Boston Bar Association

May 12, 2004

"Ethical Obligations of Corporate Counsel When Interviewing Corporate Employees"

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I. INTRODUCTION

When interviewing corporate employees, whether in the context of an internal investigation or otherwise, corporate counsel has an obligation to advise the interviewee of the nature of counsel's role as counsel for the corporation rather than the individual interviewee. This obligation, referred to by some commentators as a "corporate miranda" warning and by others as an "adnarim" warning (Miranda spelled backwards), is found in the Rules of Professional Conduct and supported by case law and ethics opinions. Corporate counsel's obligation to provide such a warning exists most clearly (i) when there is an apparent conflict between the corporation and the employee and (ii) when counsel knows or reasonably should know that the employee misunderstands counsel's role. The "corporate miranda" duty, however, is an evolving one, and the duty is likely to arise in an increasing number of situations. Failure to advise an interviewed employee can result in harsh consequences, including disqualification of corporate counsel and loss of the corporation's privilege. Consequently, when interviewing employees, corporate counsel should provide an adequately detailed warning that alerts the employee of counsel's role as advocate for the corporation and apprises the employee of her right to seek independent counsel.

II. EXISTENCE AND SCOPE OF CORPORATE COUNSEL'S OBLIGATION WHEN INTERVIEWING CORPORATE EMPLOYEES

A. Source of Duty.

1. Rule 1.13. The duty to advise an interviewed employee of the nature and scope of corporate counsel's representation arises from the Rules of Professional Conduct. The Massachusetts Rules of Professional Conduct, which are virtually identical in pertinent part to the American Bar Association's Model Rules of Professional Conduct, address the responsibilities of corporate counsel in Rule 1.13 (hereinafter, "Rule 1.13"). Rule 1.13(a) states that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Mass. R. Prof. Conduct 1.13(a) (2000). Rule 1.13(d)

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imposes a duty to clarify the lawyer's role in certain circumstances, stating that "[i]n dealing with an organization's . . . constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." Mass. R. Prof. Conduct 1.13(d). The comments to Rule 1.13 note that whether such a duty exists is a factual question. See Mass. R. Prof. Conduct 1.13, cmt. 8 ("Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case."). Thus, a duty will arise when the facts of a particular case make it apparent that the corporation's interests are adverse to those of the interviewee.

2. Rule 4.3. When interviewing unrepresented employees, the determination of whether a duty to warn exists will also involve Rule 4.3 of the Massachusetts Rules of Professional Conduct (hereinafter "Rule 4.3"). Rule 4.3 addresses dealings with unrepresented persons. Rule 4.3(a) states that, not only must the lawyer avoid implying that she is disinterested, "[w]hen the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, [but] the lawyer shall make reasonable efforts to correct the misunderstanding." Mass. R. Prof. Conduct 4.3. Consequently, a duty to warn will also arise when corporate counsel knows or reasonably should know that the interviewee misunderstands the lawyer's role.

3. Ethics Committees. Ethics committees have supported a duty to warn interviewed employees when there is a potential adversity or misunderstanding as to the role of corporate counsel. A frequently-cited ethics opinion from the District of Columbia notes that a warning is required when a possible conflict is apparent and when there is a misunderstanding regarding confidentiality. See District of Columbia Ethic Op. 269 (1997).

4. Court Decisions. Courts have also called attention to the "corporate Miranda" duty. A 1997 case from the Second Circuit noted that "attorneys in all cases are required to clarify exactly whom they represent, and to highlight potential conflicts of interest to all concerned as early as possible." See United States v. International Bhd. of Teamsters, 119 F.3d 210, 215 (2d Cir. 1997). Another case, from the District of Kansas, stated that, when a lawyer becomes aware of a potential adversity between the corporate client and the constituent being interviewed, the lawyer must fairly inform the constituent that his only client is the corporation. See also Professional Services Industries, Inc. v. Kimbrell, 758 F. Supp. 676 (D. Kan. 1991). Given the support for this "corporate miranda" duty, corporate counsel must take appropriate precautions to ensure that counsel's ethical obligations are fulfilled.

B. Determining Whether a Duty Exists

1. Factual Inquiry. Determining whether a "corporate miranda" duty exists in a given factual situation can be difficult. Rules 1.13 and 4.3 work in tandem to impose a duty to warn an employee whenever (i) it is apparent that the

organization's and the employee's interests are adverse, and (ii) when the lawyer has reason to believe the employee misunderstands the lawyer's role. See Mass. R. Prof. Conduct 1.13(d) and 4.3. The text of the rules seems to limit their application; according to the text of these Rules, the duty only arises when the adversity is "apparent" or when the lawyer "knows or reasonably should know" of a misunderstanding. See id. Given the likelihood for adversity between an employee and the corporation in an internal investigation, however, rarely will a potential adversity not be apparent. See Alan L. Silverstein, Ethical Issues Facing Corporate Counsel, 13-Fall Antitrust 18 (1998). Similarly, several aspects of the employee-corporate counsel relationship may produce misunderstandings. See id. Consequently, corporate counsel should provide a "corporate miranda" warning even when a strict interpretation of the rules may not call for one.

