Additional Materials: HYPOTHETICALS FOR "OVERVIEW OF THE MODEL RULES OF PROFESSIONAL CONDUCT FROM THE PERSPECTIVE OF INSIDE COUNSEL"

"OVERVIEW OF THE MODEL RULES OF PROFESSIONAL CONDUCT FROM THE PERSPECTIVE OF INSIDE COUNSEL"

This is an excerpt from Chapter 3, "Ethical Issues for Inside Counsel", of Corporate Counsel Guidelines

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SUMMARY

§ 3.01 Introduction

The ethical rules have been developed based on the paradigm of the private lawyer and the individual client. The rules are poorly suited to the corporate counsel's office's relationship with the corporation. Despite this awkward fit, ethics have become increasingly important for corporate counsel including defining the civil liabilities of lawyers although the ethics rules specifically eschew that role. Because of the increasing likelihood that control of a corporate entity will pass due to merger, sale or even bankruptcy or receivership, corporate lawyers may find their conduct -- and their adherence to the ethical rules -- subject to review by unfriendly eyes.

Unfortunately, there is scant guidance for the practical problems faced by corporate counsel on a daily basis. As a result, this chapter offers practical recommendations for many of these problems with the admonition that there are often no controlling cases or ethics opinions.

This chapter must be read in conjunction with portions of Chapter 6 -- Individual Rights and Liabilities of Corporate Counsel -- especially Section 6.07, which

discusses corporate counsel's employment rights and ethical duties to resign when faced with corporate misconduct, and Section 6.16, which discusses the ethical restrictions on former corporate counsel to litigate against his former employer.

§ 3.02 Licensing and Conflict of Law for Corporate Counsel: Where must the Corporate Counsel be Licensed and What Ethics Rules Apply?

The modern corporation, as well as the modern corporate counsel's office, operates in many states and, indeed, in many countries. Assuming that the corporate counsel is properly licensed in one state, the question remains whether he must be licensed in every state affected by his actions or advice? Unfortunately, there is no uniform answer and corporate counsel must look to the state law and bar association interpretations in this increasingly hostile area. State and local ACCA chapters can provide guidance for corporate counsel on the most recent interpretations of state law.

Failure to be licensed if so required by state law carries potentially serious consequences including disciplinary action, forfeiture of attorney-client privilege for communications to the unlicensed attorney and possible prosecution for a misdemeanor. These sanctions are, however, unlikely to be visited upon a corporate lawyer who represents only the corporation. The corporation is a sophisticated consumer of legal services and not the type of client that is typically protected by the ethics rules governing unauthorized practice of law.

A lawyer who is practicing in two or more states frequently faces the question of which state's ethical rules will govern his conduct. This question is addressed by Model Rule 8.5(b). In many instances, however, there is no true conflict between the ethical rules of the various states because most jurisdictions follow the ABA's Model Rules of Professional Conduct. If there is a conflict of law issue, the general rule as prescribed by Model Rule 8.5(b) is to determine if the conduct is in connection with a proceeding in a court or other tribunal where the lawyer has been admitted to practice. If so, the rules of the tribunal will govern; with courts that will typically be the jurisdiction in which the court sits. This we call the "tribunal trumps" rule.

If the tribunal trumps rule does not provide the basis for decision and the lawyer is admitted in only one state, then the ethics rules of the state where the lawyer is admitted will govern. If the lawyer is admitted in two or more states, the governing ethics rules are those of the state in which the lawyer "principally practices" unless the particular conduct has a predominant effect in another jurisdiction in which the lawyer is licensed -- in which case the principally affected jurisdiction's rules govern. Some states apply a variant of Model Rule 8.5 which provides that if a lawyer practices in a state in which he is not licensed, he is subject to the disciplinary rules of that state.

There are few guideposts for choice of law rules in multinational practice. The most that can be gleaned from a few reported cases is some analogies to the multistate cases: where a tribunal is involved, the laws of the forum in which the court sits will ordinarily govern. If that rule does not apply, then the law of the licensing country will govern.

In practice, there is little likelihood that a foreign country or foreign bar association can exercise jurisdiction over an American lawyer for disciplinary purposes. The more serious threat is that an American lawyer who violates the rules of a foreign bar association will find that sanctions may be imposed on his client for his alleged

misconduct.

§ 3.03 When is Corporate Counsel's Conduct Governed by the Ethical Rules?

In modern corporate America, the corporate lawyer often engages in conduct that falls outside of the traditional notion of professional legal services and, increasingly, has responsibility for some purely business activities of the corporation. When and to what extent are the ethical rules applicable to this conduct? The answer is far from clear.

If the lawyer has acted in a manner which reflects moral turpitude or fraud, then that conduct is prohibited by the rules even if he is not acting in a professional capacity. See Model Rule 8.4. Indeed, it has long been the rule that a lawyer must comply at all time with all applicable ethical rules whether or not he is acting in a professional capacity. ABA Formal Opinion 74-336. Assuming, however that the conduct does not reflect general unfitness for the bar, what ethics rules are "applicable" to the lawyer who is not performing professional legal services?

