

Heroes & Villains – 11/9/10

- The OPM exercise
 - Organization as Client
 - Conflicts revisited
 - Confidentiality revisited

GRPC 1.7(a)

- A lawyer shall not represent or continue to represent a client [OPM] if there is a significant risk that
 - the lawyer's own interests [Reinhard's potential personal liability as corporate director, friendships with Goodman and Weissman, most of his income comes from OPM]
 - or the lawyer's duties to
 - another client [Goodman?]
 - a former client [Goodman, Weissman]
 - or a third person [the law firm?]
- will materially and adversely affect the representation of the client

1.13: Who is the Client?

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7.
 - If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

1.13: Who is the Client?

- (d) In dealing with an organization's directors, officers, employees, members, shareholders or other 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.

GRPC 1.13 Comments

- [2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6: Confidentiality of Information.
- This does not mean, however, that constituents of an organizational client are the clients of the lawyer.
- The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6: Confidentiality of Information.

GRPC 1.13 Comments

- [7] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization (1) of the conflict or potential conflict of interest, (2) that the lawyer cannot represent such constituent, and (3) that such person may wish to obtain independent representation.
- Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

Duty to prevent injury to organization

- “(b) 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 which reasonably might be imputed to the organization,
 - and is likely to result in substantial injury to the organization,
 - the lawyer shall proceed as is reasonably necessary in the best interest of the organization”
- If lawyer knows
 - Violation of legal obligation to organization or
 - Violation of law imputable to the organization
 - That is likely to result in substantial injury TO THE ORGANIZATION

1.13(b-c) “shall proceed as is reasonably necessary in the best interest of the organization”

- Ask for reconsideration of the matter
- Advise that a separate legal opinion is needed
- Refer to higher authority
 - if warranted by the seriousness of the matter, to the highest authority that can act in behalf of the organization
- Minimize disruption of the organization
- Minimize the risk of revealing confidential information to persons outside the organization
- If the highest authority that can act on behalf of the organization
 - insists upon action,
 - or refuses to act
 - clearly a violation of law that is likely to result in substantial injury to the organization
 - the lawyer may resign

Warn lenders/customers? GRPC 4.1

- In the course of representing a client a lawyer shall not knowingly ...
- (b) fail to disclose a material fact to a third person
 - when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client,
 - unless disclosure is prohibited by Rule 1.6

Is disclosure prohibited by 1.6?

- **A lawyer may reveal information ...to avoid or prevent harm or substantial financial loss to another as a result of client criminal conduct ... clearly in violation of the law**
- **[but] if the client has acted at the time the lawyer learns of the threat of harm or loss to a victim,**
 - **use or disclosure is permissible only if the harm or loss has not yet occurred**

THE OPM CASE: What Really Happened

[Primarily drawn from Taylor, "Ethics and the Law: A Case History,"
New York Times Magazine (Jan 9, 1983)]

Goodman's visit

- Meeting actually was with senior partner Joseph Hutner, not Reinhard
- Hutner claimed that Goodman intercepted Clifton's letter before he could read it and took it with him
- However, Hutner learned the essential content by meeting with Clifton's lawyer, William Davis

June 1980

- According to Davis Clifton has evidence that
 - O.P.M. had perpetrated a multimillion-dollar fraud
 - the opinion letters Singer Hutner had drawn up to obtain loans for O.P.M. had been based upon false documents
- In Clifton's opinion, to survive OPM would probably have to continue the same type of wrongful activity

- Singer Hutner obtains outside legal advice from Joseph McLaughlin (Dean, Fordham Law School) and Henry Putzel, a former federal prosecutor
 - The firm wanted to do the ethical thing, and
 - The firm wanted to continue representing O.P.M. unless they were ethically and legally obliged to quit.

- The firm's obligations to O.P.M. might be inconsistent with giving Goodman's secrets the fullest protection.
 - Thus, a lawyer is found to represent Goodman
- Goodman's new lawyer, Lawler ... tells Putzel that he knows of no ongoing fraud.
 - Hutner had told Goodman his disclosures to Lawler would be protected only so long as they did not indicate any ongoing fraud.

Advice from McLaughlin and Putzel

- Singer Hutner can ethically continue to represent O.P.M., based on Lawler's report that there was no ongoing fraud.
- Singer Hutner is bound to keep everything it had already learned secret, except from Weissman.
- DR 4-101: A lawyer may reveal ...
the intention of his client to commit a crime and
the information necessary to prevent the crime

Advice from McLaughlin and Putzel

- It is not necessary to check the authenticity of the computer-lease documents with third parties
- Singer Hutner has no legal duty to withdraw past opinion letters
 - leaving the victims of a past fraud in the dark was not an ongoing fraud
- DR 7-102(b): A lawyer who receives information clearly establishing that:
 - (1) His client has, in the course of the representation, perpetrated a fraud upon a person ... shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person ...
 - *except when the information is protected as a privileged communication*

Summer 1980

Singer Hutner continues closing loans for O.P.M. without checking the legitimacy of underlying Rockwell leases.

September 1980

- 1st week of September, Goodman tells Hutner some of the details of the fraud
- September 23 the firm votes formally to resign as O.P.M.'s general counsel
- The firm quits O.P.M. gradually
 - assume that an abrupt withdrawal would cause O.P.M. to collapse
 - will handle legal business until OPM can find new counsel.

Duty of Confidentiality to OPM

The firm

- tells nothing to the corporations and bankers who had been defrauded
- responds to inquiries from lenders and other interested parties by saying Singer Hutner and O.P.M. had agreed to part ways.
- honors Goodman's demand that Gary Simon, the O.P.M. in-house lawyer who was preparing to handle new loan closings, be kept in the dark.

October 1980

- Peter Fishbein, a Kaye Scholer partner and an old friend, phones Hutner asking
 - "is there anything I should be aware of" in considering Goodman's invitation to represent OPM
- Hutner tells him only that
 - "the decision to terminate was mutual and that there was mutual agreement that the circumstances of termination would not be discussed."

December 1980

- Singer Hutner completes withdrawal
- Rockwell International
 - Receives bank inquiry and upon investigation
 - Discovers it was paying OPM on two leases for which it lacked documentation
- After further investigation, Rockwell and the bank contact the U.S. Attorney's Office

February 1981

- A federal grand jury issues a number of indictments
- Although federal prosecutors investigated Reinhard, neither he nor any of the other Singer Hutner lawyers are indicted.

March 1981

OPM files bankruptcy

December 1982

- Goodman pleads guilty to 16 counts of conspiracy, mail fraud, wire fraud and making false statements to a bank
 - given a 12 year prison sentence.
- Weissman also pleads guilty and receives a 10 year sentence.

The Truth about OPM

- O.P.M. was short for "other people's money."
- Almost from the start, the company was basically insolvent and survived by means of fraud and bribery.
 - A single computer would be used as collateral for two or three loans with different banks
 - the value of a given piece of equipment would be inflated to obtain larger loans.

The Financial Consequences

- OPM had defrauded banks and other lenders of more than \$210 million before the company went bankrupt in 1981
- **June - August 1980:** \$61 million in fraudulent loans were closed with Singer Hutner as OPM's lawyers
- **December 80 - Jan 81:** \$15 million in fraudulent loans were closed with in-house counsel and Kaye Scholer as OPM's lawyers

1983

- Settlement of lawsuit filed by 19 lending institutions against Singer Hutner, Rockwell, Lehman Brothers and two accounting firms.
- Total payment of \$65 million
- Singer Hutner contributed approximately \$10 million.