Representing an Organization, its Constituents

In a previous column,[1] we looked at the ethical considerations involved when a lawyer represents more than one of the parties on the same side in a lawsuit. There are just as many ethical considerations involved in nonlitigation matters. This column discusses one such situation: where a single lawyer and/or her firm represent an organization, such as a corporation, and one of its "constituents," such as its President.[2]

The ethical rules involved are primarily ERs 1.13 (Organization as Client), 1.6 (Confidentiality of Information) and 1.7 (Conflict of Interest: Current Clients).[3] ER 1.13(a) makes it clear that a corporation's lawyer represents "the organization," not its "constituents," such as its officers, directors, employees and shareholders.[4] However, ER 1.13(g) provides that the lawyer, in addition to representing the organization, may also represent "any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of ER 1.7." A lawyer may therefore represent, outside of the litigation context, a limited liability company and one or more of its members, a partnership as well as one or more of its partners, and a corporation and one or more of its officers or employees. There are some potential pitfalls in these kinds of joint representation, and you need to be aware of them before you undertake the responsibilities they entail.

Disclosure to the organizational client and its constituents of potential conflict issues is essential.

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Succinctly stated, unless all the clients understand the potential conflict and give their informed consent, a lawyer may not represent both organization and constituent if there is a substantial risk that the lawyer's representation of either would be materially and adversely affected by the lawyer's duties to the other.[5]

Let's start with the easiest situation first. Your longtime client Bob comes to you to have you organize an LLC for him where he will be the only member. No conflicts here because the organization and its sole constituent will always be of one accord. But what happens when Bob wants to take on a new investor, John, who will now be a member of the LLC? Now, in addition to making sure you have an operating agreement that covers member disagreements, management responsibilities between members, and buyout provisions, you will have to explain to John not only that you are the lawyer for the LLC and Bob but that you are *not* John's lawyer and that it is advisable that John have his own lawyer review the operating agreement before he signs it. You also will want to advise John that in the event of any major disagreements concerning LLC affairs, you will continue to owe an undivided loyalty to the organization and Bob, and that John will have to get his own counsel if he feels he needs legal advice. A wise lawyer will have all this confirmed in writing.

The last situation is where things get complicated. Bob tearfully confesses to you, as his longtime lawyer, that he has been stealing money from the LLC and shows you in detail how he has been doing it. You now have a real conflict of interest: You cannot disclose the information given to you by Bob because of your duties of confidentiality under ER 1.6, yet ER 1.13 requires you, as the LLC's lawyer, when you learn that someone associated with the organization is doing something that is injuring or might injure it, to proceed in the best interests of the organization. You have a situation where Client A is stealing from Client B, and something obviously has to give. In this case, you couldn't represent the LLC against Bob to recover the money because ER 1.7(a)(1) prohibits the representation of one client that is adverse to another client. And simply terminating your professional relationship with Bob so you could continue representing the LLC won't work either: Bob would then become a "former client," and ER 1.9 prohibits your representation of a person (here, the LLC) in the same or substantially related matter in which the LLC's interests are materially adverse to the interests of the former client, Bob. Moreover, ER 1.9(c) prohibits you from using information learned before termination of your relationship with Bob to Bob's disadvantage and from revealing any information relating to the former representation, both of which you would have to do in order to

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effectively represent the LLC.

The same former client rules would apply were you to attempt to terminate your relationship with the LLC in order to continue to represent Bob. The obvious conclusion to this unfortunate situation is that you would need to tell Bob and the LLC that you cannot represent either of them and that they will each have to retain their own counsel.[6]

Hopefully, organizational representation won't be as complicated for you as this example, but disclosure to the organizational client and its constituents of potential conflict issues is essential to your duty to competently represent all of the parties involved.

endnotes

1. *Representing Multiple Parties in One Suit*, ARIZ. ATT'Y (November 2004) at 10; *see also* Ariz. Ethics Op. No. 07-04 (Nov. 2007).
2. There are two excellent articles on this subject by Joan Rogers: *Scrutinize Conflicts Rules Before Jointly Representing Company and Constituents*, 30 LAW. MAN. PROF. CONDUCT 303 (May 7, 2014) and *Authorities Illuminate Propriety of Joint Representation in Corporate Context*, 30 LAW. MAN. PROF. CONDUCT 329 (May 21, 2014).
3. Rule 42, ARIZ.R.S.CT.
4. Comment [2], ER 1.13.
5. RESTATEMENT (THIRD), THE LAW GOVERNING LAWYERS §131(2001).
6. This hypothetical is based in part on the facts given in State Bar of California Ethics Opinion 2003-163, citing California's ethics rules.