The question must be answered on a rule-by-rule basis. Virtually every rule applies only to professional conduct in that it applies only to services involved in the attorney-client relationships. What of the situation in which the lawyer is performing some professional services for a client and, in addition, performs other services that do not fall within the traditional notion of legal advice but are closely-related?

Model Rule 5.7 provides the answer: "[a] lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services ... if the law-related services are provided by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients ...". The definition of "law-related services" is "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-lawyer."

The rule is far more important for where the line is drawn and what is apparently excluded than for what is included. Can one reasonably infer from this rule that if a lawyer is providing services to a client that (i) are not professional legal services and do not fall within the definition of law-related services, or (ii) are law-related services but the services are distinct from the lawyer's provision of legal services, then the lawyer's conduct even involving a client may not be subject to the disciplinary rules? It would seem so, and this is one of the first clear lines that has been evident in the ethical rules and opinions exempting lawyers from their reach.

Where does that leave the corporate lawyer who also has non-legal employment responsibilities to the corporate client? To be safe, a lawyer who provides any legal services to the corporate client must assume that all of his conduct is governed by the ethical rules and that the burden will be on him to demonstrate why the other activities he is engaged in do not constitute "law-related services" or of they are "law-related services," they are distinct from the legal services.

§ 3.04 Corporate Law Departures As a Firm-Imputed Disqualification

The general principle of the ethical rules is that the prescriptions apply to individual lawyers not firms. Many of the rules, particularly those involving

disqualification, have been broadened to apply to the "firm" in which the individual lawyer is employed through the imputed disqualification principle of Model Rule 1.10. The question whether a corporate counsel's office is a "firm" for these purposes is answered by the commentary to Model Rule 1.10 (Imputed Disqualification): " ...the term 'firm' includes lawyers ... in the legal department of a corporation or other organization ..." As the commentary further observes, the application of this rule to the parent/subsidiary relationship raises questions of "whether the legal department of a corporation represents a subsidiary or an affiliated corporation."

Since imputed disqualification presumptively applies to the entire corporate general counsel's office, the corporation should be aware of the potential that the entire office may be disqualified by hiring a lateral lawyer, paralegal or even a legal secretary who, in their prior position, possessed confidential information from a party adverse to the current corporate client. In order to guard against this possibility and the corporation should carefully identify potential conflicts, and secure waivers from the former clients or forego hiring the lawyer.

If the corporation fails to identify a potential conflict or fails to secure a waiver from the former client, can it erect a "Chinese wall" or other similar barrier to overcome the presumption that the tainted lawyer will share confidences with others in the general counsel's office? While there is some precedent for recognizing a barrier that would overcome the presumption of shared confidences, many jurisdictions will not entertain such arguments.

The foregoing principles of imputed disqualification have frequently been applied to private law firms but we are unaware of reported cases in which they have been applied to corporate legal departments. Their application, however, is clearly mandated by the commentary and, thus, corporate counsel must be vigilant in identifying potential disqualifying conflicts.

§ 3.05 Corporate Law Department as a "Firm"-Vicarious Civil Liability of Corporate Counsel for Acts of Other Counsel

Despite the rule that a corporate general counsel's office constitutes a "firm" for purposes of imputed disqualification, it will likely not be deemed a "firm" for purposes of vicarious civil liability. Thus, one lawyer in the corporate counsel's office will probably not be liable for the torts of another. This issue is not governed by the Model Rules.

§§ 3.06-3.07 Corporate Counsel as Legal Advisor-The Interests of the Corporation Versus the Interests of Management

One of the most difficult problems for corporate lawyers is to distinguish between the interests of the corporate client and the interests of the corporate officers who control the corporate client. Put another way, recognizing that the corporate counsel's loyalty is to the corporation not its officers or directors, how does a lawyer decide what is in the best interests of the corporation when his views of the corporate interest are at odds with the views expressed by the corporation's management?

The Model Rules do not provide a structure for deciding what is in the best interests of the corporation. Instead, they provide in Model Rule 1.13 a comprehensive, if somewhat ambiguous, structure for deciding when corporate counsel must defer to the judgment of the businesspeople.

The structure requires the corporate lawyer to answer a series of questions in deciding whether she needs to challenge the decision of a corporate officer that she

believes is not in the best interests of the corporation. The first question is whether the questioned corporate action is "related to the representation"? If not, there is no further obligation under Model Rule 1.13.

If so, then the next question is whether the lawyer "knows" that corporate officer's action or decision is a violation of a duty to the entity or constitutes a violation of law for which the entity may be held liable. The application of this standard requires a high degree of certainty, i.e., the lawyer need not ordinarily proceed under Model Rule 1.13 where the question is a close one with reasonable arguments on both sides.

