



Unlawful behavior by corporate constituents

By Denis M. King and Gary M. Ronan

Published: February 15, 2010

Imagine the following scenario:

Mr. Smith, a vice president at the company for which you serve as in-house counsel, asks to meet with you privately. During the meeting, Smith tells you that he and several of his colleagues are engaged in an ongoing course of conduct on behalf of the company that you know is unlawful and believe will likely result in substantial injury to the company.

Based on Smith's description, the conduct might also cause bodily harm or economic damage to persons or entities other than the company.

Smith then asks for your advice concerning what he should do.

Smith is very likely in trouble. But that doesn't mean you have to be, too. Before answering Smith, consider the ethical rules applicable to the scenario.

Remember who your client is

First and foremost, keep in mind that the company is your client, not Smith. (See American Bar Association Rules of Professional Conduct, Rule 1.13(a).) That means you must act in the best interest of the company, which interest may diverge significantly from that of Smith.

It also means that you should clarify your role for Smith, lest he mistakenly believe that you are advising him personally. ABA Model Rule 1.13(f) provides that "[i]n dealing with an organization's directors, officers, employees, members, shareholders or other 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."

In our hypothetical situation, it is conceivable that it is in the company's best interest to bring Smith's unlawful behavior to an immediate halt and perhaps to disclose it to law enforcement authorities.

To the contrary, Smith's interest might best be served by keeping the unlawful conduct under wraps. You should therefore remind Smith that you represent the company and not Smith personally and that you cannot advise him in his personal capacity. You should be clear that your advice is given to him solely in his capacity as an officer of the company. (See Model Rule 4.3, requiring a lawyer who knows or reasonably should know that an unrepresented person misunderstands the lawyer's role to make reasonable efforts to correct the misunderstanding.)

You must also be sure that any such advice is not being used to assist Smith or others in furthering unlawful activity.

Reporting up the corporate ladder

Now that Smith understands your role, what do you do with the information provided by him? Model Rule 1.13(b) provides some guidance:

"If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law."

Because our hypothetical posits that Smith's behavior is likely to result in substantial injury to the company, absent special circumstances you are obligated to report Smith's statements to a "higher authority in the organization."

The person to whom you should report depends on the circumstances and the structure of the company. Under some circumstances (e.g., when management refuses to address a serious illegality in an adequate manner), you may be required to report to the company's board of directors or equivalent body.

That is not to say that you are always required to report the information up the corporate chain of command. Comment 4 to Model Rule 1.13 states that, in determining how to proceed, a lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person (or people) involved, the policies of the organization concerning such matters and any other relevant circumstances.

For example, the comment cites as one circumstance in which referral to a higher authority may not be necessary a situation in which the unlawful action resulted from an employee's innocent misunderstanding of the law, and the employee is willing to follow your advice as to the necessary corrective measures that need to be taken.

Disclosure outside the company

In most cases, responsible corporate managers and directors will take appropriate corrective action with regard to unlawful conduct by employees. But what if they do not? Our hypothetical assumes that the company's unlawful activities might result in bodily harm or economic damage to persons or entities other than the company. What about them?

Several of the model rules address these concerns. First, Model Rule 1.13(c) provides that if the company's highest authority fails to address in a timely and appropriate manner conduct that is clearly unlawful, and you reasonably believe that such conduct is reasonably certain to result in substantial injury to the company, then you may reveal to outsiders confidential information relating to your representation of the company, but only to the extent that you reasonably believe disclosure is necessary to prevent substantial injury to the company.

Disclosure under Model Rule 1.13(c) is permissible only when the matter is related to your representation of the company. Obviously, your decision to disclose the company's confidential information under this rule should not be made lightly, and you should make every reasonable effort to avoid the need for such disclosure.

It is also worth noting that the language of Rule 1.13(c) is discretionary, not mandatory: a lawyer "may" reveal confidential information in the circumstances described by the rule but is not obligated to do so.

In addition, Model Rule 1.6(b)(1) allows (but does not require) you to reveal confidential information if you reasonably believe that disclosure of the information is necessary to prevent the reasonably certain death of, or substantial bodily harm to, another person. The rule might apply to our hypothetical if the employees' unlawful conduct involved the discharge of toxic waste into a town's water supply, for example, creating a substantial risk of death or serious illness to consumers of that water, and disclosure of confidential information was necessary to eliminate the threat or reduce the number of victims. (See Model Rule 1.6, Comment 6.)

Finally, in our hypothetical you may also be justified in disclosing client confidences if your legal services are being used to somehow further the employees' unlawful activities.

If they are, then Model Rules 1.6(b)(2) and (3) come into play.

These rules allow (but do not require) you to reveal confidential information relating to your representation to the extent you reasonably believe disclosure is necessary to prevent your client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another, or to prevent, mitigate or rectify such an injury that will flow from a crime or fraud already completed by your client, but only if the client has used your services to further the unlawful activity.

As always, state ethics rules may differ from the model rules. For example, some states require mandatory disclosure in certain instances. A jurisdiction's rules should always be consulted when any ethics question arises. When in doubt, seek legal advice for yourself. Model Rule 1.6(b) and Comment 9 thereto allow you to reveal confidential information in order to obtain legal advice concerning your compliance with your ethical obligations.

Denis M. King is a director, and Gary M. Ronan is an associate, in the professional liability group of Goulston & Storrs in Boston. The group represents large law firms in malpractice, disciplinary and partnership disputes and provides ethics advice to both law firms and in-house counsel. King can be contacted at dking@goulstonstorrs.com; Ronan at gronan@goulstonstorrs.com.