"Your" Witness: What's at Stake in Representing Your Corporate Client's Individual Representatives

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Your longstanding client, Ethico, (as so frequently occurs in hypotheticals like these) manufactures widgets. Ethico now has been sued on grounds that its newest product line – the W-3000 – incorporates trade secrets stolen from a competitor, Nemesis. Ed Engineer, head of the W-3000 project, left Nemesis to come to work for Ethico prior to the development of the W-3000. He is not, however, named as a defendant in the suit against Ethico.

Consistent with prior practice, you were initially approached and formally retained by Ethico's general counsel, but ever since then Ed has been your point of contact with respect to the case. Ed provided you with the information you needed to respond to discovery requests, has reviewed pleadings for accuracy, and has met with you over the past months to answer your questions about Ethico's development of the W-3000. Unsurprisingly, your opponent serves you with a notice of deposition for Ed. You spend days preparing Ed for a rigorous cross-examination, but it turns out that the question that causes you the most concern is directed to you. Before Ed is sworn, your opponent asks if, in addition to representing Ethico, you also represent the witness. Well, do you?

If this is the first time this question has occurred to you, you are in trouble. In fact, the question of whether you should, or even can, represent individual representatives of your corporate clients is one that needs to be addressed at the outset of your contacts with them. While those decisions are necessarily made on a case-by-case basis, this article attempts to identify the very basic practical and ethical concerns that should be considered in making any informed decision about representing a corporate client's individual employees or officers.[2]

Am I Risking the Privilege?

For most lawyers representing corporate parties in litigation, privilege is a natural first concern. Your team has spent hours carefully reviewing documents for any hints of privilege and has segregated and logged materials reflecting attorney-client communications. You have reminded the client to be careful about sharing materials from you with others, lest your advice to them become discoverable. When you defend depositions, one of the few tools available to you is to instruct the witness not to answer on grounds that the answer is privileged. If you *don't* say you represent Ed, aren't you going to expose him to questions about his communications with you, including how exactly he worked with you to formulate Ethico's litigation strategy?

As a practical matter, protecting your client's privilege is unlikely to be your principal problem. Needless to say, the law recognizes that corporations can act only through their personnel. The provision of the ABA Model Rules of Professional Conduct (the "Model Rules") addressing the

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[2] For a much more detailed and comprehensive look at this topic, see Lawrence J. Fox, "Your Client's Employee is Being Deposed: Are You Ethically Prepared," *Litigation*, Vol. 29, No. 4 at 21-27 (Summer 2003).

representation of organizations begins with the recognition that "[a] lawyer employed or retained by an organization represents the organization acting through its duly organized constituents" and the accompanying commentary recognizes that Model Rule 1.6 (governing the obligation to preserve client confidences) applies when "one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity." Model Rule 1.13(a) and Comment 2. A similar rule applies to claims of privilege in most jurisdictions. In *Upjohn Co. v United States,* 449 U.S. 383, 394-95 (1981), the United States Supreme Court recognized that the attorney-client privilege extends to communications between corporate counsel and even low-level employees regarding their work for the company (assuming, of course, that the communications relate to legal advice being given to the company). Here, Ed's communications with you relate to a suit brought against Ethico that arises out of Ed's employment responsibilities. Under *Upjohn* (and its corollaries in many states), those communications should be privileged.[3]

If you decide to represent Ed individually, however, you may restrain Ethico's ability to *waive* privilege. A recent decision from the Central District of California, *United States v. Nicholas*, 606 F.Supp.2d 1109 (C.D. Cal. 2009), powerfully illustrates this point. In *Nicholas*, a law firm was hired by Broadcom Corporation to conduct an internal investigation of Broadcom's stock option practices. The law firm had previously represented both Broadcom and its CFO, William Ruehle, in connection with several previous securities-related actions, and had entered an appearance on behalf of Ruehle in civil claims relating to stock option backdating. *Id.* at 1112-1113. The firm interviewed Ruehle as part of the internal investigation. *Id.* at 1113. Subsequently, Broadcom made the decision to have its attorneys disclose the results of this investigation to the SEC and U.S. Attorney's Office. *Id.* at 1114. After learning of the disclosure, Ruehle objected to it. *Id.* He won. The Court overseeing Ruehle's subsequent criminal prosecution concluded that the statements made by Ruehle to the law firm were in fact privileged. *Id.* at 1115-1117. It therefore did not merely suppress the evidence reflecting Ruehle's statements to the law firm, but also referred the law firm to the California State Bar for "appropriate discipline," finding that the disclosure of Ruehle's client confidences at Broadcom's direction constituted a breach of the duty of loyalty owed to Ruehle. *Id.* at 1121.