There are relatively few conceptual difficulties in applying this rule to situations where the officer is breaching a duty of loyalty or committing a criminal or fraudulent act for which the corporation may be held liable. The analytical problem arises where the corporate officer is acting in good faith (i.e., not disloyally) but, in the corporate counsel's judgment, is making erroneous or even grossly negligent business decisions. The commentary to Model Rule 1.13 clearly indicates that second-guessing the business judgments of management is ordinarily not required, and that conclusion is consistent with corporate reality as corporate lawyers (either inside or outside) are not expected to (or even competent to) pass on the wisdom of business decisions. Unfortunately, there is very little precedent on this point and there remains the possibility that Model Rule 1.13 may be interpreted to require a lawyer to take action for a good faith business judgment. If so, when? At most, this would apply if she knew it to be reckless or, possibly, grossly negligent.

Assuming that the corporate lawyer concluded that all of the above conditions had been met, the next question is whether the action in question results in injury to the corporation of sufficient severity? Model Rule 1.13 requires "substantial injury to the organization." The severity-of-injury requirement probably has a relatively low threshold if the conduct is either disloyalty or committing a violation of law for which the corporation would be held liable. If, however, good faith but reckless (or possibly grossly negligent) conduct falls within the purview of Model Rule 1.13, then we would expect that the injury to the corporation must be serious to trigger any obligation under Model Rule 1.13.

If all of these conditions are met, what must the corporate lawyer do? The answer is that the lawyer "shall proceed as is reasonably necessary in the best interests of the organization ..." No particular action is mandated although several are specifically mentioned: asking for reconsideration of the matter, advising that a separate legal opinion on the matter be sought for presentation to the corporation, and going up the corporate ladder, i.e., referring the matter to a higher authority in the organization. See Model Rule 1.13(b)(1)-(3). The rule, however, specifically states that "[a]ny 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." Thus, Model Rule 1.13 can in no way be read to require or even permit disclosure to third parties.

If, despite these actions, the corporation insists on the activity, corporate counsel may -- but not must -- resign in accordance with Model Rule 1.16.

§ 3.08 Special Problems in Identifying the Client-Corporate Affiliates

In general, a corporate lawyer who represents one member of a corporate family may without fear of conflict represent the other members who have identical

ownership. Thus, corporate counsel can treat a parent corporation and all of its wholly-owned subsidiaries essentially as divisions or departments of a single corporate client. There are several limitations to this rule -- where the ownership is less-than-identical or where one of the corporations is either insolvent or, possibly, on the verge of insolvency.

Where there is not an identity of ownership, the minority shareholders in one corporation (typically a subsidiary) may have an interest that is different than that of the majority shareholder (typically the parent). Also, if one member of a corporate family is either insolvent or on the verge of insolvency, the loyalties of fiduciaries (including the lawyers) of that company may shift from the corporation's shareholders to its creditors.

The foregoing potential conflicts of interest do not mean that a lawyer cannot represent both members of the corporate family; it only means that they cannot, without appropriate consent, represent both corporations in transactions where there is a potential for a conflict of interest. The potential is most obvious in transactions between the two entities. It could also manifest itself in transactions that the two entities engage in with a common third party in which one corporation/client may claim that benefits or burdens were unfairly allocated.

Where there is the potential for conflict in a transaction, corporate counsel should treat the corporate family members as if they were separate clients and obtain a consent before representing two or more corporations. The consent must satisfy Model Rule 1.7. Of particular importance is Model Rule 1.13(e), which requires that the consent be given by "an appropriate official." In this context, Model Rule 1.13(e) means that informed consent is provided by an official of the organization that is himself not subject to the same conflict of interest, i.e., is not under the control of the other client.

Another distinct body of jurisprudence has addressed the general question whether a lawyer who represents one member of a corporate family is deemed to represent other members of the corporate family. This issue has arisen in disqualification motions involving private law firms. The question is addressed, but not answered, by ABA Ethics Opinion 95-390, which holds that "[t]he fact of corporate affiliation, without more, does not make all of a corporate client's affiliates into clients as well." If mere affiliation is not sufficient, what is the standard? The jurisprudence looks at a variety of issues including the relationship between the corporate counsels' offices. Because of the uncertainty in how this rule will be applied, corporate counsel should make clear in the retainer letter the nature of the client so as to avoid unnecessary issues involving disqualification.

§ 3.09 Contests for Control of the Corporation by Takeover

A contest for corporate control can present knotty decisions about the best interests of the corporation. Fortunately, corporate counsel are generally not required to resolve the issue of what course is best for the corporation. Corporate lawyers apply the same analysis to decisions involving corporate control that they do to all other corporate decisions: they should defer to the decisions of management as to the best interests of the corporation unless counsel conclude that management is breaching a duty to the entity under Model Rule 1.13. See □ 3.08.

