiums when the insured ends up never needing to file a claim. The same can be said here: the client receives a benefit knowing the advice is there if needed, and the client can get as much advice as it wants. This agreement is simply a creative way to control the spiraling costs of legal services.
But the issue becomes muddied when considering such things as whether the lawyer may deposit the pre-paid fee into the lawyer’s operating account, given the prohibition on intermingling client funds with the lawyer’s funds. At what point has the lawyer earned the fee such that the lawyer may appropriate it? And what should happen if, before the year is over, the client discharges the lawyer and seeks to recover a portion of the fee. Is the client entitled to all of it, none of it, a portion of it depending on how much of the year has transpired, or some other amount depending on how much of the lawyer’s services the client has already used, given Model Rule 1.16(d)’s mandate that any unearned portion of a fee paid in advance be returned. In its Formal Ethics Opinion 93-4, the Wisconsin Bar noted that what might start out as a reasonable fee agreement could become unreasonable after the fact, citing as an example if the client dies shortly after the agreement is made or if the attorney quits or is discharged for cause. This underscores the need for having an agreement specifying how and when the fee is earned, i.e. when the money no longer belongs to the client but becomes the lawyer’s.

**DILEMMA: CONFLICTS – LATERAL EMPLOYMENT**

After hiring a lateral partner, the managing partner inquires whether the lateral ever worked on a matter being handled by the lateral’s former law firm in which the current firm is representing the other side. The lateral reveals that he did a little work on the case when it first came in, specifically drafting a protective order for the senior partner’s review and fielding some strategy questions on a discovery issue, but spent no more than 20 hours on the case in total. The managing partner solicits and obtains the lateral’s agreement not to speak with any of the lawyers in the new firm about that case and not to do any work on it.

**Discussion**

May the new firm continue to represent the client or has the hiring of the lateral created a disqualifying conflict? This issue invokes the application of Model Rule 1.10 involving imputed conflicts. The rule provides, with some exceptions, that no lawyer in a firm “shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so.” The rule accommodates lateral mobility, however, by further providing that disqualification is not required when there is no significant risk the other lawyers in the firm would be materially limited in representing the client, the lateral lawyer is timely screened from any participation in the matter and is apportioned no part of the fee from it, and written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of the rule.

The argument for disqualification is that the screen is ineffective, and that something more is required than simply getting the lawyer’s oral agreement not to work on the case or discuss it with anyone in the new firm. One could argue that, at the old firm, the lawyer’s involvement was not trivial and that it was more extensive than what the lateral lawyer claims. The lawyer’s work on a protective order, for example, presumably required the lawyer to understand the nature of the former client’s confidential information and the lawyer may well have been privy to it. The lawyer also discussed strategy. An effective screen, therefore, would arguably require at a minimum that the lawyer agree in writing not to talk to anyone about the case and that the lawyers and support personnel in the new firm be informed in writing not to discuss the matter with the lateral. Also, the files of the case would arguably
need to be made physically inaccessible to the lateral, including with legends on them warning that the lateral may not have access to them, and including making the electronic case files inaccessible to the lawyer on the firm’s computer system. And there would need to be a system of periodic reminders about these restrictions.

The sufficiency of a screen is often subject to debate and some courts take a restrictive view. In June 2012, a federal judge (Beltran v. Avon Products, Inc., No. 2:12-cv-02502, C.D.Cal. June 1, 2012) ruled that no screen would be effective to cure the conflict because the incoming lawyer was privy to confidential information of the client in his former firm. Similarly, in January 2012, the Montana Supreme Court (Krutzfeldt Ranch LLC v. Pinnacle Bank, Mont., No. 11-0213, Jan. 31, 2012) held that, where the incoming lawyer did not formally terminate the representation when he moved to the new firm, the new firm was conflicted and had to be disqualified, regardless of any screening. Generally speaking though, a screen can be an effective way to prevent a conflict if done right, which includes formally terminating the previous representation, informing the former client about the new employment, and establishing screening procedures that are as rigorous as the circumstances require.

DILEMMA: CONFLICTS – LITIGATING AGAINST THE CLIENT’S SISTER COMPANY

A partner is asked to defend a suit brought by the sister company of a current firm client. The current client is an independent subsidiary whose business is unrelated to that of the sister company. The firm’s work for the current client is limited to preparing and prosecuting patent applications having no relationship to the subject matter of the lawsuit. Although the corporate law department of the parent company processes the legal bills and reviews the legal and matter budgets for all companies within the corporate family, the firm concludes there is no legal conflict and takes the case.

