



PROFESSIONAL RESPONSIBILITY

COUNSEL FOR THE ORGANIZATION: EMPLOYEE CONFLICTS

BY KENNETH L. JORGENSEN

Representing organizations requires daily vigilance to avoid conflicts of interest between the organization and its constituents (e.g., officers, managers, supervisors or other employees). Although ethics rules make it axiomatic that a lawyer represents "the organization" and not its individual constituents, this entity theory of client identification is at times overly legalistic. Some have argued that it tends to ignore or overlook the personal, social and human relationships that often develop between the organization's counsel and its constituents. This is especially true where the organization's counsel is "in-house."

In many organizations it is difficult to distinguish in-house counsel from other employees in the organization. Like other employees, they may take their daily direction from those authorized to manage the organization. They are often subject to the same employment policies, procedures, and benefits generally applicable to all organization employees. And like many employees, they may form close working relationships and even friendships with others in the organization.

As long as the interests of the organization and its constituents are harmonious, the dissimilarity between counsel's relationships with the organization and with other employees remains somewhat transparent. This disparity comes to the forefront, however, any time the interests of an officer, manager, supervisor or other employee become adverse to or conflict with those of the organization.

JOINT REPRESENTATION

For example, employment-related lawsuits against organizations sometimes include separate claims against individual officers, supervisors or other employees as codefendants. When the organization and one of its constituents are both named as defendants, counsel for the organization is confronted with the issue of whether joint representation of the organization and the individually sued employee is ethically appropriate. Although joint representation may serve the financial interests of both the organization and the employee, economics is only one of many considerations. The

more compelling question is whether the interests of the organization and the employee with respect to the pending employment suit are sufficiently in accord to permit joint representation. If they are not, and joint representation is undertaken, the organization may incur increased legal costs should the conflict develop and counsel for the organization be disqualified or forced to withdraw. Counsel could also face discipline or malpractice consequences stemming from the conflict.

Evaluating whether the interests of the organization and employee are sufficiently congruous requires more than a cursory or superficial review of the employment claim. Counsel for larger organizations may have the benefit of an internal investigation report prepared by the human resources department. In smaller organizations, however, the organization's counsel is often required to undertake some role in the investigative function as well. Performing both the legal and investigative roles can present a quandary for counsel. In employment suits, the named employee defendant is typically alleged to have done or not done some act creating liability. Oftentimes the sued employee is the only person in the organization, other than the plaintiff, who is privy to the facts, circumstances, or communications that form the basis for the lawsuit. The dilemma for counsel is how to go about obtaining enough information to determine whether there is a conflict without establishing an attorney-client relationship with the employee defendant and without chilling the employee's desire or willingness to provide the information.

Under Rule 1.13(d), Minnesota Rules of Professional Conduct (MRPC), counsel for the organization is required to "explain the identity of the client" when it appears to counsel that the organization's interests are adverse to those of the employee. In addition, Rule 4.3, MRPC, obligates counsel when dealing with an "unrepresented person" to clearly disclose whether the organization's interests are adverse to those of the employee; the rule also prohibits giving advice to the employee on issues as to which of the interests of the organization and the employee "have a

reasonable possibility of being in conflict." See Rules 4.3(a) and (c).

Although these obligations obviously complicate investigative discussions with employees, they do not prevent counsel from negotiating or settling a claim with an unrepresented employee.<sup>1</sup>

DECIDING JOINT REPRESENTATION

Until a decision about joint representation has been made, counsel should advise the employee that counsel represents the organization and not the employee. The subject of confidentiality and privilege should also be addressed. Counsel should explain that discussions with the employee might be privileged and/or confidential, but that any privilege or confidentiality protections belong to the organization and not the individual employee. If at any time during these discussions it appears the organization's interests are adverse to the employee, counsel must remind the employee that counsel represents the organization (Rule 1.13(d)) and refrain from giving the employee legal advice about the matter (Rule 4.3). The comment to Rule 1.13 also recommends telling the employee that he or she may wish to obtain independent representation.<sup>2</sup>

Before deciding whether to represent an employee, due diligence may also require counsel to explore whether adversity with the employee exists outside of the litigation in which the organization and employee have been named as codefendants. Specifically, does the employee have his or her own unrelated claims or disputes with the organization? The New York case of *Felix v. Balkin*<sup>3</sup> illustrates the consequences of failing to investigate such issues.

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## PROFESSIONAL RESPONSIBILITY

In *Felix*, the plaintiff brought a hostile environment sexual harassment claim against the employer and his female supervisor, Morales, claiming that the harassment had been reported to Morales and she had failed to take any action. Counsel for the employer, Steer, agreed to jointly represent Morales and the employer. After a joint answer was filed denying the harassment, Morales filed her own sexual harassment complaint against the employer with EEOC. Morales' EEOC complaint contradicted the joint answer denying the plaintiff's hostile environment claim, thereby forcing Steer to withdraw as Morales' counsel and also from representing the employer. The employer was also forced to hire other counsel to handle the Morales EEOC complaint.