§ 3.10 Derivative Litigation

Another instance which presents a potentially difficult problem for corporate counsel is shareholders' derivative litigation in which the corporation has rejected the derivative demand and the plaintiff is proceeding against existing management and/or the board of directors. Since the shareholder is ostensibly bringing the case in the name, and for the benefit, of the corporate entity, does the corporate counsel's loyalty lie with the derivative plaintiff or with management?

Model Rule 1.13 requires that corporate counsel accept the decision of corporate management as to the best interests of the corporation unless counsel concludes that management is breaching a duty toward the corporation. Thus, if corporate management rejects the shareholders' derivative demand, corporate counsel will ordinarily be required to accept that decision. There is even support for the notion that corporate counsel can seek dismissal of a "frivolous" shareholders' derivative suit -- a curious conclusion in light of the highly subjective nature of the evaluation and the fact that any recovery would go to the corporation.

A secondary question is whether corporate counsel can properly represent both the corporation and the individual defendants -- typically management and the board? There are a number of potential conflicts that may preclude counsel from doing so: counsel may have given legal advice on which some of the corporate officers or directors relied (or will claim they relied) in making the decision in question or counsel may possibly be a fact witness to the events in question.

Assuming that counsel's personal involvement in the conduct is not disqualifying, the general rule appears to be that corporate counsel can represent both the corporation and the defendant directors and officers where the allegations involve questions of business judgment but not where the allegations are fraud or self-dealing. Even in those jurisdictions where this may be permitted, however, the potential for mischief is great and warns that such dual representation should be avoided.

Corporate counsel must also be aware of the potential for shareholders in a derivative case invading the corporation's attorney-client privilege if they can demonstrate "good cause" under the rule of Garner v. Wolfinbarger.

§ 3.11 Duty of Confidentiality

The lawyer's duty of confidentiality is governed by Model Rule 1.6. Unfortunately, the state to state variations on Model Rule 1.6 are greater than the variations of any other ethics rule. Thus, in the same factual circumstances, disclosure may be required in one state, permitted in another state and absolutely prohibited in a third state. It is, therefore, impossible to prescribe a universally accepted rule and corporate counsel must be guided by the text of the governing rule. For the purposes of our analysis, we have focussed on the ABA's version of Model Rule 1.6.

Apart from disclosure impliedly authorized as part of the representation, counsel must keep confidential all information relating to the representation except as disclosure is expressly permitted by the Rules. Information relating to the representation is a much broader category than merely attorney-client privileged information and it includes "all information relating to the representation, whatever its source."

A lawyer may reveal such client information where the lawyer believes it necessary to prevent the client from committing a criminal act that the lawyer believes is

likely to result in imminent death or substantial bodily harm. A lawyer's right to reveal client information is examined in greater detail in Sections relating to counsel's right to defend or exonerate himself and Section relating to ethics-based termination of employment. See §§ 5.__, 6.07

In addition to the ethical restrictions on the disclosure of client information, every employee or other agent has duties of confidentiality as prescribed by the Restatement (Second) of Agency, or analogous state law jurisprudence. In general, this forbids the use of confidential information from an employer or principal in competition with the employer or to the detriment of the employer.

As a general rule, there is no ethical prohibition on sharing information between various corporate officers although the disclosure of confidential information should be limited as much as possible to avoid jeopardizing the attorney-client privilege.

§§ 3.12-3.13 Duties to Offer Advice

A lawyer has a general duty to be informed. When does a corporate lawyer have a duty to offer advice? The commentary to Model Rule 2.1 (Advisor) makes clear that a lawyer is not required to give advice until asked by a client. The limitation on that rule is, however, that "when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client ... may require the lawyer to act if the client's course of action is related to the representation."

This rule may operate differently for private lawyers, whose scope of representation is often defined, than for inside corporate counsel, who may be responsible for all legal affairs of the company. Thus, it may be difficult to conclude that any corporate matter is not related to the representation by an inside general counsel. Even so, the commentary does not require that the lawyer offer advice but merely permits her to do so, and it requires a high degree of certainty ("knows") of the adverse consequences.

Another portion of the commentary to Model Rule 1.2 makes clear that the "lawyer ordinarily has no duty to initiate investigation of a client's affairs ..." Where the matter falls outside of the agreed-upon scope of representation, the lawyer is not required to investigate; if, notwithstanding the lack of investigation, the lawyer knows that an adverse consequence will befall the client, she may (but is not always required to) offer advice to the client.

Finally, the commentary to Model Rule 1.2 strongly suggests that in giving advice the lawyer is not required to challenge or question the veracity of statements by corporate officials but may accept them as true. The limitation on this rule is that a lawyer may not turn a blind eye to evidence known to the lawyer suggesting that the officers' statements are untrue.

§ 3.14 The Errant Officer

There is no absolute prohibition against corporate counsel representing both the corporation and one or more of its directors, officers, employees or agents. Indeed, dual representation often occurs with adequate consent as prescribed by Model Rule 1.7. Corporate counsel must be sensitive to the potential for conflict of interest

when considering this joint representation or even when receiving information from a corporate officer or employee who is himself involved in possible liability-causing activity. Depending on the nature of the problem, the officer may have interests that conflict with the corporation. Receiving confidential information from the officer without adequate notice to the officer of the fact that corporate counsel represents only the corporation, and not the officer individually, may allow the officer to argue later that counsel was his personal lawyer.

