

# Inside Ethics

## In-house counsel represents the company, not its employees

By Derek B. Domian and  
James T. Hargrove

**I**n-house counsel deals with the people employed by their companies, but they *only* represent the company itself. It is a fact of life that in-house counsel must sometimes deal with corporate personalities whose interests may be in conflict with those of the company.

This article develops a checklist that every in-house counsel should have handy when dealing with corporate officers and employees whose interests may be at odds with the corporation's.

To protect the interests of your client, you should take care to check off three items when dealing with potentially adverse constituents: (1) clarify that you represent the company and not them; (2) advise them that they may want

*Derek Domian is an associate and James Hargrove is a director in the professional liability group of Goulston & Storrs. Derek can be reached at 617.574.6568 or ddomain@goulstonstorrs.com. Jim can be reached at 617.574.3548 or jhargrove@goulstonstorrs.com.*



DOMIAN



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to consult independent counsel, especially where the interests of the corporation and constituents seem destined for adversity; and (3) advise them that the attorney-client privilege may not protect their communications with you should the company decide to disclose them.

These items, which are detailed below, will protect the company's interests by ensuring that its lawyer does not inadvertently acquire another client who may disqualify the lawyer from continuing to act on the company's behalf. Just as importantly, it will also protect the lawyer from professional discipline and claims of legal malpractice.

### Murky motives

The following scenario introduces the ethical issues for which the checklist will prove useful.

You are general counsel for Fair Co. One day the CEO of Fair Co. comes to your office and shows you a letter from the company's former senior vice president, whom the CEO recently fired ostensibly "for cause." The letter asserts claims against both Fair Co. and the CEO for unlawful termination.

During this meeting, the CEO confides in you that she never liked the Senior VP and suggests that there may have been more personal reasons for her decision. She asks you to respond to the letter.

Before you do, you pull out your checklist and consider the ethical issues in play.

### Checklist to help you respond

**1. Identify your client.** Analysis of your ethical obligations to Fair Co. and the CEO starts with the question: Who is your client?

Rule 1.13(a) of the ABA Model Rules of

Professional Conduct, which has been adopted by a majority of states, provides your answer: "A lawyer retained by an organization represents the organization acting through its duly authorized constituents." "Constituents" in this context means the corporation's officers, directors, employees, and shareholders. Although as a practical matter you deal with Fair Co. through its living, breathing, and speaking officers and employees, you only represent the entity, not its constituents.

In-house counsel will usually find this distinction easy to apply. When a chief technology officer consults corporate counsel about an intellectual property matter, the CTO is seeking advice on behalf of the company. Likewise, when an employee approaches corporate counsel about a fender-bender he caused while on vacation with his family, it is clear that he is approaching counsel on a matter wholly outside the interests of the company.

In neither case will in-house counsel misapprehend the identity of his client and where his loyalties lie.

The situation becomes more complicated, however, when a corporate constituent with whom in-house counsel is dealing has interests that may diverge from those of the corporation.

In our scenario, in-house counsel will at least sense the potential for a conflict of interest between the CEO and Fair Co. In terminating the Senior VP, the CEO may have acted for reasons that are not only unflattering but potentially in violation of Fair Co.'s employment policies, or any contract that it may have had with the VP.

If this is true, Fair Co. may ultimately have to assume a position adverse to the CEO in responding to the VP's claims. At this pre-

liminary stage, in-house counsel cannot diagnose the potential conflict of interest between Fair Co. and the CEO with any precision, but, having at least sensed it, in-house counsel will want to proceed with caution.

Rule 1.13(d) instructs in-house counsel how to do so, providing that “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.”

Unfortunately, this guidance immediately begs another question for which counsel will also want guidance, namely, *how* apparent must the conflict be to invoke Rule 1.13(d)’s duty to explain. No clear formulation has been offered, but, as a practical matter, in-house counsel would be well-served by adopting the time-tested “reasonably prudent lawyer” standard for appraising the types of potential conflicts that may trigger Rule 1.13(d).

In our example, you do not need incredible foresight to detect the conflict of interest that potentially waits in store. The same may not be said about the CEO, however, who, after years of service with Fair Co. and regular dealings with you, may innocently identify her interests with the company’s and take the company’s lawyer to be hers.

To correct this misperception, you should immediately clarify your role and remind the CEO that you represent Fair Co. in every case where there is an adversity of interest.

**2. Advise the corporate constituent to seek independent counsel.** In dealing with

corporate constituents whose interests may be adverse to the company, the Comment to Rule 1.13 further suggests a lawyer should advise the constituent “that such person may wish to obtain independent representation.”

This obligation follows logically from the lawyer’s primary obligation to clarify his role and where his loyalties lie. It also follows from the principle (enshrined in Model Rule 4.3) that a lawyer must not state or imply he is disinterested when dealing with an unrepresented person.

Advised of potentially adverse interests that may warrant separate representation, the corporate constituent will immediately understand who the lawyer does and does not rep-

resent. CEO that may disqualify you from representing Fair Co. if the CEO’s interests do in fact turn out to be adverse. This relationship may also subject you to a legal malpractice claim further down the road.

**3. Advise the corporate constituent about the attorney-client privilege.** Finally, the Comment to Rule 1.13 goes one step further and suggests a lawyer should advise the corporate constituent that “discussions between the lawyer for the organization and the individual may not be privileged.”

In our example, the attorney-client privilege belongs to Fair Co., not the CEO. This means that any communications from the CEO will be held in confidence by Fair Co., but that Fair Co. may ultimately decide to disclose such communications if they aid the company’s defense.

Indeed, the CEO, presumably with the attorney-client privilege in mind, has already suggested that she terminated the V.P. for personal reasons never sanctioned by Fair Co. If you do not immediately eliminate the pretense of confidentiality and the CEO continues to talk, you may be risking an inadvertent attorney-client relationship by lulling the CEO into handing you information that she will claim was confidential.

These communications may provide fodder for the claim that it was reasonable for the CEO to rely on you as her lawyer. This will disqualify you from representing the company if it decides to adopt a position adverse to the CEO and from using otherwise helpful admissions by the CEO in support of that position.

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In our example, given that Fair Co. may ultimately find it necessary to assume a position adverse to the CEO, you will want to advise the CEO as tactfully as possible that you intend to respond to the letter only on behalf of the company and that she should seek independent counsel to respond on her behalf.

Resist the temptation to draft the response first and get around to formalities later. If there is any confusion about whom you represented in the response, you may find yourself with an inadvertent attorney-client relationship with the