Later, several of Morales' coemployees filed their own hostile environment sexual harassment suits against the employer. Steer and his law firm agreed to defend the employer against these claims. Eventually, Morales brought her own harassment suit against the employer and the cases were consolidated. Morales then moved to disqualify Steer and his firm from defending the employer against the harassment claims that had been brought by her coemployees and consolidated with her suit.

In disqualifying Steer and his law firm, the court was extremely critical of how Steer went about undertaking the joint representation of Morales and her employer. Specifically, the court criticized Steer's failure to meet separately with Morales, failure to conduct a detailed study of the facts underlying the harassment claim, and reliance upon a "brief recitation" of the facts from the employer's HR manager. Steer was also condemned for failing to prepare "an engagement letter ... defining what might happen if a conflict between his two clients were to arise."<sup>4</sup> More importantly, the court denounced Steer's failure to ask Morales if she had her own claims or disputes against the employer and held that Steer and his firm had failed to "discharge their professional obligations." It was this failure that permitted the court to overlook Morales' concealment of her own claim from Steer and determine that Steer and his firm should be disqualified from representing the employer in the companion harassment cases that had been consolidated with Morales' suit.<sup>5</sup>

### CONSENT TO JOINT REPRESENTATION

Once a decision has been made to jointly represent the organization and an employee, counsel should obtain, in writ-

ing,<sup>6</sup> the informed consent of both clients.<sup>7</sup> "Informed consent" is defined by the Model Rules as client agreement to a proposed course of conduct after the lawyer "has communicated adequate information and explanation about the material risks of and reasonably available alternatives."<sup>8</sup>

In joint representations, adequate information and explanation necessarily include advising both clients that if a conflict develops between them, ordinarily the lawyer will be forced to withdraw and both clients will need to obtain independent representation.<sup>9</sup> Both clients should be apprised that as between joint clients the attorney-client privilege does not attach and if litigation ensues between the joint clients the privilege will not protect client communications with the lawyer.<sup>10</sup> The effect of joint representation upon confidentiality should also be discussed. Joint clients should agree that information received from either client will be shared with the other because of the lawyer's equal duty of loyalty to both clients. Absent such a waiver or understanding, the lawyer will be forced to withdraw if one client decides that information material to the representation is to be kept from the other.

Agreement between the organization and employee should also be reached about how disagreements over strategy or litigation decisions, including whether to settle, will be resolved. Officers, managers and supervisors understandably prefer litigation results exonerating their behavior, whereas settlement agreements, including apology or continuing reference letters, may better serve the organization's interests. Finally, the jointly represented employee should be required to affirm in writing that he or she has no known claims against the organization or any other named defendants.<sup>11</sup> □

### NOTES

1. The Comment to Model Rule 4.3 states that the Rule does not prohibit a lawyer from resolving a dispute with an unrepresented person as long as the lawyer has explained that the lawyer represents the adverse party and not the unrepresented party. The Comment further permits the lawyer to explain his or her view of the underlying legal obligations to the unrepresented party.

2. The Comment to Rule 1.13 is silent about the types of facts or circumstances that would trigger counsel's obligation to issue the warning to obtain independent counsel. Although the Model Rule Comment addresses this issue, its guidance is not very enlightening; "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."

3. 49 F. Supp. 2d 260 (S.D.N.Y. 1999).

4. *Id.* at 265.

5. Morales' plaintiff counsel may have won the battle, but lost the war. The court also sua sponte disqualified Morales' counsel because it determined that counsel must have known that Morales was a codefendant in a sexual harassment claim against the employer and was being represented by the employer's counsel while Morales was in the process of putting together her own harassment claim against the employer.

6. Rule 1.7 of the Model Rules of Professional Conduct, currently under consideration for adoption in Minnesota by the Supreme Court, requires that all client consents to conflicts of interest be confirmed in writing. Moreover, in the *Felix* case supra, the Court implied that the lawyer may have been able to continue to represent the employer when a conflict developed with the employee if the lawyer had obtained the employee's consent in an engagement letter. *Felix v. Balkin*, at p. 271.

7. The consent to joint representation given by or on behalf of the organization must be obtained from an appropriate organization official other than the employee who is to be jointly represented, or by the shareholders. Rule 1.13(g), Minnesota Rules of Professional Conduct.

8. See Rule 1.0(g), ABA Model Rules of Professional Conduct.

9. The absence of privilege between joint clients would permit either client to use privileged communications against the other. It would not, however, vitiate the privilege as to third parties or others not privy to the communications within the joint representation.

10. Under certain circumstances, courts may permit the employer's counsel to continue representing the employer when a conflict later develops with the represented employee.

However, advance consent from the employee is required and counsel bears the burden of "showing that circumstances exist to warrant an inference of understanding and implied consent." Section 132, Comment (i), Restatement of the Law Third: The Law Governing Lawyers (ALI 2000). See e.g., *Rymal v. Baergen*, 2004 WL 1260260, (Mich. App., 06/08/04) where the employer's counsel was permitted to continue to represent the employer after a conflict with the employee became evident during the employee's deposition.

11. Requiring represented employees to affirm they have no claims against the organization as a precondition to joint representation may also benefit the organization if the employee later asserts a claim.