Do I Really Want *Another* Client?

As the *Nicholas* decision suggests, Ed's ability to control the waiver of privilege if you represent him individually is really only the tip of the iceberg. As an ethical lawyer, your far greater concern is that – if you agree to represent both Ethico and Ed – you will have two *different* clients each of which you will owe the *same* duties of loyalty and confidentiality. Whether you should, or even can, attempt such a joint representation is going to require some thought.

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[3] A different analysis may apply if your jurisdiction (like this author's) applies a "control group" test to invocations of the attorney-client privilege. In such jurisdictions, communications with a low-level corporate employee may be privileged only if the attorney represents the employee individually. *Compare Buckman v. Columbus-Cabrini Med. Ctr.*, 651 N.E.2d 767, 771 (Ill. App. Ct. 1995) (communication between nurse and hospital counsel privileged; counsel represented nurse at deposition) *with Rounds v. Jackson Park Hosp. and Med. Ctr.*, 745 N.E.2d 561, 568 (Ill. App. Ct. 2001) (communications from nurse not privileged because nurse not part of hospital control group).

A starting point for determining whether you can ethically represent both Ed and Ethico is your jurisdiction's counterpart to ABA Model Rule 1.7. Rule 1.7 provides, that (absent a permissible waiver) a lawyer "shall not" represent a client if:

> (1) the representation of one client will be directly adverse to another client; or
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> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

Model Rule 1.7(a). So what does that mean for Ed?

To this point, it doesn't look like Ed and Ethico are directly adverse. They aren't suing one another and presumably neither Ed nor Ethico would like to see Nemesis prevail. While the commentary to this rule points out that direct adversity can also arise from other circumstances, like the need to cross-examine one client on behalf of another (*see* Model Rule 1.7(a), Comment 6), it doesn't seem like an adverse examination of Ed would help Ethico here – especially if Ethico can be held vicariously liable for Ed's actions.

The much thornier question is whether there is a "significant risk" that your representation of either Ethico or Ed will be materially limited by your responsibilities to the other. Indeed, such a limitation might arise even if Ethico would be vicariously liable for anything Ed did. Imagine, for example, that Ed in fact broke into a vault at Nemesis to steal plans for a W-3000 prototype prior to joining Ethico – a fact that (a) would expose both Ethico and Ed to civil liability and (b) if known to Ethico, would lead Ethico to fire Ed under Ethico's strict code of corporate conduct. You learn this from Ed, however, only *after* you agree to represent him. You now have a dilemma. You have received from your client, Ed, information that he will not want you to share with your client, Ethico (which will fire Ed once it finds out). Without that information, however, Ethico may want to fight the claim brought by Nemesis -- which, represented by more than competent counsel, will uncover the theft in the course of discovery, bringing down Ed, Ethico, and all – rather than seek an early settlement. There is no obvious way to resolve this problem. While Model Rule 1.7 allows both clients to waive a conflict under some circumstances, that waiver requires "informed" consent of both clients. Model Rule 1.7(b)(4). Here, Ethico cannot provide informed consent because you can't provide it with the relevant information – Ed wants it kept secret. Nor can you disclose Ed's misconduct to Ethico just because Ethico is also a client (one that hired you and is paying for your representation of Ed). To the contrary, a recent ABA formal ethics opinion – addressing similar circumstances – held that a lawyer's duty to protect his client's confidential information (which arises under Model Rule 1.6(a)) applied to each client individually, such that *if* a lawyer recognized that he or she could *only* effectively represent one client by revealing the confidences of another, the lawyer would have to withdraw from one or both representations to avoid violating Model Rule 1.7. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-450 (2008).

Of course, the fact that there is *some* risk of conflict does not preclude you from representing Ed. The real question under Rule 1.7 is whether that limitation is "substantial." To answer that question, you would like to be able to talk to Ed *before* you agree to represent him in order to find out whether there are any circumstances likely to give rise to a conflict. Again, that's a little easier said than done.

