



WEARING TWO HATS? NAVIGATING THE DUAL-HAT DILEMMA

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Presenters:

- **Donald D. Gamburg (Philadelphia)**
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“UNREEL ETHICS”



“Life moves pretty fast. If you don’t stop and look around once in a while, you could miss it.”

– Ferris Bueller

“UNREEL ETHICS” CONTD.

- For this session, we are going to “stop and look around” at four (4) ethical issues that may confront in-house counsel and implicate differing interests in counsel’s role with the organization. We will work through them together to ensure your comfort level with the Model Rules and your professional obligations.

ISSUE 1: I Am Not The Guy You Kill!



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- Model Rule 1.13(a):
“A lawyer, employed by or retained by an organization...represents the organization acting through duly authorized constituents.”

ISSUE 1: I Am Not The Guy You Kill!

- Who are “constituents”?
 - Directors
 - Officers
 - Employees
 - Shareholders
 - (Potentially) subsidiaries/affiliates

ISSUE 1: I Am Not The Guy You Kill!

- How does this work when in-house counsel hears about potential wrongdoing in the Company?
 - Circumstance in Model Rule 1.13(b):
 - “If a lawyer for an organization knows that (an officer) is engaged in action...that is a violation of...law that may be imputed to the organization....”

ISSUE 1: I Am Not The Guy You Kill!

- In-House Counsel's Duty:
 - Refer the matter to a higher authority, including to the highest authority that can act on behalf of the organization, if warranted
 - “Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so”
 - Is this an “out”?

ISSUE 1: I Am Not The Guy You Kill!

- How did this play out in “Michael Collins”?
 - How could in-house counsel have walked the line?
 - How did Collins transgress his obligations?
 - To the client?
 - Under professional responsibility?

ISSUE 1: I Am Not The Guy You Kill!

- Hypothetical:
 - As in-house counsel, you hear about an executive's plans to violate usury laws
 - If discovered, the Company could be liable for civil and criminal penalties
 - You report your concerns to the CEO – nothing
 - You report your concerns to the Board – Board acts appropriately to resolve the issue
 - You are fired – now what?

ISSUE 1: I Am Not The Guy You Kill!

- Model Rule 1.13(e)
 - Shall proceed as the lawyer reasonably believes necessary to assure organization's highest authority is aware of the termination
- But does this help?
 - Utah
 - Ninth Circuit

ISSUE 2: The Pitfalls of Two Clients: Dual Representation of Employer and Employee



“I may not know much of law ... but I know what is right and what’s wrong. And I know what you’re asking is wrong.”

Advantages to Representing Both the Employer and the Alleged Perpetrator

- Efficiency/cost savings
- Unified front
- Control litigation
- Ensure cooperation between defendants

Risks to Representing Both the Employer and the Alleged Perpetrator

- Conflicts of interest – current or potential
- Privilege issues
- Different views regarding settlement or appeal

But an Advance Waiver Saves Me, Right?

Not so fast ...

- ABA Model Rule 1.7:
 - Attorney can only represent two conflicted clients if (among other things) “each affected client gives informed consent, confirmed in writing”
 - BUT, informed consent is difficult to establish for individual employees

Informed Consent?

Attorneys Should Communicate the Following:

- Conflicts of interest may be discovered
- Ethical standards may require withdrawal from representation of individual, and if so, attorney may continue to represent company
- Possibility of restricting claims/defenses if parties agree not to take conflicting positions
- Added cost/disruption if individual must obtain new counsel later
- Counsel may disclose to employer any information that employee provides to attorney

Text message from alleged harasser in sexual harassment case:

“You will regret going to HR ...”

Facebook post from alleged race discriminator posting opinion that:

- He should be allowed to display Confederate flag bumper sticker on his car
- Praising the Ku Klux Klan as a misunderstood and benevolent organization

ISSUE 3: Duty to Keep Information Confidential



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- Model Rule 1.6:
 - “A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent after consultation, except for disclosures that are impliedly authorized in order to carry out the representation....”

ISSUE 3: Duty to Keep Information Confidential

- Model Rule 1.6:
 - “OR”
 - Prevent reasonably certain death or substantial bodily harm
 - Prevent client from committing a crime or from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services

- Model Rule 1.6:
 - “OR”
 - Prevent, mitigate or rectify substantial injury to the financial interests of property of another that is reasonably certain to result in or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services
 - Secure legal advice about the lawyer’s compliance with the Rules

ISSUE 3: Duty to Keep Information Confidential

- Model Rule 1.6:
 - “OR”
 - Establish a claim or defense in controversy between lawyer and client, establish a defense to criminal charge or civil claim against lawyer based on conduct in which client was involved, or to respond to allegations in a proceeding concerning client representation
 - Comply with other law or court order

ISSUE 3: Duty to Keep Information Confidential

- The Firm
 - Did Mitch McDeere comply with Model Rule 1.6?

ISSUE 3: Duty to Keep Information Confidential

- How can this go wrong?

ISSUE 3: Duty to Keep Information Confidential

- “An ethical code is not a garment that lawyers may don and doff at pleasure.”
 - *McCuin v. Texas Power & Light Co.*, 5th Cir. 1983

ISSUE 4: In-house Counsel Responsibility for the Ethical Conduct of Outside Counsel; Balancing Business Against Ethics



Rule 5.01 Permits In-house Counsel to be Disciplined if the Lawyer

“... orders, encourages or knowingly permits the [unethical] conduct involved”

OR

“... if the lawyer has direct supervisory authority over the other lawyer, and with knowledge of the other lawyer’s violation of these rules knowingly fails to take reasonable remedial action to avoid and mitigate the consequences of the other lawyer’s violations.”

The Case of Natalie Attired and Warren Peace

- Natalie sues ABC Company alleging gender discrimination following termination
- Discovery reveals false claim against medical plan years ago
- Outside defense counsel informs in-house counsel, Warren Peace, that he intends to threaten criminal prosecution to persuade Natalie to dismiss the gender discrimination claim. Peace acquiesces.

The Case of Natalie Attired and Warren Peace

- Ethical issue for defense counsel?
- Ethical issue for in-house counsel Warren Peace?

Okay to Threaten Criminal Prosecution?

Yes, if:

- 1) The criminal matter is related to the client's civil claim
and
- 2) The lawyer has a well-founded belief that civil claim and the criminal charges are warranted by law and facts
and
- 3) The lawyer does not attempt to exert influence over the criminal process

- ABA formal opinion 92-363

Remember Model Rule 5.01 culpability if
“... orders, encourages or knowingly permits the
[unethical] conduct ...”

- Ethical issue for defense counsel?

Yes.

Why?

- Ethical issue for in-house counsel?

Yes.

Why?

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- Access to ACC resources, including:
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 - ACC Docket Magazine
 - InfoPAKs
 - QuickCounsel Guides
- **For more information or to refer a new member, see your hosts today or contact Chapter Administrator, Chris Stewart, at ChrisStewart@ACCglobal.com.**