Discussion

For many years, the conventional view was that a lawyer representing a corporation can never handle a litigation against the corporation’s parent company, subsidiaries, or sister corporations. Following this view, the argument for disqualification is that the benefit of the doubt cuts in favor of the existing client, to whom the firm owes a duty of loyalty. Although the current rules do not craft a per se rule barring a firm from litigating against a client’s sister or affiliated company, the question of conflict is one of fact, turning on interrelatedness and other factors. Here, the two companies are joined at the legal department in the parent company. The legal department has some supervision over the activities of the law firm, as evidenced by its review and approval of bills and budgets. Presumably, the legal department would consider it a violation of the duty of loyalty for the patent lawyer to handle a matter against another company in the corporate family and therefore would expect that, under rules of imputed disqualification, no one else in the firm may do so either. This is not a case where the two companies are truly independent and isolated from each other, with completely independent management and internal legal counsel.

The argument against disqualification rests on Model Rule 1.7, comment 34, which provides that the representation of one company does not necessarily make every affiliated company a client for conflict purposes:
A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. . . . Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

Those who see no conflict would argue that, as a basic fact of modern corporate life, a lawyer’s knowledge of confidential information from one member of a large corporate family is not information that could give the adversaries of an affiliate an advantage, and a judgment against one subsidiary will not adversely affect other subsidiaries. Corporations that choose to do business as separate entities, they would argue, ought not to be able to get the benefits of separateness without also accepting the burdens of separateness. Companies ought not to be able to pick and choose when they want to be recognized as separate entities (for, say, limited liability purposes) and when they want to be recognized as alter egos (for conflict purposes). Here, the patent infringement work performed for subsidiary A is unrelated to the sister company, making it permissible to represent a new client in a suit against the sister company.

In 1995, the ABA issued Formal Opinion No. 95-390, in which a divided ethics committee concluded that representation of one company in a corporate family does not necessarily disqualify the firm from representing a client in an unrelated matter against the parent, subsidiary, or affiliate of the first company. In the eyes of the committee’s majority, whether the firm may take on the unrelated matter against the parent, subsidiary, or affiliate turns on a variety of circumstances, such as whether the lawyer and client have a reasonable expectation that the lawyer serves as counsel for the related entities, whether confidential information from the related entity was given to the lawyer, whether management between the related companies is intertwined, whether the same in-house lawyer supervises the work of outside counsel for the related entities, and whether the representation of the second client can have an adverse effect on the first client. An additional consideration is whether the lawyer’s handling of the respective representations might materially limit the lawyer’s or law firm’s ability to discharge the duties owed to each client.

Reported case law on this topic has reached differing conclusions. Compare *Brooklyn Navy Yard Cogeneration Partners, L.P. v. Superior Court*, 70 Cal. Rptr. 2d 419 (Cal. Ct. App. 1997) (approving law firm’s representation of one client in a matter adverse to the parent corporation of another client of the firm, except where the parent and subsidiary are alter egos) with *Travelers Indemnity Co. v. Gerling Global Reinsurance Corp.*, 2000 U.S. Dist. LEXIS 11639 (S.D.N.Y. 2000) (disqualifying law firm from representing one client in a matter adverse to the sister corporation of another client of the firm, where the two sister corporations shared numerous resources).

**DILEMMA: REPRESENTING THE CLIENT’S COMPETITOR**

A lawyer represents company X in defense of a suit brought by a customer charging systematic and fraudulent overpricing. In an unrelated matter, the lawyer’s firm represents company Y, a competitor of company X, in a covenant not to compete suit, where company Y is attempting to stop the head of
sales and marketing from joining a third competitor. Company Y demands that the firm cease representing company X.

**Discussion**

This dilemma raises the issue of whether and when a law firm would be conflicted from representing the competitor of a client. Without more, the mere fact that one client is a competitor of another does not ordinarily create a disqualifiable conflict.

One problem, however, is that such dual representation increases the likelihood that one client might give the law firm access to confidential information that could be useful to the competitor and thus used to the detriment of the client who provided it. Although no self-respecting law firm would knowingly allow any lawyer to use confidential information from one client to aid another client, and although the firm might even establish ethical walls to prevent an inadvertent use or disclosure of each client’s information, this does not necessarily make the problem go away.

