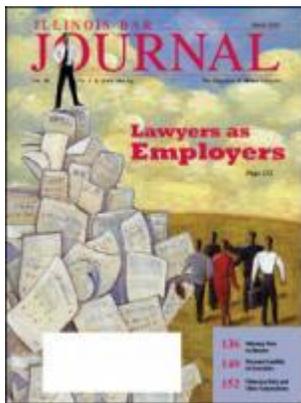


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Business Law

Organization as Client - a Continuing Dilemma for Business Lawyers

Under the new ethics rules - as under the old - lawyers must take care to put directors, officers and others on notice when their interests are adverse to those of the client organization.

By Stephen Proctor

Effective January 1, 2010, Illinois lawyers became subject to the revised Illinois Rules of Professional Conduct. For Illinois business lawyers, one of the most important of these rules continues to be Rule 1.13, "Organization as Client."

Rule 1.13 acknowledges at the outset that a lawyer employed by an organization represents the organization acting through its "constituents," such as its directors, officers, employees, members, and shareholders. Rule 1.13(a). "In dealing with an organization's [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." Rule 1.13(f).

The principal established in Rule 1.13 is not new and is consistent with the former Rule 1.13. But the importance of the rule was brought into sharp focus by a recent California case.

District court criticizes law firm

Broadcom Corporation was charged in a shareholder lawsuit with backdating stock options grants to management. Broadcom hired the law firm of Irell & Manella to investigate the charges. As part of its investigation, attorneys with Irell & Manella interviewed William Ruehle, the chief financial officer, in connection with the investigation.

Later, after the U.S. government brought criminal charges against him, Ruehle sought to suppress the evidence resulting from his interviews with the attorneys, claiming that he believed they were representing him personally and not the corporation. (Irell & Manella claimed it disclosed to Ruehle that the firm was representing the corporation, and not him personally, but he said he had no memory of this disclosure.)

The federal district court in central California agreed with Ruehle. 606 F Supp 2d 1109 (CD Cal 2009) But the court went even further. It referred Irell & Manella to the State Bar of California for review and possible disciplinary action based on its alleged unprofessional conduct and conflict of interest.

"Irell's ethical breaches of the duty of loyalty are very troubling," said the court. "It must be disconcerting to Mr. Ruehle to know that his own lawyers at Irell disclosed his confidential and privileged information to the Government, lawyers whom Mr. Ruehle trusted and believed would never do anything to hurt him." Id at 1121.

Appellate court overturns district court

On appeal, the ninth circuit took a surprisingly different approach and was critical of the district court's opinion. In the end, the appellate court declined to suppress the evidence of the interview. *USA v Ruehle*, 583 F3d 600 (9th Cir 2009).

At the outset, the ninth circuit said the district court opinion was premised on a "fundamental flaw" - analyzing attorney-client privilege issues based on state law rather than federal common law. Under federal common law, the burden was on Ruehle to show that his communications with Irell & Manella were covered by attorney-client privilege. The ninth circuit decided that Ruehle was unable to make this showing.

In support of its decision, the appellate court cited several facts from the evidence, including the following:

- Ruehle admitted that he understood the results of Irell & Manella's investigation would be disclosed to Broadcom's independent auditors to establish the integrity of Broadcom's financial statements or to take measures to correct misleading reports.
- As the CFO, Ruehle was not an ordinary employee. Rather, he was charged with primary responsibility for Broadcom's financial affairs and Broadcom's compliance with reporting and record keeping requirements imposed by federal law. In such a position, Ruehle could not claim ignorance of disclosure requirements imposed on a public company and the need to truthfully report information to the SEC.
- Ruehle not only knew the information he discussed with Irell & Manella would be disclosed to Broadcom's outside auditors, he was actually present when the information was disclosed, and he did not object.
- His "shock" that the contents of the interviews could be used in a criminal case against him was "of no consequence." He knew his statements were not confidential, which meant they were not subject to attorney-client privilege.

As a result, the ninth circuit allowed the content of Ruehle's interview with Irell & Manella, which he was attempting to suppress, to be used in the criminal proceeding.

But what about the lower court's suggestion that Irell & Manella should be disciplined? The appellate court said that this matter was not part of the appeal, calling the failure to obtain written consent from Ruehle "troubling" but concluding it was no reason to suppress the evidence from his interview.

A Miranda warning for "constituents"

The case is a good illustration of the dilemmas that face attorneys representing organizations and, at the same time, working directly with its "constituents." Rule 1.13, and the accompanying comments, provide helpful guidance to attorneys. But applying the rule in an actual case can still be difficult.

Although Rule 1.13 does not require a law firm to get a written consent from a "constituent" when conducting an internal corporate investigation, the ninth circuit suggested that it would have been best to do so. In this regard, Lin Hanson has prepared a sample corporate "Miranda" disclosure and consent.

The disclosure makes clear that the attorney represents the corporation, not the individual signing the consent. If you'd like a copy, contact Lin at lhanson@dkehq.org.

Epilogue: Last December, based on alleged prosecutorial misconduct (unrelated to the Irell & Manella issue), the trial court dismissed the criminal charges against Ruehle. The court also dismissed, without prejudice, separate charges of the U.S. Securities and Exchange Commission against Ruehle.

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