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ETHICS FOR BUSINESS LAWYERS: AN OVERVIEW OF CONSIDERATIONS FOR COMMON SITUATIONS

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I. INTRODUCTION

It is a basic tenant of business law that corporations and other limited-liability entities (such as LLCs) are persons legally separate from their constituent individuals. But because these entities can only speak and act through their constituent individuals, a lawyer representing such an entity will necessarily always deal with her client through the constituent individuals, and those individuals' interests may not always align with the interests of the client entity. This basic fact of business law leads to a number of complicated and, at times, difficult ethical considerations. This article explores a few of the most common of these ethical considerations.

First, this article discusses the importance of identifying one's client when one represents an organization but not its constituent individuals. This includes a discussion of a lawyer's obligation to take remedial action when a constituent individual acts or intends to act contrary to the interests of the organization. Second, this article covers ethical considerations for the lawyer representing multiple clients jointly (e.g., the organization and one or more of its constituent individuals). Third, the article describes ethical standards governing communications between a lawyer or her client and another represented party, as well as standards governing communications with an unrepresented party. Finally, the article concludes by explaining the potential pitfalls presented by the differences between Texas's narrow allied-litigant doctrine and the broader conception of the common-interest doctrine recognized in other jurisdictions.

II. DISCUSSION

A. Identifying and Serving Your Client

In *The Informant!*, Matt Damon plays Mark Whitacre, a real-life executive at Archer Daniels Midland (ADM) in the early 1990s who blew the whistle on the company's price-fixing conspiracy and served as a secret informant during the ensuing FBI investigation. Ahead of the climactic FBI raid on ADM headquarters, the agents advise Whitacre: "Whatever happens tomorrow, it's in your best interest to get an attorney who will represent your interests alone." "The company lawyers are going to come to all of the executives with a list of attorneys to pick from," another agent tells Whitacre, "But you've got to understand, these attorneys are paid for by ADM; they do not represent you."

Whitacre's situation—a common occurrence at the intersection of law and business—implicates the nuanced and varied ethical issues around a lawyer's representation of a business entity. Unlike the conventional lawyer-client relationship in which a lawyer represents an individual and can easily determine the client's identity, a lawyer representing a business entity faces a far more challenging task. Nevertheless, under the Texas Disciplinary Rules of Professional Conduct ("Rules"), a lawyer has a potential obligation—to either herself or others, depending on context—to clarify the identity of her client in order to (1) avoid a misunderstanding on the part of corporate individuals regarding the identity of the lawyer's client; (2) determine the lawyer's responsibility to take remedial action to protect the

organization from an individual's violation of an obligation; and (3) assess the contours of the attorney-client privilege. Rules 1.12 and 1.05, and other authorities, provide relevant guidance.

1. Avoiding Misunderstandings About Client Identity

A lawyer retained by an organization "represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents."[1] Yet, the Rules recognize that "the lawyer-client relationship must be maintained through a constituent who acts as an intermediary between the organizational client and the lawyer."[2] In other words, despite the fact that an organization can "speak and decide only through its agents or constituents such as its officers or employees," a lawyer retained by the organization does not by virtue of her retention represent the constituent individuals.[3]

Perhaps it goes without saying that this legal fiction gives rise to the natural question of when and how a lawyer must clarify, for the benefit of the non-client constituent individual, that the lawyer represents the organizational client and not the individual. But given recognition by several observers that "an increasing number of civil courts have been willing to find that attorneys owe some type of duty to non-clients,"[4] especially in the context of entity representation, clarifying the identity of the client also inures to the benefit of the lawyer herself. In short, the question of a lawyer's obligation to clarify client identity is an important one.

Rule 1.12 provides twofold guidance in answering that question. A lawyer must ("shall") explain the identity of the client to the constituent(s) of the organization when: (1) "it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing"; or (2) "explanation appears reasonably necessary to avoid misunderstanding on [the] part" of constituents with whom the lawyer is dealing.[5] This is a fact-specific inquiry,[6] and sometimes an ethical scenario will fall within both categories of guidance under Rule 1.12.

Consider the following examples highlighting an application of Rule 1.12(e) in practice:

- *You are retained by Corporation X to assist with corporate governance issues. Corporation X has a board comprised of three directors: Director A, Director B, and Director C. Each Director has equal voting power. You are retained through a*

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[1] Tex. Disciplinary R. Prof'l Conduct R. 1.12, cmt. 1.
[2] *Id.*; *see also id.* (noting that the fact that the lawyer-client relationship is maintained through a constituent intermediary "requires the lawyer under certain conditions to be concerned [with] whether the intermediary legitimately represents the organizational client").
[3] *Id.*
[4] D. Ryan Nayar, *Almost Clients: A Closer Look at Attorney Responsibility in the Context of Entity Representation*, TEX. J. BUS. L. 313, 323 (2006).
[5] Tex. Disciplinary R. Prof'l Conduct R. 1.12(e); *see also* Tex. Disciplinary R. Prof'l Conduct R. 4.03 ("When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.").
[6] *See, e.g.*, *Seeberger v. Bank of Am.*, No. EP-14-CV-366-KC, 2015 WL 5824878, at *5 (W.D. Tex. Oct. 6, 2015).

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