The Simulated Firm Meeting of Singer Hutner

Clark Hutner called a meeting of the partners of Singer Hutner to discuss how to proceed in light of: the Clifton memo; his own discussions with Weissman regarding the Clifton memo; and, Andy Reinhard’s discussion with Goodman. At the time of the meeting, the partners at Singer Hutner knew that they could only keep OPM’s business contingent on three conditions: 1) Andy Reinhard had to be removed from the OPM Board of Directors; 2) the contents of Clifton’s letter had to remain strictly undisclosed; and 3) Weissman and Goodman would resolve problems with Rockwell’s prior leases without involvement from Singer Hutner. In essence, Singer Hutner could keep OPM’s business if they ignored what had happened and maintained a strict code of silence regarding the alleged fraud. The firm meeting resulted in a wide range of opinions on how to proceed. Three opinions, highlighted below, captured either the essence of a strong view held by many partners or identified a unique point of view held only by a couple of partners.

First, half the partners in subgroup B2 suggested that Singer Hutner continue to represent OPM. The partners offered many variations on the theme; but, more commonly than not, they asserted that the firm should continue the professional relationship. Alfonso stated that the firm has a “duty” to stay with the OPM because of a responsibility to protect the corporate entity. (B2: 4:10-4:26.) Kasey stated firmly that he is “sure that [Singer Hutner] should stay with OPM” based on the need to maintain the firm’s revenue stream. (B2: 10:45-10:59.) He also inferred that staying with OPM would assist the firm in controlling the situation created by the Clifton memo by: keeping the alleged fraud from coming out; keeping OPM’s business; and possibly controlling Goodman’s activities. (B2: 11:40-11:54.) Reginald, stated, equally as firmly as Kasey, that, “there is no way we [Singer Hutner] can sever our ties with OPM.” (B2: 12:30-12:34.) Lindsey, on the other hand, while stating that Singer Hutner should maintain its relationship with OPM, B2: 13:40-13:46, suggested a more stringent oversight of the opinion letter process, B2: 14:08-14:40. Further, only one person in subgroup B1 asserted the view that the Singer Hutner should keep OPM as a client. Anne provided clear support for maintaining a relationship with OPM based on her view that Singer Hutner is in the best position to advise OPM in a “positive direction.” (B1: 11:04-11:11.) For those who talked about maintaining the attorney-client relationship, the overwhelming point of view was that Singer Hutner should keep OPM as a client.

A second and distinct point of view arose in subgroup B1 regarding whether to report the alleged fraudulent activities of OPM. Angie stated that Singer Hutner has “an obligation to take more affirmative action in terms of referring OPM’s activities or particularly Goodman’s activities to the proper authorities to let them know this [alleged fraudulent activity] is going on.” (B1: 3:15-3:31.) She asserted that the firm should consider such an affirmative step so that Singer Hutner is not “blamed” or held liable for the alleged fraud, along with OPM over the long-term. (B1: 3:55-4:10.) She clarified that her suggestion that Singer Hutner alert the authorities was not necessarily a proposal to disclose the contents and existence of the Clifton memo but rather as a proposal to disclose the possible frauds themselves. (B1: 3:47-3:54.)

A third and singular view also came from subgroup B1 when Tawanna suggested that Singer Hutner affirmatively withdraw the opinion letters that it issued for OPM’s use in securing
loans for lease agreements. (B1: 13:42-13:54.) Her rationale was that any alleged fraud precipitating from the possibly false opinion letters could be imputed to Singer Hutner because the letters and other documents could serve as notice that Singer Hutner knew that OPM secured loans through fraudulent means and used Singer Hutner to do it. (B1: 13:26-13:40.)

**In Real Life …**

The facts of the real OPM situation were slightly different from those available at the time of the simulated meeting. In real life, Hutner wrote a memo at Singer Hutner which indicated that William J. Davis (Clifton’s attorney) had told the firm that its opinion letters had been used by OPM to perpetrate a multimillion-dollar fraud. (S. Taylor, “Ethics and the Law: A Case History,” New York Times Magazine, January 9, 1983 (excerpt).) Thus, Singer Hutner knew it was involved in a fraud and was not in the position to “maintain a smoke screen of deniability.” Id.