The conflict issue ordinarily does not depend on how useful the information might be to the competitor, or even on whether such confidential information has in fact passed from the first client to the law firm. If the lawyer or law firm received confidential information in the representation of the first client and if the later representation of the competitor is substantially related to the representation of the first client, there is often a rebuttable presumption that confidential information was shared.

Depending on the effectiveness of the law firm’s screening procedures and establishment of ethical walls, a firm may be able to avoid a conflict issue or a disqualification motion. However, depending on the nature of the two representations, the amount of involvement of the lawyer in the affairs of the first client, and the substantiality of the relationship between the two representations, an ethical wall may not be adequate to protect against disqualification. For an analysis of this problem, see *Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz*, 529 Pa. 241 (1992).

**DILEMMA: CONFLICTING DUTIES – CONFIDENTIALITY VS. DISCLOSURE AND LOYALTY**

The CEO of a corporate client informs the company’s outside counsel that the CEO is planning to leave the company at the end of the year to join a company that sells a similar product. The CEO instructs the lawyer not to tell anyone in the client company about the CEO’s plans until the CEO is ready to announce it in about four months. The CEO explains that the current company and new company, though selling similar products, are not competitors because the current company sells only in the commercial sector while the new company sells only in the military sector. The CEO also explains that, if the lawyer were to tell anyone in the company, the news would be disruptive and detrimental to the company.

**Discussion**

May the lawyer may – or must the lawyer – disclose the CEO’s plans to the board of directors. The CEO claims that a premature disclosure would be disruptive to the organization, but the lawyer may feel that the CEO’s desire for secrecy is to hide that the CEO is about to migrate to a potential competitor. Moreover, concealing the information would deprive the company of the ability to take
pre-emptive protective measures, including steps to prevent the CEO from taking company confidential information and trade secrets to the new employer.

The argument that the CEO’s information must be kept confidential and not disclosed to others in the company is rooted in Model Rule 1.13. A corporate client has many constituents who collectively constitute the company and who may have individual interests that are adverse to the company but whose information must be communicated to the lawyer in confidence so that the lawyer can effectively represent the company. Rule 1.13(b) says:

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 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.

Those who would argue for keeping the information confidential would say that it would be difficult for the lawyer to “know” whether the CEO’s contemplated action violates a legal obligation to the company or would likely result in substantial injury to the company. If, as the CEO claims, the new employer is not a competitor, or if the CEO is not a party to a non-compete agreement, then there may well be no violation of a legal duty. Further comment 2 to this rule says in relevant part: “When one of the constituents of an organizational client communicates with the organization’s lawyer in that person’s organizational capacity, the communication is protected by Rule 1.6 . . . . The lawyer may not disclose to constituents [of the organizational client] information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.” Under this comment, because the lawyer has not been authorized to report the CEO’s information to other constituents, but rather has been explicitly instructed by the CEO not to do so, it is not the lawyer’s role to second guess the instruction and reveal the CEO’s information to the directors.

However, an argument for disclosure can also be made. One might analogize to Rule 1.7 comment 31, which addresses disclosure issues when a lawyer has more than one client in a common representation:

As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client’s interests . . . . The lawyer should, at the outset of the common representation and as part of the process of obtaining each client’s informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.

Essentially, in a common representation, one client may not keep secrets from the other if the information bears on the representation and might affect the other client’s interest. Here, the CEO is not even a client, but rather a representative of the client. If they were common clients, the lawyer would presumably have a duty of disclosure to the company under Rule 1.7. The case for disclosure therefore should be even stronger here, where the sole client is the company.
Rule 1.13 also is relevant because part (a) makes clear that the company and not its constituents are the client. Part (f) and comment 10 also indicate that, when the interests of the company and the constituent are in conflict, the lawyer must inform the constituent that the lawyer represents the company and that conversations between the lawyer and the constituent may not be privileged (Rule 1.13 (f) and comment 10). Also, while the lawyer might not know whether the CEO is under an obligation not to move to a potential competitor, the lawyer might reasonably conclude that the CEO is violating other duties to the company, i.e. duties of good faith, loyalty, and disclosure of material information. Because the lawyer could reasonably conclude that the failure to inform the company would likely injure the company substantially through its inability to take adequate and timely measures to transition to a new CEO, those who argue for disclosure would say that Rule 1.13 (b) authorizes and may well require the lawyer to disclose the information to the directors.