When Ed talks to you to determine whether you can represent him, he becomes a "prospective client" under the Model Rules, which means that you will owe him duties under Model Rule 1.18. Rule 1.18 provides that, even when no lawyer-client relationship ensues from a discussion with a prospective client, a lawyer (1) cannot use or reveal information learned in the consultation (except as would otherwise be permitted by the Rules) and (2) cannot represent a client with adverse interests in the same matter if the information would be substantially harmful to the prospective client in that matter. Model Rule 1.18 (b, c). Those duties might seem to give rise to the exact same problem you had before, since if Ed reveals to you the business about the theft (or some other confidence that might influence your advice to Ethico) it is no less confidential merely because it came in the course of your conversation about *whether* you can represent him. There is, however, a catch. Rule 1.18(d)(1) provides that a disqualification under Rule 1.18 can be waived (provided it is done in writing) and the comments to the Rule expressly provide that a lawyer can condition conversations with a prospective client on the prospective client's informed consent to the lawyer's use of any information obtained during the interview. Rule 1.18, Comment 5. So, assuming that Ed will consent, in advance and in writing, to a candid interview with you in which he knows any information will be shared with Ethico, you should be able to get a better sense of whether representing him is likely to jeopardize your representation of Ethico.

Of course, there's one further wrinkle. Assuming you decide that you *can* represent Ethico and Ed jointly in this case, you should be aware that representing Ed *may* affect your ability to represent Ethico in future cases. Imagine now that, after you've taken on Ed as a client and started to defend both Ed and Ethico in the Nemesis matter, Ethico's general counsel gives your firm another call. Ethico would like you to spearhead an investigation into reports that Ed's been embezzling money so that (after the Nemesis matter is concluded of course) they can seek to take appropriate action against Ed. That's a representation you cannot accept. Needless to say, agreeing to this representation would involve direct adversity to your current client, Ed, and run afoul of Rule 1.7.[4] *See also Nicholas*, 606 F.Supp.2d at 1119 (noting that interrogation of client CFO for benefit of client company breached duty of loyalty to CFO). Moreover, even after the Nemesis matter is closed, you will owe Ed continuing duties, as a former client, to avoid undertaking any representation where information learned from Ed would need to be used to his disadvantage. Model Rule 1.9(c)(1). In short, if you agree to take on Ed as a client, you are agreeing to treat him as one, with all the duties that accompany representing any client. That may be a risk you are willing to take, but it is not a decision whose consequences should be ignored.

Trust Me, I'm Not Your Lawyer

By this point, you've probably decided that it might be a lot easier simply to avoid representing Ed. And why should you bother? You know you represent Ethico, and Ed hasn't asked about what that means for him. Wouldn't it be easier just to let sleeping dogs lie and not bother getting Ed worried about whether he needs a lawyer?

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[4] Rule 1.7(b) allows such conflicts to be waived by both clients, in writing, assuming the lawyer "reasonably believes" that he or she will be able to provide competent and diligent representation notwithstanding the conflict and given the informed consent of both parties. It is difficult to imagine, however, how Ed could provide informed consent to an investigation of which he is unaware.

Simply ignoring the question of Ed's representation, however, is not really a viable option. In addressing how to communicate with an organization's employees, officers, or other constituents when representing an organization, Model Rule 1.13 provides that "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 constituent with whom the lawyer is dealing." Model Rule 1.13(f). As the comment to this rule indicates, "[c]are must be taken to assure that the individual understands that, when there is . . . adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged." Model Rule 1.13, Comment 10. So – at least if you actually encounter an area where Ed's interests may diverge from Ethico's – you will need to take care to advise Ed that you really don't represent *him* but only the company.

In fact, however, you may need to remind Ed that you don't represent him well *before* you encounter any actual adversity. If no one represents Ed, then the general rule governing unrepresented persons comes into play. Model Rule 4.3 states that, in dealing with a person not represented by counsel, a lawyer "shall not state or imply that the lawyer is disinterested." Indeed, as soon as the lawyer reasonably should know that his or her own role is misunderstood, the lawyer "shall make reasonable efforts to correct the misunderstanding." *Id.* Moreover, the lawyer "shall not give legal advice to an unrepresented person, other than the advice to secure counsel" if the lawyer knows or reasonably should know that the person has a conflict of interest with the client or even if there is a "reasonable possibility" of such a conflict. *Id.* As the commentary to this rule explains, an unrepresented person "might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person." *Id.*, Comment [1].