2. Factors Weighing in Favor of a "Corporate Miranda" Duty. Several factors may make the existence of a duty more likely:

> a) *Pre-Existing Relationship with the Interviewee.* A pre-existing relationship between the employee and corporate counsel may create a misunderstanding. If counsel has represented the employee in her individual capacity in the past, a lawyer may have a duty to advise the client that the lawyer no longer represents her as an individual. See In re Brown, 956 P.2d 188, 198 (Or. 1998).
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> b) *In-House versus External Counsel.* Given the close relationship between employees and in-house counsel, a duty is more likely to exist when an employee is interviewed by in-house counsel, as opposed to outside counsel. See ABA/BNA Lawyers' Manual on Professional Conduct Reference Manual: Types of Practice, Corporate, Client Identity, L.M.P.C. 91:2001 (1998) (hereinafter "ABA Manual").
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> c) *Size and Sophistication of Corporation.* Members of a small, closely-held corporation are also more likely to equate the corporation's interests with their own. See, e.g., Rosman v. Shapiro, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987) (finding it reasonable for a shareholder in a close corporation to believe that corporate counsel was representing him in his individual capacity).

Although these additional factors may make the existence of a duty more likely, a duty may exist without any of these factors.

3. Duty to Re-Advise. The "corporate miranda" obligation is an evolving one, and courts are likely to impose a duty in an increasing variety of situations. See, e.g., Schiffli Embroidery Workers Pension Fund v. Ryan, Beck & Co., 1994 WL 62124, *3-*4 (D.N.J. 1994) (finding a duty to advise fund trustee that attorney was not acting as his individual attorney). Even where corporate counsel has advised the employee of counsel's role as advisor to the corporation, a lawyer may want to remind the interviewee of counsel's role during the course of the

interview. Because Rule 4.3 imposes an obligation when the lawyer "knows or reasonably should know" of a misunderstanding, if it becomes clear to the lawyer that, despite the lawyer's warning, the employee is under the mistaken impression that the lawyer represents the employee, the lawyer should clarify her role. While doing so may result in a less candid response from the employee, the consequences of failure to warn may be more severe.

III. CONSEQUENCES OF FAILURE TO FULFILL THE DUTY TO WARN: IMPUTED ATTORNEY-CLIENT RELATIONSHIP

A. Finding of Attorney-Client Relationship. In addition to being a breach of an attorney's ethical obligations, failure to fulfill the "corporate miranda" obligation could result in a court finding an imputed attorney-client relationship.

1. When a Court Will Find an Attorney-Client Relationship. The standard for finding an attorney-client relationship varies from state to state. Courts are increasingly looking at the reasonable expectations of the would-be client. See ABA Manual. Massachusetts, in particular, will find an imputed attorney-client relationship where "(1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance." DeVaux v. American Home Assurance Co., 387 Mass. 814, 817-18 (1983) (quoting Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (Iowa 1977)). Consequently, corporate counsel should guard against making any statements during the course of an employee interview that the employee could interpret as legal advice.

2. Requirements for Finding an Attorney-Client Relationship Strictly Construed. Courts strictly interpret the requirements for finding an attorney-client relationship. See, e.g. U.S. v. Sawyer, 878 F. Supp. 295, 296 (D. Mass. 1995) (finding no attorney-client relationship where employee did not establish that corporate counsel represented him in his individual capacity). Consequently, where the employee is not reasonable in her belief that the attorney is representing her individual interests, a court is unlikely to find an attorney-client relationship. See, e.g., TJD Dissolution Corp. v. Savoie Supply Co., 460 N.W.2d 59, 62-63 (Minn. Ct. App. 1990) (finding it unreasonable for a major shareholder to believe that corporate counsel was representing the shareholder where corporation's and shareholder's interests were clearly adverse).

B. Consequences of Finding an Attorney-Client Relationship. The results if a court finds an attorney-client relationship to exist can be disastrous. For instance, the employee may sue the lawyer for malpractice; the lawyer may be disqualified from representing the corporation in matters adverse to the employee; the attorney-client privilege may be waived, thereby allowing adversaries access to documents that might otherwise be protected; and work-product protection may be lost. See ABA Manual. The harsh consequences that could result from a finding that an attorney-client relationship exists suggest that, notwithstanding the strict requirements for recognition o.

an attorney-client relationship, an attorney should clarify any misunderstanding that an interviewee may have as to the nature and scope of the attorney's representation.

IV. SUGGESTED WARNING

Although Rule 1.13(d) states only that the lawyer must "explain the identity of the client," the evolving state of the law suggests that a more detailed warning is prudent. Rule 4.3(b) states that, when dealing with an unrepresented person, an attorney should limit her advice to the recommendation that she secure counsel; however, the comment to this rule explains that "[n]othing in this Rule . . . should be understood as precluding the lawyer from functioning in the normal representational role of advancing the client's position." Mass. R. Prof. Conduct 4.3, cmt. 1. Accordingly, when counsel representing a corporation is conducting employee witness interviews as part of an internal investigation or otherwise, in order both to establish the existence of the corporation's privilege and to protect the corporation's and the attorney's interests, a warning including the following elements should be considered:

- That the lawyer represents the corporation and does not represent the interviewee;
- That the interview is being conducted for the purpose of gathering factual information necessary to defend the company in anticipation of litigation;
- That discussions between the lawyer and the individual will be protected by the corporation's privilege, which privilege the corporation may waive in its discretion;
- That the substance of the interview should be kept confidential;
- That the information gathered during the interview may be used by the corporation, in its discretion, for a variety of purposes, including disciplinary measures; and
- That the information gathered during the interview may be shared with the government or other regulators.

V. CONCLUSION

Although a detailed warning may seem like a cumbersome impediment to candid interviewee responses, a detailed warning may be necessary to protect both corporate counsel's and the corporation's interests. Failure to provide an adequate "corporate miranda" warning may result in both breach of the attorney's ethical obligations and loss of protection for the corporate client. Consequently, when faced with the decision of whether to advise, or re-advise, an interviewee of the attorney's role as corporate counsel, an attorney should err on the side of caution.