Ethical Considerations for Organization Lawyers:

Food for Thought & Possible Action

By Jill Pilgrim

A few days ago at a social gathering, the grandfather of the celebrating clan rhetorically asked me "What do you know about business? You're a lawyer." Like most prejudiced folks, this elder gentleman, whom I had just met, felt entitled to evaluate my twenty-seven year career as an attorney and judge that it could not have resulted in me learning anything about business. He didn't even know my career details. The injustice of being falsely accused (or pre-judged)! As if being a lawyer precludes being a business person!

Lawyering; A Multi-Disciplinary Obligation

I dedicate this article to my accuser, with this quote from the New York State Rules of Professional Conduct:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation. (emphasis added).[1]

It's a weighty responsibility being a lawyer! Not only must we be competent practitioners, writers and researchers of the law, we are also expected to keep ourselves abreast of current (and historical) moral, economic, social, psychological and political "factors" relevant to the representation of our client and convey legal advice to the client in a gentle, sensitive manner that does not upset our client:

> In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits.[2]

And when a client "inexperienced in legal matters" asks for technical advice, "the lawyer's responsibility as an advisor may include indicating that more may be involved than strictly legal considerations."[3]

So, indeed, as a lawyer who has worked in large, medium-sized and small law firms, run my own law practice, practiced tax, corporate, real estate, estates and guardianship law, been a project manager on political matters in an international context, been in-house counsel to two different categories of charitable organizations, taken courses at two business schools (accounting and business plan writing), read newspapers other than the National Law Journal, followed social trends to the extent of joining Facebook and LinkedIn, I feel that I have the credentials to assert that I know something about business. Certainly I have made substantial progress towards fulfilling my

[1] New York Rules of Professional Conduct (hereinafter "NYS") Rule 2.1: Advisor.
[2] Missouri Rules of Professional Conduct (hereinafter "MO") Rule 4-2.1: Advisor Comment [1].
[3] Id [3].

professional obligations as a legal advisor to my business clients. Yet, I often worry that I'm not living up to the lofty goals of the various State Bar Association Disciplinary Rules and Codes of Conduct that license my conduct as an attorney. I'm not sure that all of my fellow lawyers recognize that, as officers of the court, it is not enough to just be competent in our field of practice. Since there are so many disciplinary rules governing attorneys' conduct and attorney-client relations, I have chosen to focus on the professional obligations of business lawyers who work within or for companies and other similar business associations.

Client-Lawyer Relationship – Organization as Client

At random I chose to compare the rules of professional conduct for lawyers within four states -- Indiana, Louisiana, Missouri and New York. (I am licensed to practice law in Indiana and New York, so those two were not truly random.) It appears that all of these states have subscribed to the American Bar Association Model Rules of Professional Conduct, with a few variations that are worthy of note. But first, let's look at the basic rules that are quite consistent across the four above-mentioned states:

> (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
> (b) If a lawyer for an organization knows that an officer, employee, or other person . . . 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 which might reasonably 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 the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.[4]

While you try to wrap your mind around what the above-quoted language really means, I'll digress to reminding you of recent news reports about lawyers who allegedly did not alert authorities to the misdeeds of the corporate leadership for which they worked.[5]

To be clear, in analyzing any situation, an attorney must determine whether she "knows" something. In Louisiana, as in many states, knowing means "actual knowledge of facts" which may be "inferred from circumstances."[6] She must assess whether the individual(s) involved are likely in the future to act in a certain manner, or not act in a certain manner; either of which cause concern. That concern would result from a determination that the action or inaction either (a) violated a legal obligation to the organization; or (b) violated the law, a legal violation which could be imputed to the organization. But who or what is the organization? Is it the building (s) and staff housed in it, no matter where they are in the world? Is it the constituency of the organization whether they are members or shareholders? Is it only the Board of Directors? Many organization leaders would be stumped when asked to define who or what is the organization.