To avoid this problem, counsel must be able to identify immediately situations which have a high likelihood for a conflict of interest between the corporation and the officer. Where those indications are present, counsel should avoid dual representation. He must also take timely steps to assure that officer knows that corporate counsel does not represent him.

If the lawyer concludes that the company's interest is adverse to the officer's, then counsel should advise the officer of the adversity, that corporate counsel cannot represent the individual, and that the person may wish to hire separate counsel.

§ 3.15-3.16 Duties to Partners, Coventurers and to Participants in Closely-Held Corporations

Another treacherous situation is where corporate counsel also represents a partnership or joint venture in which the corporation is a participant. The problem is that by becoming counsel for the partnership or venture, corporate counsel undertakes duties to the entity, and may even be deemed to undertake duties to each participant. These duties to the partnership entity and/or its participants may place corporate counsel in a conflict of interest situation with his primary corporate client. The problem will become aggravated if a dispute arises between the partners or venturers.

The risks from this situation are considerable and counsel should strive to avoid being placed in this position. After formation of the partnership or venture, the entity should hire separate counsel. If corporate counsel cannot avoid the situation, careful written clarification of the role of counsel, and segregation of files may reduce the risks to counsel and the corporate client.

Corporate counsel should also be aware that some cases have found a closely held corporation more akin to a partnership than to a corporation. A court that reaches such a conclusion may preclude counsel for the closely held corporation from filing suit against a shareholder -- a result that would not ordinarily obtain in public corporations.

§ 3.17 Corporate Counsel as Business Advisor

Lawyers in business transactions have ethical duties under Model Rule 4.1 not to knowingly make a false statement of material fact. In addition, a lawyer may not 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 Model Rule 1.6. "Fact" in this context excludes estimates of value and other puffery that is commonly engaged in during negotiations.

While Model Rule 4.1 forbids withholding information that would assist in a crime or fraud (unless confidentiality is required by Model Rule 1.6), it does not address

the larger issue of an attorney's ethical duties for misrepresentation by silence. In the absence of a duty to disclose information, an attorney has no obligation to disclose information to an adversary and is, indeed, ethically prohibited from doing so under Model Rule 1.6. A duty to disclose information may arise where the lawyer has previously made a representation that is no longer true and upon which he knows his adversary is relying.

§ 3.18 Corporate Counsel as Advocate-Is Non-Litigating Corporate Counsel Governed by Model Rules 3.1□3.7?

Model Rules 3.1 through 3.7 provide pertinent ethical rules for the lawyer as advocate. These rules include restrictions on asserting unmeritorious claims or defenses, engaging in dilatory litigation practices, presenting false and misleading evidence, being unfair to opposing counsel and the like. While there is no doubt that these rules apply to trial counsel and all others who have entered an appearance before the court, the question is whether the rules apply to corporate counsel who are directing or monitoring litigation but are not identified as advocates in pleadings. The absence of direct authority on the reach of the lawyer-as-advocate rules is probably irrelevant because there are so many other ethical rules that would reach the activity of the corporate lawyer who is monitoring or directing litigation.

In most instances, Model Rule 8.4 may control because it prohibits a lawyer from "knowingly assist[ing] or induc[ing] another" person from violating the ethical rules. Thus, where trial counsel is violating the rules, corporate counsel cannot assist or encourage the conduct. In extreme cases, actions that violate the lawyer-as-advocate rules may also violate Model Rule 8.4(d) which prohibits "engag[ing] in conduct that is prejudicial to the administration of justice."

Model Rule 5.1(b) is also likely to impose obligations on corporate counsel because it provides that a "lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the [ethical rules]".

§ 3.19 Corporate Counsel as Advocate-Truth and the Tribunal

The obligations of the lawyer to be truthful to the tribunal during litigation are prescribed by Model Rule 3.3. The four prohibitions are knowingly (1) making a false statement of fact or law to a tribunal, (2) failing to disclose a material fact to a tribunal "when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client," (3) failing to disclose adverse legal authority in the controlling jurisdiction that has not already been disclosed by opposing counsel, and (4) offering evidence she knows to be false.

§ 3.20 The Corporate Counsel's Ethical Duty to Resign Because of Improper or Unlawful Corporate Conduct

The corporate counsel's duty to resign because of improper or illegal corporate conduct is governed by the complex interplay of three rules: Model Rule 1.13, Model Rule 1.2 and Model Rule 1.16. In general, this problem arises where the lawyer has advised the corporation that it must disclose some fact or take some action related to the lawyer's representation, and the company refuses to do so.