DILEMMA: CONFLICTING DUTIES – CONFIDENTIALITY VS. RESPECT FOR RIGHTS OF THIRD PARTIES

To forestall a lawsuit, a lawyer advises his client’s CEO to sign a memorandum of understanding agreeing to escrow an expected $2 million insurance payment as security for the opposing party’s claims as a prelude to negotiating or mediating the claims. A week after signing it, the CEO tells the lawyer that the company will not escrow the insurance payment because it needs the money to meet operating expenses. When the lawyer reminds the CEO of the written agreement promising to escrow the money, the CEO says that the company cannot honor it or else the company will fold by the end of the month. The lawyer tells the CEO that he will need to alert the opposing attorney and try to renegotiate the agreement. The CEO instructs the lawyer not to do that, explaining that the decision not to escrow the money is confidential and that, if the opposing party were to learn of it, the opposing party would file a lawsuit, which would trigger a default under the company’s loan covenants.

Discussion

Here, the lawyer is caught between his client’s instruction to keep the imminent breach confidential and what the lawyer perceives as an obligation to disclose a material fact to the opposing counsel, namely the client’s decision to renege on an agreement that was just recently signed and that the lawyer negotiated.

The argument for not disclosing the information is that Model Rule 1.6 (b) imposes a near-absolute rule of confidentiality. To be sure, the rule requires a lawyer to reveal a confidence “to the extent the lawyer reasonably believes necessary to prevent the client from committing a . . . fraudulent act that the lawyer reasonably believes is likely to result in . . . substantial injury to the financial interest . . . of another.” But the lawyer has no justification for believing the client is committing a fraudulent act. The evidence of fraud is ambiguous at best. Although the client’s statement of intention to renege follows closely after signing the agreement, the lawyer does not know that the client signed the contract intending to renege. The lawyer must give the client the benefit of the doubt and presume the client intended to perform but later had a change of heart upon realizing performance would put the company in an impossible position. Because this is a breach, not fraud, the lawyer must keep the information confidential. The opposing party was represented by counsel, who could have negotiated for a monitoring or reporting provision. The failure to do so should not cast on the lawyer for the

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reneging party a duty to disclose the client’s breach. The lawyer’s duty is to protect the client’s interest, not the other party’s.

The contrary argument would be based on the premise that the evidence of the client’s fraud is overwhelming. When the client signed the agreement, the client had to have known that the insurance money would be needed for other things. The client made the escrow concession only when the lawyer counseled the client to do it. The well-meaning and creative lawyer conceived of the escrow as a means to resolve the client’s predicament and got both the client and the opposing party to agree to it. Even if the client did not sign the agreement with fraudulent intent, the lawyer’s failure to disclose the client’s imminent breach would be dishonest in violation of Model Rule 8.4, which prohibits a lawyer from engaging in conduct involving dishonesty. After getting the opposing party to agree to this forbearance agreement, it would be dishonest to allow the opposing party to remain ignorant of the client’s willful breach of the very promise that induced the forbearance. Whether the client signed the contract intending to breach it or formed the intent to breach shortly after signing the agreement, the failure to disclose the breach is dishonest either way and the lawyer, so the argument goes, is duty bound to remedy the situation, even if that requires disclosing the client’s intent.

DILEMMA: DUTIES TO PROSPECTIVE CLIENTS

An employee of a corporate client has been dealing with a young partner in the firm on company business. One morning, the employee calls the young partner, reports that her manager has been sexually harassing her, and asks the young partner to file an employment discrimination case against the company. The young partner explains that, because the company is a firm client, the firm would have a conflict of interest and therefore cannot represent the employee in her claim against the company. The employee says that she understands, but tells the young partner not to tell anybody because, if word leaked out, the company would just cover everything up and make her life miserable. Believing that the relationship partner should know about this, the young partner tells the relationship partner about the conversation. The relationship partner states that the client must be informed or else the firm will lose the client, but the young partner objects, believing that the rules against disclosure of client confidences also apply to potential clients and that the employee was a potential client to whom the firm now owes a duty of confidentiality.

Discussion

This dilemma raises the issue of when a person becomes a “potential client” entitled to the lawyer’s duty of confidentiality. The young partner views the employee as a potential client to whom the duty of confidentiality is owed, even though the firm would be barred by a conflict from accepting the engagement. The young partner’s views are premised on Model Rule 1.18, which states:

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

With an exception not relevant here, the rule further states:

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information . . . .
In the younger partner’s mind, when the employee revealed that she wanted to bring a claim for sexual harassment and wanted the firm to represent her, she became “a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter.” This made her a prospective client and hence the duty of confidentiality attached. As the younger partner sees it, the employee had no understanding about rules on conflicts of interest and hence had a reasonable expectation of confidentiality. Therefore, the lawyer would not be free to disclose the confidences of the employee, as a potential client, to anyone, including to any other client. This duty exists, according to comment 3 of the rule, “regardless of how brief the initial conference may be.”