[4] Indiana Rules of Professional Conduct (hereinafter "IN") Rule 1.13. Organization as Client.
[5] Sue Reisinger, *Was He Listening? Legal advice – whether it was taken or not – is at the center of state and federal probes of Bank of America,* Corporate Counsel, Nov. 2009, 64-72. Hereinafter cited as "Reisinger, *Was He Listening?*"
[6] Louisiana Rules of Professional Conduct with amendments through October 1, 2009 (hereinafter "LA") Rule 1.0(f).

Based upon my twenty–seven years in the work world, I venture to guess that employees of organizations violate obligations to the organization on a weekly, if not daily basis. Of course, not all of these violations are threatening to the organization. Contrast employees who consistently violate dress codes or fail to timely file expense reports with an employee who withholds important business information from the Chief Executive Officer so that he can proceed down a course of dealing he is committed to or because he does not want to encounter her likely negative response. The latter situation may occur on a weekly basis as well but, depending upon the information withheld, it may harm the organization's interests in a significant way. But what if withholding information harms one segment of the organization, but not the entire organization?

Finally, having tied himself in knots to decide that a serious act or omission that could violate a policy or law has occurred or is likely to occur, the lawyer must now weigh whether disclosure to a higher authority or the highest authority in the organization is warranted, based upon his "reasonable belief" that the interests of the organization would be well served by such action. Just posing this question, as a result of the wording of the rule, suggests that all violations of the law do not rise to the level of reportable events. Isn't that a curious position for a state's professional rule of conduct to espouse? For guidance, the Louisiana Rules of Professional Conduct offer a definition of belief, meaning that the person involved actually supposed the fact in question to be true" adding that "[a] person's belief may be inferred from circumstances."[7] I keep wishing the rule would tell me what those circumstances are, but alas, it does not!

In partial summary, not only must we lawyers be life-long students of all social, economic and political movements during our lifetime, we must also somehow determine if we "know" something, what the intended future actions of the business executives for whom we work are, whether the "known," intended future act, or refusal to act, violates a legal obligation to or could be "imputed" to our client organization and, having blithely made the above determinations, further assess whether all of the above will "likely" lead to substantial injury to the organization. A lawyer will conduct this analysis knowing that if harm does come to the organization in the future, regardless of the apparent validity of her decision at the time, she may still be charged with violating ethical and professional obligations to the organization in a criminal, civil or administrative proceeding, not to mention the professional embarrassment and likely public ridicule. (I can hear Leno telling the lawyers jokes now!) Who signed me up for this job? Oh, I did, never mind.

Luckily, the states of Indiana and Missouri do provide some guidance on the interpretation of the above rules, in the form of "comments":

> When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. . . . knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. (emphasis added).[8]

[7] LA Rule 1.0(a).

[8] MO Rule [3]. Indiana has virtually identical language contained in Comment [3] to IN Rule 1.13.

Missouri's rule of professional conduct related to representation of organizations by lawyers provides additional guidance within the rule itself:

> In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization." (emphasis added).[9]

Furthermore, the rule offers very helpful specific actions that an overwhelmed legal organization counsel might take, such as:

> (1) asking for reconsideration of the matter;
> (2) advising that a separate legal opinion on the matter be sought . . .;
> (3) referring the matter to higher authority in the organization . . .

Thus, to recap, our bag of tricks has now been supplemented with the need for lawyers to be able to make "inferences" from the conduct of business people in the organization, access levels of seriousness of the violation in question, the unknown consequences of either taking action or not, the "apparent motivation" of persons involved in suspect behavior, and to implement a solution without disrupting the organization or revealing confidential information to third parties. To quote a popular sports icon of our time "Are you serious?" I think we're being underpaid!

Curiously, none of states' rules address the lawyer's obligation in the face of the misdeeds or failure to act of the higher authority.

An Organization Lawyer's Dilemma & Consequences: To Act or Not

Of course a likely consequence of reporting your boss or bosses to higher authorities for actions or failures to act that you believe are a violation of a legal obligation to the organization, or a violation of the law, risks the appearance of disloyalty at best, or Machiavellian career climbing at worst. Either way, the lawyer placed in the situation may lose his job or the confidence and trust of his peers and business leaders. Some states, like Indiana, address this situation:

> A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to Paragraphs (b)[10] and (c),[11] or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.[12]

[9] MO Rule 4-1.13(b).