The first step, as in virtually every corporate lawyer dilemma, is to at least examine whether the decision is being made by the most senior authority within the corporation. Put another way, has the lawyer gone as high up the corporate ladder as she can go or is it possible that a higher authority will agree with her and avert

the crisis? This is essentially a Model Rule 1.13 problem and should be examined in detail before proceeding to more drastic measures.

Model Rule 1.2(d) categorically prohibits a lawyer from counseling or assisting a client in activity that the lawyer "knows is criminal or fraudulent." If directed by the client to perform such acts, a lawyer must resign as required by Model Rule 1.16(a)(1).

One significant problem, however, may be determining whether a proposed activity will be characterized as criminal conduct. This is true because if things go badly, many seemingly non-criminal acts may be viewed as part of a criminal conspiracy to defraud or to injure third parties such as consumers. One point is clear: Model Rule 1.2(d) does not require a lawyer to refrain from counseling or advising a client based on the fact that the client's prior acts were criminal or fraudulent. Many clients come to lawyers for advice or representation regarding the potential consequences of past misconduct and it is perfectly proper to provide such representation.

Model Rule 1.2(d) requires that the lawyer "know" that the client's acts are criminal or fraudulent. This imports a high standard of certainty into the rule and, thus, the rule does not prohibit a lawyer from representing a client where the legality of the proposed action is debatable as a matter of law. This would include where the law is unsettled or the lawyer has a good faith belief that the positions are warranted under existing law or by a good faith argument for an extension, modification or reversal of existing law.

What if the client's proposed action is non-fraudulent or non-criminal based upon the facts as represented by the client but the lawyer has not independently verified the facts? The general rule is that a lawyer is not required for purposes of Rule 1.2(d) to challenge the client's veracity or to verify independently everything that the client represents. That does not mean, however, that the lawyer is free to accept a client's assertions that are implausible or that the lawyer can turn a blind eye to what is plain to be seen. Balancing these two principles, especially in light of the likelihood that the lawyer's conduct is likely to be judged only if there is a corporate catastrophe, may be one of the most difficult decisions that a corporate lawyer will be required to make.

Even if the lawyer concludes that the client's conduct is neither criminal nor fraudulent, the lawyer may be forced to resign if the representation will result in the lawyer personally engaging in a violation of law or a violation of an ethical rule. This is the prescribed by Model Rule 1.16(a). A very significant unanswered issue is whether a lawyer is required to resign if the "other law" that he would be required to violate through the continued representation was a law other than a criminal law or statute. Self-protective reasons may drive a lawyer to give this provision a broad reading.

Apart from the circumstances in which the lawyer is required to resign, there are a number of situations in which she is permitted to resign. There are two standards for permissive resignation. Where resignation can be accomplished without material adverse effect on the interests of the client, a lawyer can resign without a reason.

Otherwise, permissive resignation is governed by Model Rule 1.16(b) which provides in pertinent part that a lawyer may resign if the "client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent." The difference between this standard for permissive resignation and the standard for mandatory resignation is that resignation is not required unless the lawyer's services are being used to assist or further a fraud (Model Rules 1.2 (d) and 1.16(a)(1)). A lawyer may, but is not required to, resign, if her services have already been used to perpetrate a crime or fraud.

Even resignation, however, does not relieve a lawyer of the obligations of confidentiality except where a "noisy withdrawal" is permitted.

§§ 3.21-3.27 Contacting Corporate Employees Without Corporate Counsel Present

Model Rule 4.2 prohibits a lawyer from contacting a party who is represented by counsel without the approval of the other party's lawyer. Violation of this rule has led to disqualification of counsel, suppression of statements taken in violation of the rule and, of course, professional discipline. Because of conceptual problems of defining which corporate employees are "the client" in a corporate representation, the application of this rule to corporate litigation has become a quagmire.

The prohibition against contacting directly a represented person, once thought to apply only where there were proceedings or litigation pending, is now clearly applicable to all situations where the person is represented with respect to the subject matter of the contact. Thus, a lawyer is prohibited from contacting a principal (without the consent of his lawyer) in non-litigation matters such as contract negotiations as well as in court proceedings. The prohibition is also not limited to situations in which the clients are adverse -- although it is presumed that if they are working cooperatively, their respective lawyers, if asked, may permit the clients to talk directly with the other counsel.

The reach of Model Rule 4.2, when applied to the corporation, has been addressed in Comment 4 to that rule which prohibits contact with "persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." Unfortunately, this formulation is very difficult to apply with any precision and predictability except to those individuals at the very top of the organization (who will presumably be included). There appears to be a trend in the cases to exempt from the reach of Model Rule 4.2 low level corporate employees who were purely witnesses to the incident although even that rule is not absolute. In the absence of clear precedent in the jurisdiction, counsel contacting any corporate employees without reaching agreement with corporate counsel about the reach of Model Rule 4.2 or securing a court order in the pending case, face great uncertainty in the vast gray area where most of the important witnesses are likely to be found.