Arguably, the simulated meeting participants did not have as much evidence as the real partners that there had been an actual fraud. But, the simulated Hutner, in his memo to the firm partners indicated that the possibility of fraud was real when he wrote, “I am afraid we must assume that Clifton's memo … is accurate and that it may only be the tip of an iceberg.” (Instructions for Second OPM Exercise: Confidential Memorandum.) That difference in facts notwithstanding, the majority of the partners in the simulated meeting who spoke on the issue of firm withdrawal made the same recommendation as the real partners of Singer Hutner. They wished to stay with OPM. Further, at least three partners, Kasey, B2: 10-45-10:59, Reginald, B2: 12:38-12:55, and Anne, B1: 12:08-12:13, seemed to heed Clark Hutner’s reminder that OPM represented 60% of Singer Hutner’s revenue; it appears these partners felt that severing the relationship with OPM was too high a price to pay for the alleged fraud of its client. On the other hand, while the real partners of OPM had a strong preference to stay with OPM, they said they wanted to do so “barring ethical and legal obligations to quit.” (S. Taylor, supra.) In contrast, only Kasey, while advocating that Singer Hutner stay with OPM, suggested that the firm consider an evaluation of the ethical issues at some later time. (B2: 12:14-12:25.) An ethics evaluation was not is most immediate concern.

Nonetheless, both the real partners and some of the simulated partnership group decided that staying with OPM was the better decision. The real law firm stayed with OPM from June 1980, the month it had notice of the fraud, until December 1980. The firm made a formal decision to sever the relationship gradually; however, Singer Hutner’s decision to remain with OPM resulted in OPM’s continued use of the firm to close $61 million dollars worth of fraudulent loans. (S. Taylor, supra.)

The issue of disclosure, however, yielded a much more dramatic difference between at least one opinion from the simulated group and the real Singer Hutner partnership. S. Taylor’s article described Singer Hutner has having a “close-mouthed stance” during a “summer of nondisclosure” where the firm wanted to divine the truth of the alleged fraud yet wanted to “do it in a way that would wrap it in the legal code of silence that is the attorney-client privilege.”

The article does not indicate that Singer Hunter ever had plans to report the alleged fraud to any law enforcement authorities. In fact, Singer Hutner maintained its silence to everyone including other attorneys who subsequently handled OPM’s opinion letters, OPM’s new council and the corporations and bankers who had been defrauded. (S. Taylor, supra.) In contrast, Angie’s suggestion, that Singer Hutner report the alleged fraud to the proper authorities, is strikingly different from what actually happened. Singer Hutner never blew the whistle on OPM. The
U.S. Attorney’s Office investigated OPM and issued indictments only after Rockwell and the bank discovered inconsistencies themselves. (Id.)

Further, while relying on the advice of their council, the real partners in Singer Hutner took another contrasting step as compared to a simulated partner suggestion. The firm did not withdraw or disavow their opinion letters which had been used fraudulently. Singer Hutner’s council, Putzel, based his recommendation that Singer Hutner leave the opinion letters and not withdrawn them on the understanding the frauds were in the past and that therefore the past frauds would not constitute a continuing fraud. (Id.) As already indicated, subgroup B1 offered the opposite advice. Tawanna advised that Singer Hutner withdraw the letters and minimize the appearance that Singer Hutner knew of OPM’s frauds. B1: 13:28-13:50.

**Best Advice: Hindsight is 20/20**

In retrospect, the best advice for a partner to give at the meeting is: 1) Singer Hutner should terminate its representation of OPM completely; 2) Singer Hutner should withdraw its opinion letters from all who have seen them; and 3) Singer Hutner must remain silent as to the contents of the Clifton memo unless it reasonably believes that OPM is has, is or will continue to use Singer Hutner in fraud.

First, the Model Rules of Professional Conduct (“MR” or “the Model Rules”) provide sufficient rationale to support a conclusion by Singer Hutner to terminate their representation of OPM. Model Rule 1.16(b)(3) permits Singer Hutner to withdraw if it believes that OPM used Singer Hutner’s opinion letters to perpetuate a crime or fraud. The facts available before the simulated meeting suggest that Singer Hutner could rationally conclude that fraud occurred. Before the Singer Hutner simulated meeting, not only had Goodman and Weissman asked Singer Hutner to keep the contents of the Clifton letter confidential, neither Goodman nor Weissman offered evidence that Clifton had made a serious mistake. In fact, Goodman and Weissman’s behavior forced the opposite conclusion – that something was hidden and someone had done something wrong. All of these facts support a reasonable belief that a fraud occurred.

Further, Singer Hutner will not be required to represent OPM if it reasonably believes OPM will continue in the fraud. MR 1.16(b)(2). Clark Hutner reasonably believes that OPM has used Singer Hutner’s services (opinion letters) in the past to act fraudulently; he says as much in his memo to the firm. (Instructions for Second OPM Exercise: Confidential Memorandum.) Moreover, due to the fact that Weissman wants to bargain Singer Hutner’s silence in exchange for continued business with OPM was cause to believe that OPM intended to persist in a cause of action that Singer Hutner could reasonably believe is criminal or fraudulent. This provides a basis for permissive withdrawal, even if that withdrawal will cause a material adverse effect on OPM’s interests. Model Rule 1.16(b)(1)&(2); Comment 7, MR 1.16.

