

Who Is the General Counsel's Client? An Important Development

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A new state supreme court decision^[1] demonstrates the significant professional responsibility risks that can arise when a general counsel fails to adequately resolve the question of who—or what—is her client.

This is particularly so in the context of a complex legal proceeding or investigation involving interaction with corporate executives and/or directors both in their individual capacities and as actors for a represented organization.

This new decision, arising from highly public, tragic circumstances, also serves to remind general counsel of the importance of properly communicated "Upjohn" warnings to corporate executives, and of the need to confirm that complex matters are adequately staffed by the department of legal affairs. Together, these issues are exacerbated by the increasing complexity of health system organizational structures and the Department of Justice's (DOJ's) continuing focus on individual accountability for corporate wrongdoing.

As such, the decision provides an important opportunity for general counsel to confirm fundamental representational matters with their internal clientele and set expectations for their ability and responsibility to represent that internal clientele simultaneously with their organizational client.

Background

The court's decision stems from the appearance of a general counsel on behalf of her organizational client and several of the organization's executives in a grand jury proceeding, and her subsequent grand jury testimony that resulted in potential criminal liability for the executives.^[2] Ironically, the executives escaped liability because a court held the grand jury could not rely on testimony by the general counsel that breached obligations to the executives.

After finding the executives reasonably believed the general counsel served also as their personal counsel in the grand jury investigation, the state bar's disciplinary board determined that the general counsel lacked sufficient specific criminal-law and grand-jury experience to represent the executives in the matter competently, failed to recognize the conflicts of interest between her organizational and individual clients, breached confidentiality obligations to the individual clients in her grand jury testimony, and prevented the state from pursuing criminal charges against the executives. The Pennsylvania Supreme Court agreed with the disciplinary board and its decision to issue a public censure of the general counsel.

Analysis

The foundation of the state supreme court's conclusion was that the three executives reasonably believed that the general counsel was their personal attorney before the grand jury. She communicated with the executives about their appearances before the grand jury and she identified herself to the grand jury as representing the executives while appearing before the grand jury. She did not explain to the executives or to the grand jury any limitations regarding the scope of her representation. *The conclusion that the executives were also the general counsel's clients leads directly to the finding that the general counsel violated the rules of professional conduct.*

The position of general counsel by its nature requires a skilled lawyer to handle a variety of diverse matters for the organizational client. But general counsel are not expected to be experts in every matter—to do so would be patently unfair (and is a limitation that their executive and board leadership must understand).

General counsel must be especially careful when representing members of the organization, as well as the organization itself. They should be alert to circumstances suggesting the need to supplement their expertise with additional counsel, whether from inside the organization or without. In this particular matter, that did not occur.

In the matter at hand, the general counsel had no experience in criminal law or grand jury investigations. That lack of experience may have factored into the general counsel's failure to recognize the significance of appearing on the executives' behalf before the grand jury. According to the supreme court, it actually did contribute to the failure to recognize the jeopardy facing the executives and to the failure to investigate the matter sufficiently for the organization. The supreme court concluded that the general counsel's inexperience resulted in the executives and the organization not receiving competent representation.

The joint representation resulting from the general counsel's representation of the organization and the three executives contained inherent conflicts of interest. All joint representations have such conflicts, but in the context of a criminal matter, such conflicts can be more significant. In this situation, the conflicts between the individual clients materialized quickly when they testified inconsistently. The general counsel did not identify the potential conflicts at the outset, nor the actual ones that arose. The general counsel would have had no conflicts of interest if she had limited her representation to the organization.

The general counsel's breach of her confidentiality obligations to the executives was a direct consequence of the decision that the executives were her clients. The general counsel testified to the grand jury about her conversations with the executives. Had the individuals not been her clients, then the organization or its general counsel probably could have disclosed them to the grand jury. In light of the conclusion that the executives were her clients, and they had not consented to the disclosures, however, the further conclusion that the clients' confidentiality rights were breached is axiomatic.

The "Upjohn Warning"

The supreme court decision also serves to underscore the importance of the so-called "Upjohn Warning"; i.e., the obligation to inform constituent members of the organization (where there is potential adversity between the constituent and the corporation) that corporate counsel represents the organization and is not the personal attorney of the constituent. This obligation arises from the U.S. Supreme Court's decision in *Upjohn v. United States*,^[3] which held that communications between corporate counsel and lower-level employees are privileged.

To avoid misunderstanding, an Upjohn warning under such circumstances should advise the corporate employee that the attorney-client privilege belongs to the corporation; that the attorney-client privilege cannot be invoked by the employee; and that any communication between the counsel and the employee may be disclosed to third parties in the organization's discretion.

Had the general counsel issued strong Upjohn warnings to the executives in the matter at hand and facilitated the executives' procurement of personal counsel, she likely would have avoided disciplinary proceedings.