So now you are talking to Ed, having made the decision not to represent him, perhaps because you've concluded there is at least a "reasonable possibility" that representing him would give rise to a conflict. Under these rules, you are going to have a hard time keeping silent once he starts asking for anything resembling legal advice. Assume that, as an inexperienced witness, he asks you how he should approach questions at his upcoming deposition. Since he is a corporate constituent you should be able to advise him about deposition procedure under Rule 1.13, but you will also need to make sure he understands that you are offering him advice solely in your capacity as Ethico's counsel. There may also be instances where you may not be able to answer Ed's questions. Suppose Ed asks you what penalties he will face if he gives erroneous testimony at his deposition? You could presumably tell him that Ethico wouldn't want him to do that, and might be able to note your own obligations to correct false testimony under Model Rule 3.3(a)(3), but you will probably need to tell him that only his own counsel could advise him about his own individual rights. And what if he asks if he really *needs* his own counsel to protect himself from personal liability? While Rule 4.3 says you can advise an unrepresented person to get counsel, it says nothing about telling the unrepresented person *not* to do so. Telling Ed that you can't say whether he really needs counsel is probably not going to reassure him that you are on his side. He may *want* his own lawyer, and Ethico may not want to pay for that.

As a practical matter, of course, the conversation with the corporate witness is rarely so ominous. You will simply make clear that which Ed probably knows already – that you are Ethico's

lawyer and that Ethico, not Ed, will direct your action in the case (including what aspects of your conversation with Ed to reveal). Under Rule 4.3, however, it is important to maintain continued vigilance against Ed forgetting that you do not represent him individually. If confusion about your role emerges, you may well need to *prove* that you did what you can to dispel that confusion. In *Nicholas,* for example, the law firm that was ultimately recommended for sanction claimed to have warned the CFO that it represented only the corporation in the internal investigation. The court took a dim view of this claim noting that there was no written record of such a warning. *Nicholas,* 606 F. Supp. 2d at 1116. Indeed, once a lawyer is perceived as having allowed a misunderstanding concerning his or her role to go uncorrected, a court may find an attorney-client relationship to come into being irrespective of the lawyer's intentions. *See, e.g., In re Grand Jury Subpoena: Under Seal,* 415 F.3d 334, 340 (4th Cir. 2005) (noting that a "watered-down" warning that lawyers did not represent individual officers, but could in the future, could lead into "a potential legal and ethical mine field"); *but see Tuttle v. Combined Ins. Co.*, 222 F.R.D. 424, 429 (E.D. Cal. 2004) (noting that employee's "mere belief" that corporate counsel represented them did not create attorney-client relationship), *aff'd* 225 Fed. Appx. 620 (9th Cir. 2007).

Remember: You Are Not Alone

So where does this leave your relationship with Ed? Should you agree to represent him, giving him the assurance that you are looking out for his interests as well as Ethico's at the risk of losing both clients should a conflict emerge, or should you tell Ed you are not his lawyer, preserving your relationship with Ethico at the cost of making a key witness a lot more nervous?

As noted at the outset of this article, there is not a single solution to this question. Nor, however, should you feel obliged to answer it on your own. Ethico *is* your client, and already has a general counsel smart enough to have hired you in the first instance. You might want to consult with him or her in thinking through this problem. You have met Ed only in connection with this single representation – the general counsel will probably have a much better sense of Ed's background with Ethico and the various factors that will need to inform a decision as to whether it makes sense for you to represent him individually.

The only decision that is plainly wrong is to ignore the issue entirely, trusting that you will be able to sort out whom you represent after a question from your opponent, or a conflict between Ed and Ethico, forces the issue. By waiting, you make it much likely that decisions that could have been made *by* you will now be made *for* you, either by a court that may sanction you for failing to represent a client you never wanted or by a client you *did* want that now finds itself unhappy with its choice of counsel.

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