Additionally, Comment 7, under MR 1.16, suggest that withdrawal of representation could occur where “the client insist on taking action … with which the lawyer has a fundamental disagreement.” In this case, Clark Hutner’s subtle suggestion to Weissman that Singer Hutner assess the legality of all future leases was met by strong resistance. Weismann did not give Singer Hutner an option to have more oversight. If the partners see this as a fundamental conflict, Singer Hutner has the option and justification to withdraw from representation if it can do so without causing material harm to OPM.

On the other hand, Singer Hutner must discontinue representation of OPM, under MR 1.16(a)(1), “if the representation will result in violation of the … law.” Based on the facts, Singer Hutner’s opinion letters allow OPM to secure loans to underwrite computer equipment.
Singer Hutner’s opinion letters are a key component of how OPM operates. At the time of the meeting, the partners do not know with certainty that there has been a violation or that there will be a violation of the law. Equally problematic for Singer Hutner is the fact that the most logical way to determine whether there has been a breach of law involves either forcing OPM to be forthcoming about the issue or to contact Rockwell directly to verify the use of Singer Hutner’s paperwork. Both of these options are outside the express desire or direction of their client, OPM. Singer Hutner does not have the comfort to know with certainty that there has been fraud. Thus, this absence of certainty makes it difficult for Singer Hutner to rely on the mandatory requirement for withdrawal under MR 1.16(a)(1). If OPM, before the simulated meeting, had been more forthcoming with the fact that the prior leases were fraudulent, then even though the leases were formed in the past, as long as those leases still exist, there is a continuing fraud on which Singer Hutner could rely for a mandatory withdrawal. Also, based on what the partners know, the fraud is not a fact. Therefore, it is doubtful that a mandatory withdrawal is required under MR 1.16.

Model Rule 1.2, however, provides another option for mandatory withdrawal. Singer Hutner has a duty to avoid knowingly counseling or assisting OPM in conduct that Singer Hutner knows is criminal or fraudulent. If Singer Hutner does nothing, it could be complicit in the fraud and, by its omission, aid OPM in concealing the fraud. If Singer Hutner indicates or communicates the alleged fraud to the wrong parties, OPM could suffer financial loses that would result from the scandal. Additionally, Singer Hutner could be accused of breaching the attorney-client privilege as to OPM if, by blowing the whistle on the alleged fraud, Singer Hutner communicates the existence and contents of the memo. Clark Hutner’s reasonable inference that there is a fraud may be enough for the partners to advise mandatory withdrawal based on MR 1.2. Further, MR 1.2 Comment 10 suggests that Singer-Hutner should withdraw from representing OPM so that the attorneys can satisfy their professional obligations. Thus, both permissive and mandatory authority exist under MR 1.2.

A partner at Singer Hutner, who advises that the firm sever its relationship with OPM, has ample permissive and mandatory support to do so under the Model Rules. A decision to sever the relationship would help maintain Singer Hutner’s integrity as a firm because it would proceed with knowledge that it is not complicit in any future acts of fraud. In a more subtle way, this action may be helpful to the community because it could put Rockwell and the banks on notice that there may be a problem with OPM. Singer Hutner would not be able to talk about its reason for withdrawal. But, the fact of Singer Hutner’s withdrawal would not be a breach of attorney-client privilege. Further, the fact that the Singer Hutner-OPM relationship ended, a relationship that built Singer Hutner, will not go unnoticed in the community.

Next, there is permissive support under the Model Rules regarding withdrawal of the opinion letters as well. The path to this suggestion comes, however, by an indirect route. The Model Rules provide guidance to attorneys in their truthfulness in statements to others in MR 4.1. Under MR 4.1(b), a lawyer must not “knowingly” fail to disclose a material fact when doing so will “avoid assisting a criminal or fraudulent act by a client.” The attorney must have actual knowledge of the material fact or infer it from the circumstances. MR 1.0(f). But disclosure under 4.1(b) is subject to the overriding general principle that any information regarding the representation of a client is subject to attorney-client privilege and cannot be divulged without the express informed consent of the client. MR 1.6(a). In this case, the