As a general rule, former employees of a corporation or other entity are not viewed as falling within the no-contact provisions of Model Rule 4.2 unless the corporate employee was centrally involved in the transaction or the employee has confidential, bordering on privileged, information about the litigation. Even where the lawyer is permitted to contact employees or former employees of a corporate adversary, the lawyer should disclose her identity and the fact that she represents a party that is adverse to the employee's current or former employer in pending or prospective litigation.

If a lawyer is prohibited from contacting a represented person without the consent of that person's counsel, the same restriction applies to non-lawyer agents acting as the lawyer's behest. This is the rule derived from ABA Formal Opinion 95-396 which prohibits a lawyer from sending an investigator to contact the represented person. See Model Rules 5.3(c) and 8.4(a). This should not, however, prevent client-to-client contacts although there is a question whether the lawyer can ethically employ the client to extract uncounselled admissions in such contacts.

The application of Model Rule 4.2 to contacts by government prosecutors and investigators has been a major source of controversy and conflict between the Justice Department and the organized bar. The Justice Department has insisted that it is exempt from the ethical rules governing all other lawyers and that in investigations of corporations, it can contact a much broader range of corporate employees without the consent of corporate counsel. This self-proclaimed exemption from the ethical rules was memorialized in 28 C.F.R. part 77. The Justice Department's position, however, has also been rejected by ABA Formal Opinion 95-396 and now by federal legislation, 28 U.S.C. □ 530B, which subjects government attorneys to the same rules as other practicing lawyers. It is doubtful that the Justice Department will accept the new legislation and further developments can be expected.

A party may have somewhat broader rights to communicate with federal government officials without the consent of the government's lawyer. This right derives from the First Amendment guarantee that citizens may "petition for the redress of grievances." ABA Formal Opinion 97-408 specifically addresses this point: it holds that Model Rule 4.2 is generally applicable to contacts with government officers but that in certain circumstances a private person may contact a government official without government lawyer's consent. The government lawyer, however, must be given advance notice of the contact (and copies of any written material) so that the lawyer may advise the government official regarding whether to meet. Some state bar associations may have more liberal rules for contacting government officials.

§§ 3.28-3.29 Requesting Corporate Employees Not to Communicate with Opposing Parties or the Government

As a general rule, a lawyer cannot request a person to refrain from giving relevant information to another party. See Model Rule 3.4(f). The only exceptions are where the person is "a relative or employee or other agent of a client" and the "lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information." Under this rule, corporate counsel can ethically request all corporate employees not to give information to another private party. Although not resolved, we also believe that corporate counsel is ethically permitted to couple that "request" with a directive from senior management making it a condition of employment that no such information be voluntarily disclosed.

In general, corporate counsel (and corporate management) have been much less likely to direct or even request corporate employees not to provide information to law enforcement investigators. The fear, of course, is that the government will claim obstruction of justice. This delicate issue is examined in □ ___.

§ 3.30 Ethical Responsibility for the Actions of Other Lawyers and Non□Lawyers in Corporate Counsel's Office

Model Rule 5.1 requires a supervisory attorney or partner in a law firm to have in place "measures giving reasonable assurance that all lawyers in the office conform to the [Model Rules]" and imposes upon supervisors a duty to monitor subordinates. Liability for the actions of a subordinate attorney, however, requires that the supervising attorney order or ratify the unethical conduct of a subordinate with knowledge of the specific conduct or know of the conduct when its consequences can be avoided or mitigated, and fail to take action. Model Rule 5.1(c).

Model Rule 5.2 provides that a subordinate lawyer is bound by the ethics rules notwithstanding directions of another, and presumably senior, lawyer. Rule 5.2(b) however provides that a subordinate lawyer who "acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty"

does not violate the ethical rules.

Model Rule 5.3 applies to nonlawyer assistants the same principles that are applied to subordinate lawyers in Model Rule 5.1. Thus, a supervisory lawyer may be liable for the actions of non-lawyer assistants in these circumstances.

§ 3.31 The Ethics of Dealing with Regulators

Model Rule 3.9 and ABA Opinion 93-375 address the issue of when a lawyer's involvement in the administrative process constitutes litigation for the lawyer-as-advocate rules (Model Rules 3.1-3.7). Rule 3.9 extends certain lawyer-as-advocate rules to the attorney who represents a client "before a legislative or administrative tribunal in a non-adjudicative proceeding." If those rules apply, a lawyer may in some circumstances be required to volunteer damaging information about a client despite the general obligations of confidentiality of Model Rule 1.6. ABA Opinion 93-375 makes clear that the administrative proceeding so envisioned refers only to trial-type proceedings in which evidence is presented for decision to a neutral fact-finder by parties, witnesses are examined, arguments presented, etc. Thus, the vast majority of administrative and agency activity would not be subject to the ethical rules governing litigation.