The contrary argument would look to comment 2 to Rule 1.18, which states that when “a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, [the person] is . . . not a ‘prospective client.’” The relationship partner believes that that’s what happened here. The employee revealed this information to the younger partner unilaterally, who was, if not sandbagged, then at least caught unawares. Given that the employee knew that the lawyer was counsel for the company, it would not have been reasonable for the employee to expect that the lawyer would be willing to accept an engagement against the company. The fact that the employee might have been ignorant about conflict of interest rules and imputed conflicts does not change the analysis, for the “reasonable expectation” standard is objective, not subjective.

This dilemma highlights a potentially serious additional issue, as Rule 1.18 may well prevent the law firm from representing the current client in any sexual harassment claim brought by the employee. The rule mandates not only confidentiality but disqualification, subject to limited exceptions. Once the duty of confidentiality to a potential client is triggered, the lawyer:

(c) . . . shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.
This rule should alert a lawyer to understand the context of a conversation at the earliest opportunity to figure out whether the person is potentially seeking legal advice or representation. If so, the conversation should cease until the adverse parties are identified and a conflict check clears.

**DILEMMA: CONFLICTS WITH A CLIENT’S EMPLOYER**

A lawyer receives a call about taking on a matter adverse to a company that the firm has never represented. However, the company’s CEO has been a longstanding personal client of the firm. The attorney who handles the CEO’s work has handled the CEO’s estate plan, personal investments, and personal business deals unrelated to the company. The attorney has also advised the CEO from time to time on how to respond to certain problems at the company and how to deal with certain directors. The lawyer who received the call wants to accept the engagement, believing there is no conflict because the firm never represented the company. The lawyer who handles the work for the CEO believes there is not simply a business conflict but a legal conflict.

**Discussion**

Is the company to be treated as a client for conflict purposes because of the firm’s representation of a high level constituent of the company? The lawyer who sees no conflict feels the issue is governed by Rule 1.13, which is premised on the idea that, while an organizational client may act only through its constituents, the constituents are not the client. Logic would therefore suggest that when a law firm represents an individual constituent in a personal capacity, the organization is not the client. The individual is the client. Hence, there would be no conflict if the firm accepted an engagement adverse to the company.

The lawyer who sees a conflict analyzes the situation differently. Rule 1.13 does not establish that the constituent of an organizational client is not the client. Comment 34 to Rule 1.7 states that “A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent.” It thus may still be the case, depending on the facts, that the representation of an organization may mean that the constituent is to be regarded as a client as well. The same principal should operate in reverse: depending on the facts, the representation of an constituent may mean that the organization is to be regarded as a client too for conflict purposes. Here, through representing the CEO, the lawyer has been privy to information about the company. Indeed, if the CEO is so closely aligned with the company, the lawyer believes that, for all practical purposes, the company should be treated as if it were also a client of the firm, the same way that, when a parent company closely controls its subsidiary, the representation of the parent makes the subsidiary a client for conflict purposes, and vice versa. Moreover, a conflict exists when the representation could be materially adverse to the interest of a current client. The lawyer who feels there is a conflict foresees that the proposed representation of a new client in a matter adverse to the company could impair the interests of the CEO materially, because the engagement could impair the CEO’s standing in the company or because what hurts the company also hurts the CEO. A conflict also exists when there is a significant risk that the representation of a client will be materially limited by the lawyer’s responsibilities to another client or by a personal interest of the lawyer. Model Rule 1.7 (a) (2).
bar that lawyer from representing a party in a matter adverse to the company. This conflict is imputed to all the other lawyers in the firm. Model Rule 1.10.

This issue was addressed by the District of Columbia Bar in 2005 in its Ethics Opinion 328. According to that opinion, the issue is whether the organization has become a “de facto client,” which involves looking at such considerations as the organization’s expectations and the firm’s receipt of information confidential to the organization. The opinion says: “Given the cross-fertilization with upper management and the sensitivity of the issues likely to be encountered in such a representation, the organization may have a reasonable expectation that the lawyer will not be adverse to it in another matter,” but the determination “will be fact-dependent.”