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1 MR 1.0(f) defines “knows” or “knowledge” as “actual knowledge of the fact in question” or that “knowledge may be inferred from circumstances.”
behavior of OPM’s executive leadership, Goodman and Weissman, provide enough information for Clark Hutner to infer the fact that there has been fraud perpetrated on the basis of the Singer Hutner opinion letters. Thus, this could be a material fact of fraud. However, since the knowledge of that fraud came in the course representing its client, Singer Hutner’s knowledge is subject to the general confidentiality rule under MR 1.6. But, Singer Hutner has other options to pursue under MR 4.1. Instead of disclosure of a material fact, Singer Hutner can consider withdrawal and disaffirmation of its opinion letters so as to remain truthful in its statements to others under MR 4.1. MR 4.1, Comment 3 suggest that withdrawing the letters is a means to avoid assisting a client’s crime or fraud. Thus, the fact of the withdrawal is permitted and will not entail a breach under MR 1.6. Singer Hutner, if it uses this approach, cannot divulge the rationale for its withdrawal because, again, that knowledge came in the course of representing OPM. However, it is permitted to withdraw and disaffirm the letters. Again, this action has the effect of placing Rockwell and the bank on notice that something is amiss. While it is true that neither Rockwell nor the banks may not take notice of a problem; withdrawal and disaffirmation of the opinion letters by Singer Hutner should provide some subtle warning. In this way, Singer Hutner not only mitigates its own liability, but maintains its integrity.

Final advice regarding disclosure of confidential information may also rest on permissive support in the Model Rules. In this case, Singer Hutner has reason to believe it has been used to perpetuate fraud. Yet, the mandatory requirements preventing disclosure present a significant obstacle to announcing OPM’s allege abuses. Advice by a partner to disclose the confidential Clifton memo would strike at one of the most fundamental principles of the client-lawyer relationship which is, in the absence of informed consent, keep all matters related the client’s representation confidential, whatever its source. MR 1.6, Comment 2-3; T. Alibrandi, Privileged Information, 1984 (excerpts), at 96. Overall, Singer Hutner has a duty to OPM, Goodman and Weissman to maintain the confidence. Further, Singer Hutner has no duty to disclose OPM’s alleged fraud as soon as Singer Hutner suspects that such a fraud is taking place. That duty is only required under MR 3.3(b) –in court -- once there is a clear establishment of the fraud. Clear fraud is not evident at this stage of OPM and Singer Hutner’s simulated relationship. Although the fraud can be inferred, it appears that, MR. 1.6(a) prohibits such a disclosure unless it meets an exception under MR 1.6(b).

A partner, if advising disclosure of the Clifton memo, however, could rely on permissive support in the Model Rules to do so. Model Rule 1.6(b)(2) permits disclosing a client’s confidentiality to prevent a future crime, fraud or substantial financial harm. In this instance, if the partners have reasonable belief that Goodman and Weissman intend to continue the alleged fraud, then the firm has permissive authority to divulge its knowledge to the extent necessary to prevent harm to Rockwell and the banks. Comment 7, under MR 1.6, suggest that if Singer Hutner reasonably believes that OPM has used its services fraudulently and has intent do continue the practice, then OPM has forfeited the protection of the attorney-client privilege. If, however, the partners are concerned about the future intent of Goodman and Weissman to perpetuate the alleged fraud, the partners can also rely upon MR 1.6(b)(3). That exception under MR 1.6 a permits disclosure in order “to prevent, mitigate or rectify” the injury that may have come at the client’s hands while using the attorney’s services.

Other permissive support to disclose the alleged abuses exist in MR 1.13(c). The focus of MR 1.13(c) is protection of an organization from substantial injury. In this case, Singer Hutner has already addressed the highest level officers of OPM with regard to the allegation of fraud. Clark Hutner believes that the allegations are true. Thus, if Clark Hutner and the other partners
believe that the violation “is reasonably certain to result in substantial injury to” OPM, Singer Hutner has satisfied the requirement of 1.13(c) and may reveal what it knows regardless of prohibitions under MR 1.6.

Based on what the Model Rules require, prohibit and permit, it appears that the advice noted above serves OPM, other businesses, and the public while allowing the attorneys to maintain integrity in their work. If Singer Hutner is reasonably certain that Goodman and Weissman are committing fraud or crimes while they are using Singer Hutner’s services, Goodman and Weissman have relinquished their attorney-client privilege cannot be shielded by its protection. If terminating its services to OPM, Singer Hutner’s only duty lies in taking action to be reasonably practicable to protect OPM’s interest during the severance process. MR 1.16(d). If Singer Hutner provides OPM with notice of the termination and allows them to secure other council, Singer Hutner has met its fundamental requirements under the rules. Id.