



Knowing Who Your Client Is

**Ethical Issues for Company Counsel Arising
from Representation of Company Stakeholders**



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Presenters:

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Who Is Your Client?

- Organization/company is the client
- However, “an organization represents the organization acting through its duly authorized constituents.” RPC 1.13(a).
- “Duly authorized constituents” is undefined:
 - Traditional view
 - Modern view
 - *Rsmt. (3d) of Law Governing Lawyers* § 96(1)

Who Is Your Client?

- “In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer:
 - knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.” [PA and DE R. 1.13(d)]
 - believes that such explanation is necessary to avoid misunderstanding on their part.” [NJ R. 1.13(d)]
- Confidentiality obligations and *Upjohn* warnings

Conflict with Organization's Constituents

- Challenge for in-house counsel:
 - D's and O's control counsel's employment and compensation
 - Counsel may have personal relationship with D's and O's
 - Counsel perform multiple roles
- RPC 1.13(b): if lawyer knows that organization constituent is (1) engaged in illegal conduct and (2) such conduct "is likely to result in substantial injury to the organization," the lawyer must "proceed as is reasonably necessary in the best interest of the organization"
 - Applies to only questions of law

Unintentional Representations

- Do not need written agreement to form AC-relationship
- *Bevill* test:
 1. Officer must show he/she approached counsel for purpose of obtaining legal advice;
 2. Demonstrate that they made clear that they were seeking legal advice in individual capacity;
 3. Demonstrate that counsel saw fit to communicate with them in their individual capacity;
 4. Proof that conversations were confidential; and
 5. Communications did not concern corporate matters.

Unintentional Representations: Case Examples

- Penn State / Jerry Sandusky Fallout
 - Penn State GC Cynthia Baldwin joined senior university officials when they testified before grand jury
 - Baldwin later testified before grand jury, and testimony was used to support indictments against officials
- What should Baldwin have done differently?

Unintentional Representations: Case Examples

- Penn State / Jerry Sandusky Fallout (cont.)
 - Officials successfully moved to quash several counts in indictments
 - Disciplinary charges against Baldwin
 - Board recently recommended public censure
 - Takeaways?

Unintentional Representations: Red Flags

- Investigations
 - Internal
 - Governmental
- Employee Disputes; Harassment Allegations
- Helping company stakeholders with personal matters (e.g., tax, real estate, family law)

Joint Representations: RPC 1.13(e)

“A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.”

Joint Representations: Conflicts and Potential Conflicts

- Requires careful assessment
- Two requirements:
 - 1) disinterested lawyer test
 - 2) informed consent, after full disclosure of benefits, risks and scope of joint representation
- Waivable v. non-waivable conflicts

Joint Representations: Benefits v. Risks

Benefits	Risks
Cost savings	Ethical violations
Ease of communication	Disqualification
United front	Malpractice
Depth and breadth of knowledge	Limitations on disclosure
Control	Incompetent representation

Joint Representation: Navigating Ethical Limitations

- Can attorney share confidential information between clients?
 - Who controls the privilege?
 - What happens if a conflict arises?
- * Engagement letter is critical...be proactive

Joint Representation: Litigation Context

- Shareholder disputes
- Individual employees named in lawsuits
- Employer-employee relationships
- Government investigations

Joint Representation: Transactional Context

- Conflicts in M&A: Issues when in-house counsel represent the organization in a transaction involving related parties.
 - Parent/Subsidiary; Corporation/Founder; Partnership/Partners
 - RPC 1.7:
 - Cmt. 34: “A lawyer who represents a corporation...does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary.”
 - 1.7(b): Accordingly, a lawyer can represent multiple parties to a transaction only if (1) the lawyer reasonably believes that she “will be able to provide competent and diligent representation” to each client and (2) **“each affected client gives informed consent, confirmed in writing.”**
 - Retention of outside counsel for related parties.

Joint Representation: Transactional Examples

- **Stock Sale**
 - Representing selling shareholders with conflicting interests
 - Variable consideration and post-closing employment terms
 - RPC 1.7(a)(2): need to advise for the use of other counsel
- **Management Buy-Out or Redemption**
 - RPC 1.7(b) – client provides informed consent in writing
- **Sale of Subsidiary**
 - Post-Closing Disputes (Escrow, Indemnity)
 - RPC 1.9 – Former Client (again, informed consent)
 - RPC 3.7 – Prohibition against lawyer acting as an advocate and witness
- **Tips:** Use of independent outside counsel; have the parties agree in writing regarding matters of privilege and subsequent representation.

Best Practices

- Communication is key, and put it in writing
- Focus on reasonable expectations of stakeholder
- Give *Upjohn* warnings
- Anticipate potential future conflicts and the need to obtain separate legal counsel for subsidiaries and stakeholders
- Avoid giving advice on personal matters

Questions?

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