Focus on Individual Accountability

The significance of this new decision is heightened by the continued government focus on individual accountability for corporate wrongdoing, both civil and criminal, and on the importance of corporate cooperation in the context of governmental investigations. This, notwithstanding the slightly more

lenient policies on corporate cooperation incorporated in November 2018 into the Justice Manual (formerly referred to as the United States Attorneys Manual).^[4]

The DOJ's revised policy is intended to provide a pathway for corporations to receive credit for cooperation with the government in the context of investigations of corporate misconduct. As before, the extension of credit is premised on a company's efforts to identify those of its employees who may be responsible for the misconduct. Under the revised policy, companies are not being asked to identify all the culprits, just those who are "substantially involved." For civil cases, that often will mean culpable members of senior management and the board of directors.

In announcing the revised policy, then-Deputy Attorney General Rod Rosenstein made it clear that "pursuing individuals responsible for wrongdoing will [continue to] be a top priority in every corporate investigation," and that "absent extraordinary circumstances, a corporate resolution should not protect individuals from criminal liability."^[5]

The possibility that the government may focus on executive conduct from the beginning of an investigation, together with continuing corporate incentives to identify to the government employees who may have been substantially involved in the alleged misconduct, underscores the potential for friction between an executive and the corporation. This, in turn, increases the importance of an accurate and timely Upjohn warning and an awareness of the possible need for additional staffing experience on the matter.

Lessons for the General Counsel

The general counsel heads down a treacherous path when she participates in a legal proceeding or investigation that requires her interaction with internal clientele such as directors, officers, and key employees. This is particularly the case when the general counsel knows, or has reason to know, that one or more of those constituents may face personal legal exposure given the nature of the proceeding or investigation. A general counsel creates additional risk for herself when the investigation involves substantive law or legal process for which she lacks material experience.

It is essential at the front end of an investigation to analyze the known facts to determine whether individuals within the corporation (1) have any meaningful risk of personal exposure or (2) may otherwise have interests directly adverse to the corporation. If an individual has plausible risk, then the general counsel cannot represent both the corporation and the individual, as their interests are directly adverse to one another. Counsel is unlikely to find a path to resolving the conflict and should approach an attempt to do so warily, no matter how much pressure is applied by the organization or its key personnel.

In that circumstance, the individual needs to obtain his own counsel whose duties run only to the individual. Even where interests appear at the outset to be totally aligned, the general counsel must remain vigilant. If the facts evolve in a way that creates direct adversity between the corporation and the employee that was not originally understood by the general counsel, the employee should be told to obtain his own lawyer at that time.

The issue becomes real for those in the health care sector considering the volume of laws and regulations that provide for civil and/or criminal penalties for individuals. The most obvious of these include state and federal anti-kickback laws and false claim statutes, Medicare exclusion or debarment regulations, and antitrust laws that prohibit price fixing and market allocation. But it is the Justice Manual, with its direct focus on individual accountability, that makes issues relating to dual representation Upjohn warnings more immediate and material.

While most sophisticated health care executives are increasingly aware of the government's focus on individual accountability, many would be greatly surprised to know that the general counsel in many circumstances is not "their" lawyer—particularly in the early stages of an internal investigation—and that they may not have the protection of privilege. (And, of course, the DOJ guidelines make it clear that the government's focus on individuals will commence from the

beginning of an investigation). Some executives may have such a limited understanding of legal matters that they will assume that the general counsel has the requisite expertise to handle all civil and criminal matters—and direct him to do so without additional resources.

Thus, any misunderstanding or misrepresentation presents clear potential risks for the officer or director, and attempting to over-represent could carry serious risks for the general counsel. For that reason, the general counsel is well advised to proactively address dual representation issues with internal constituents. The goal is to establish clarity on who the general counsel can and does represent—and whom he cannot and does not represent, and to provide executive leadership with a list of conflict-free outside counsel whom they can engage to represent their individual interests. This new Pennsylvania Supreme Court decision provides a timely entrée for the general counsel to have that discussion with the board and members of the senior leadership team.

The state supreme court's decision arose from a complex set of facts and judicial decisions. Yet the unique and tragic circumstances do not lessen the ultimate professional responsibility lessons arising from the decision.

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The authors wish to note the contributions of William P. Schuman, Anne M. Murphy of Arent Fox, and Kelsey Leingang of Rush University Health System to the preparation of this article.

Endnotes

[1] *Office of Disciplinary Counsel v Baldwin*, No. 2587 DD3, 2020 Pa LEXIS 1160 (Pa. Feb. 19, 2020).

[2] For additional background on this case, see *Office of Disciplinary Counsel v. Fina*, J-106-2019 (Pa. Feb. 19, 2020); and Michael W. Peregrine and William P. Schuman (with Anne M. Murphy and Kelsey Leingang contributing), *Who Is the General Counsel's Client? New Developments*, AHLA Weekly, Feb. 2, 2016, <https://www.healthlawyers.org/News/Health%20Lawyers%20Weekly/Pages/2016/February%202016/February%2012%202016/Who-Is-the-General-Counsel-Client-New-Developments.aspx>.

[3] *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

[4] U.S. Dep't of Justice, *U.S. Attorneys' Manual* (2018), <https://www.justice.gov/jm/justice-manual>.

[5] Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act, Nov. 29, 2018, <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0>.