[10] Rule requiring lawyer to report suspected violations of organizational obligations or violations of law, either of which are likely to result in substantial injury to the organization, to the "highest" organizational authority. IN Rule 1.13(b).

[11] Rule permitting lawyer to reveal organizational confidences, but only to prevent substantial injury to the organization. IN Rule 1.13(c).

[12] IN Rule 1.13(e). Louisiana has an identical rule without explanation. See LA Rule 1.13(e).

Regrettably, the "Comment" on this rule only restates the rule without providing further guidance or anticipated outcome.[13]

In this vein, consider what happened to the Bank of America attorneys last year, during that bank's acquisition of Merrill Lynch & Co.:

> Whether or not Lewis [then Bank of America CEO], who will step down December 31, took his lawyers' advice is now at the heart of hearings before Congress, and investigations by the Securities and Exchange Commission, the U.S. Department of Justice, and the attorneys general of New York and North Carolina. . . . During those critical days in December, Mayopoulos [then Bank of American General Counsel] . . . was ousted from the bank, without notice and without explanation.
>
> At the same time, the bank dismissed deputy general counsel David Onorato, chief of litigation and securities inquiries. . . Even though Lewis had Merrill's veteran general counsel, Rosemary Berkery, in the wings, he ignored her, and she quickly left just before Christmas.[14]

Yikes! It sure looks ugly when these attorney conduct rules are applied to real life situations.

I would not be a good legal educator if I did not administer a "test" in the form of a hypothetical, so here it is:

Hypothetical #1

Your Firm, Lawyers LLC, is outside counsel to a hedge fund formed as a limited partnership – Hedge LP. Lawyers LLC is hired by the Hedge LP's general partner – Hedge GP -- which is owned by Mr. Paul, the sole principal and managing member. Lawyers LLC collaborated with its client Hedge LP, represented by Mr. Paul, in the preparation of an "Offering Memorandum" and subsequent updates thereto. It turns out that Mr. Paul misrepresented and concealed the extent of Hedge LP's investment in certain securities whose value declined precipitously, after an initial increase. The Securities and Exchange Commission files a federal lawsuit against Mr. Paul, Hedge LP and Hedge GP. Mr. Paul subsequently is indicted on securities fraud charges, pleads guilty on three counts, and admits that he intentionally concealed the extent of Hedge LP's investment in a particular stock. As a consequence, Hedge LP's limited partners sue Lawyers LLC for fraud and breach of fiduciary duty, for failure to disclose Mr. Paul's activities and for misrepresentations contained in the Offering Memorandum it prepared.

Q: Have Lawyers LLC violated any rules of professional conduct?[15]

Signing Off: Food for Thought

Despite my tongue in cheek tone above – done purely for entertainment value – I take my responsibilities as an attorney and officer of the court seriously, as do those lawyers who are reading this article. The goal of this article is to remind us busy lawyers to pick up our various state attorney rules of professional conduct, from time to time, for a refresher. We need to discuss these

[13] *See* Comment [8] to IN Rule 1.13.

[14] Reisinger, *Was He Listening?*, pp. 64-65.

[15] According to the NY Court of Appeals in Eurycleia Partners, LV v. Seward & Kissel, LLP, 2009 NY Slip Op 04299 [12 NY3d 553], the answer is no because "there is no indication that S&K was ever informed of Wood River's overall asset levels or the cost basis of the Endwave shares."

complicated rules and possible interpretations among ourselves more frequently, and engage our state disciplinary rule makers in dialogue about reality versus utopian views of the business world.

Furthermore, we have all been remiss in educating our non-lawyer business colleagues about the heavy obligations placed upon lawyers to "do good by our clients" no matter what; even at the risks of our jobs and the ability to support ourselves and our families. Perhaps the various State Bar Associations or the American Bar Association should embark upon an Attorney image rehabilitation campaign! The first step, of course, would be to scrutinize more thoroughly those seeking to enter the profession, and tighten up our discipline of "bad acting" attorneys.