**DILEMMA: CONFLICTING DUTIES – CONFIDENTIALITY VS. DILIGENT REPRESENTATION**

A client is being investigated for allegedly violating a regulation regarding certain disclosures associated with shipping products overseas. Whether there is a violation turns on the interpretation of the regulation. In the course of the representation, the client tells the lawyer that another company, which the lawyer represented in the past, engages in the same practice, and that this establishes the standard in the industry, which the client feels is relevant to how the regulation should be interpreted. The client asks the lawyer to point this out to the government. The lawyer had drafted shipping contracts for the former client but lacked any knowledge of the former client’s disclosure practices under the regulation, which was not a subject of the contract. The lawyer asks the current client whether the information about the former client’s disclosure practices is common knowledge in the industry. The current client says that it depends on who is asked, but that the information is important and needs to be argued to the government.

**Discussion**

In this dilemma, the lawyer must decide whether to treat as confidential certain information learned about a former client after the representation has concluded. The information relates to the former representation in a broad sense but is brought to the lawyer’s attention by a current client, who wants the lawyer to use the information in advocating a position to the government. The lawyer is uncertain whether the duty under Model Rule 1.6 (a) not to “reveal information relating to the representation of a client” applies to information learned about a former client from an independent source after the representation has concluded.

The argument that the information may not be used looks to the words of Rule 1.6 (a), which commands the lawyer to keep confidential “information relating to the representation of a client.” It is not limited to information learned from the client or learned during the representation. Moreover, comment 3 to the rule says that the rule applies “to all information relating to the representation, whatever its source.” There is a very practical reason why the lawyer believes this information must be treated as confidential: its use could result in the government turning its attention to the practices of the former client. The former client would argue that use of the information would therefore not only violate the duty of confidentiality but the duty of loyalty.
The current client however would urge the lawyer to use the information because the current client is entitled to the lawyer’s diligent representation. The argument that the information is available for the lawyer’s use turns on giving the word “relating” a common sense, practical meaning. In the former representation, the lawyer was never asked to provide legal advice on the disclosure practices at issue or on the regulation. In fact, the lawyer was surprised to learn this information from the current client because it did not come up in the former representation. If the current client went to some other lawyer with the same information, the other lawyer would not be disabled from using the information, and the current lawyer arguably should not be disabled from using it either.

The practical resolution is for the lawyer to refer the current client to some other attorney who does not have even an arguable duty to keep the information confidential. But the practical solution begs the questions whether the information is protected if learned after the representation is concluded or from a source other than the client, or whether the information is related to the former representation, or whether the information is off limits if brought to the lawyer’s attention by a current client in the same industry. Restatement (Third) of the Law Governing Lawyers § 59 answers some of these questions. The rule “covers all information relating to representation of a client . . . gathered from any source. . . .” Id. cmt. b. The rule also covers information “acquired . . . after the representation . . . so long as it is not generally known . . . and relates to the representation.” Id. The Restatement does not, however, answer whether the information is “related” to the former representation or whether it is generally known. The safest approach is to assume the information is related to the earlier representation but whether it is generally known “depends on all circumstances relevant in obtaining the information.” Id. Unlike the Restatement though, the Model Rules contain no explicit exception for generally known information, although one might rightly or wrongly believe that, as a matter of logic, such an exception would be implicit.

CONCLUSION
At the extremes, the ethical outcomes are clear and lawyers know how to avoid crossing boundaries. But these dilemmas show there are vast gray areas where the boundaries are not at all clear. Further, in many instances the ethical quandary could be thrust upon the lawyer by external circumstances, where the lawyer confronts some spontaneous event, like suddenly learning information that imposes a duty to do one thing or another.

Some of the most difficult issues involve conflicting ethical duties, arising from rules that point in different or opposite directions or that create risks because the lawyer has to choose between conflicting ethics principles. Should the lawyer disclose information or must the lawyer keep it confidential? Are there times when the lawyer’s duty to a third party overrides the lawyer’s duty to a client?

We study these dilemmas not because they illuminate the answers but because they do not. These dilemmas sensitize lawyers to understand that ethics issues do not stop once the conflict check clears but persist throughout a representation and can continue long after the representation ends. These dilemmas teach that, in resolving an ethics problem, the rules of professional conduct often tee up an issue without resolving it. Making a decision on the proper course of conduct requires careful analysis, research, and reasoned judgment, sometimes without ever reaching comfort as to where he correct path lies, and common sense may not always offer the right solution.
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