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Intangible Client, Real Problems

Representing an organization during serious misconduct has gotten trickier, says expert

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When a lawyer is representing a company in the midst of a serious investigation, the client might be amorphous, but the tension is often palpable.

Denver attorney Cecil Morris, a complex civil litigator who is of counsel with Fairfield & Woods, outlined the potential problems and remedies for attorneys acting on behalf of an organization in a Wednesday presentation at the Colorado Bar Association CLE. Morris, who is a member of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct, said the current climate of regulation and federal investigation has elevated the risk of ethical conflicts for attorneys representing organizations, be they in-house or outside counsel.

Starting in the late '90s and moving into the early 2000s, there was a shift in the law and dynamics for lawyers representing the organization client that makes for often challenging circumstances for those lawyers today.

Corporate wrongdoing had taken center stage in the wake of the Enron scandal and the Worldcom accounting fraud in the early 2000s. But even before those events, the Ethics 2000 Commission made significant changes to the American Bar Association Model Rules of Professional Conduct regarding attorney-client relationships, including when the organization is the client. Colorado adopted the Ethics 2000 revisions in 2008.

In the midst of those changes, and the growing public awareness of corporate fraud, came the Sarbanes-Oxley Act in 2002 and the Dodd-Frank Act of 2010, which raised the regulatory stakes for financial institutions and other corporations of all kinds, not to mention the attorneys advising them.

But the most recent of these sweeping regulatory enforcement changes came in September 2015 when Deputy U.S. Attorney General Sally Yates issued a memorandum of understanding directing the Department of Justice staff to focus on individual employees when investigating corporate wrongdoing. The directive, now known as the Yates Memo, came at a time when the DOJ faced public pressure to hold more individual wrongdoers accountable for scandals rather than hand out large fines to companies as a whole.

The Yates Memo, in addition to the existing confluence of legal and organizational pressures, has ramped up the tension between attorneys and the organizations they represent, Morris said.

"I've seen some of that happen right now," he said. Attorneys may experience difficulty dealing with the corporation's constituents and in trying to preserve attorney-client privilege as well as cooperation credit with the government in case the investigation takes a turn for the worse, he added.

Colorado Rules of Professional Conduct 1.13 and 1.16 figure heavily in how an attorney ought to proceed in representing the organization client. Rule 1.13(a) defines the duty in that "a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents," with the constituents being officers, directors, employees, shareholders, etc. as clarified by the comments to the rule. Rule 1.16 governs how and when the lawyer is to withdraw from representing the organization under certain circumstances.

Morris said that understanding what the ethics rules are asking lawyers to do isn't the hard part — it's applying them in the context of a corporate investigation, which potentially has so many conflicting interests from the organization itself and its various employees and leaders.

"The legal standards here are not particularly difficult," Morris said. "What is challenging is the actual dynamic and dealing … with these problems as they arise or you come to know of them and essentially the sensitive exercise of independent professional judgment in dealing with them."

Still, representing an organization isn't as clear-cut a relationship as it is with an individual; the attorney is representing "an idea" or an "incorporeal concept" while having to deal with real people within in and without, Morris said.

And in representing that incorporeal entity, the attorney has to pick up the phone and talk to various people involved in the transaction or litigation at hand, not to mention sometimes the person in accounting who authorizes his or her paycheck.

"Therein lies the tension," Morris said. "They're acting for the organization as a constituent, but they're not your client. And a variety of mischief flows from that very simple proposition." He emphasized that attorneys must always maintain focus on who the client is. Without that focus, lawyers run the risk of unwittingly establishing attorney-client relationships with the constituents, like members of the company's C-suite, which can create conflicts when the organization and its individuals are under investigation for serious problems.

Attorneys should remember that in these situations, the duty of confidentiality is to the entity, not the constituents that the lawyer talks to, he added.

Given the current environment of ethics rules, laws and corporate investigations, "the risk of non-disclosure is probably greater now than the risk of disclosure," Morris said. He noted that there's a stark difference in risk, however, between up-the-ladder disclosure versus external disclosure.

According to Colorado Rule of Professional Conduct 1.13(b), if the lawyer knows of a violation of a legal obligation or "a violation of law that reasonably might be imputed to the organization" that is "likely to result in substantial injury to the organization," he or she "shall proceed as is reasonably necessary" in the organization's best interest. Rule 1.13(b) states that the lawyer "shall refer the matter to higher authority in the organization" unless the lawyer reasonably believes that doing so is actually not in the organization's best interest.

The comments of the rule note that in some circumstances, a matter could be resolved where it is without a need to report up the ladder. A mid-level manager might have misinterpreted a simple securities regulation, for example, and the attorney might "remonstrate with" that constituent to remediate that problem; apprising the constituent of the problem, where appropriate, may be "an assumption that underpins the rules," according to Morris.

But remonstrating with the constituent is often not enough; following up to make sure the constituent resolved the problem is necessary, especially considering that if "it hits the fan" down the road, the lawyer will be asked why he or she didn't do more with that knowledge, Morris said.

One of the most difficult moments for an attorney representing an organization is when he or she decides to report out — to the Securities and Exchange Commission, the DOJ, or another agency with authority in the matter. The external disclosure needs to be tailored to the problem and not unload any unrelated grievances the attorney might have with the organization or its members, Morris said.

It's "dead serious business" to take that step, Morris said, and before doing so, the attorney ought to talk it over with other members of the legal department or firm. Sole practitioners in that situation might consult the Colorado Bar Association's Ethics Hotline, he added.

Washington, D.C., attorney Edward Bennett Williams famously said that if it becomes clear in a matter that someone in the organization is going to jail, "make sure it's your client and not you."

Morris clarified the importance of that quote. "It's not just self-preservation, it's a recognition of what our role is," he said. "Our role is not to assist the client in the perpetration of a crime or fraud." •

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