Formal Opinion 93-375 is clearly a response to, and total repudiation of, the position taken by the Office of Thrift Supervision in its well-known case involving Kaye, Scholer, Fierman, Hays & Handler in which the OTS pursued the law firm in essence for its failure to disclose information adverse to a client in a bank examination. Another conclusion of equal importance for those who practice administrative law is that "a lawyer has no obligation to bring to the attention of the examiners conduct the lawyer believes is not a violation, even if she has reason to believe that the examiners have a contrary view."

§ 3.32 Ethical Limitations on the Attorney as Director

The ethical issue for the attorney-director is whether the obligations of a corporate director conflict with her ethical duties as a lawyer for the corporation, and thus present a conflict of interest under Model Rule 1.7(b). We conclude that there is no inherent ethical impropriety in an attorney also acting as a director for a corporation which she, or her firm, represents provided that she abstains from certain types of decisions and makes appropriate disclosures. This conclusion, however, has been overshadowed by the reality that attorney-directors are primary targets in litigation, can seldom secure adequate liability insurance and may find themselves in awkward and ambiguous situations particularly in a company that faces serious problems.

Some of the more serious problems that the attorney-director can face involve the attorney's ethical obligations of candor to tribunals (Model Rule 3.3(a)(4)) and, in some instances, third parties (Model Rule 1.6(b)) that may be seen by the corporation's other directors as not being in the best interests of the company. An attorney-director may also find that her personal liability as a director may affect the advice she gives as a lawyer. These situations must be avoided, if possible, or remedied, if necessary, by resignation from the board.

Other problems involve the somewhat ambiguous role of the attorney-director in giving advice at board meetings and otherwise. If litigation results from activities in

which the attorney-director played a significant role, there is frequently a questions whether the advice was legal advice or a business judgment and whether the other directors were entitled to rely upon the lawyer's views, or even his silence, as giving the law firm's stamp of approval to the decision.

These practical problems have culminated in ABA Formal Opinion 98-410 which reluctantly concludes that a lawyer may serve on the board of a company she represents if she adequately informs the company of the risks and refrains from certain types of work. The Opinion's extensive conclusions are reviewed in the text.

A much more detailed analysis of this same issue, which reaches much the same conclusions, can be found in "Report of the Task Force of the Independent Lawyer -- The Lawyer-Director: Implications for Independence" (1998) issued by the ABA's Section on Litigation.

§ 3.33 Ethical Restrictions on Contact with the Press

Model Rule 3.6 prescribes the ethical limitations on a lawyer's ability to discuss matters with the press. These limitations are in addition to the confidentiality requirements of Model Rule 1.6 and the restrictions in any gag order or confidentiality provisions imposed by court order or court rule.

In general, a lawyer who has participated in an investigation or litigation of a matter cannot make extrajudicial statements to the press that will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. Excepted from this rule is certain objective information about the proceeding. See Model Rule 3.6(b). A lawyer is also permitted a limited right to reply to recent publicity not initiated by the client or lawyer which has had a substantial undue prejudicial effect on the client's rights.

§ 3.34 Limitations on Working for Competitors

A lawyer's ability to work for a competitor of his current corporate employer is governed by the general rules of agency and by Model Rule 1.9 (Conflict of Interest -- Former Client). Absent consent, Model Rule 1.9 prohibits a lawyer who has represented a corporation/client in one matter from being adverse to his former client in that matter or a substantially related matter. The lawyer cannot work on the same specific litigation or contract for his new employer in which he represented his former employer -- that much is clear.

The more difficult interpretive problem under Model Rule 1.9 is the definition of "substantially related matter" and, specifically, whether general knowledge of how one company approaches business opportunities precludes the lawyer from moving to a direct competitor. Apparently the only court that has attempted to apply this rule to corporate counsel moving between competitors has rejected the argument that the lawyer gained "general knowledge" of his former client's business that should prevent all employment by a competitor. Instead, the court only prohibited the lawyer from working on matters for his new corporate employer of the type he handled (lease negotiations) for his former employer in which the former employer had a direct competitive interest.

More difficult, and unanswered, questions involve the lawyer who moves between corporations that are head-to-head competitors on virtually all matters such as long distance carriers, airlines on competing routes, software companies, etc.

§ 3.35 Ethical Limits on Consultation

While it is commonplace for lawyers to consult informally with one another to resolve ethical or legal issues that arise in their practices, such consultations may present problems for corporate counsel. The problem arises from the fact that because of corporate counsel's position, such consultations instantly disclose the identity of the client and thus may imperil client confidences. The ethical rules, as interpreted and applied by ABA Formal Opinion 98-411, require approval by the client of such disclosures. One way to address this issue would be to seek advice from the corporation's outside counsel and thus not reveal confidences outside of the privileged relationship.

Additional problems are encountered where the corporate counsel is considering her ethical obligations in a manner that is adverse to the corporate client's professed interest. There, corporate counsel cannot consult the corporation's outside lawyers because of adversity of interest and must disclose the information to her own lawyer even without client approval although that would appear to be a risky alternative.
