WHAT CAN YOU TELL YOUR EMPLOYEES WHEN THE FEDS ARRIVE TO QUESTION THEM?

Your company is the target of a federal criminal investigation. The federal investigators have contacted a number of current and former employees to obtain evidence. Against your advice, the company had decided against providing a separate lawyer to represent those individuals. You, of course, do not represent them. Now, some of the employees have contacted you, asking about the investigation and about whether and how they should respond to the government agents. How far can you go in providing information? What are the risks?

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Corporate investigations, whether conducted by the company itself or by government agents, create unique and intractable problems for in-house counsel. Corporate employees are accustomed to seeking advice from inside counsel, and inside counsel are accustomed to providing advice, yet that advice-giving can be the source of a problem. The ethical rules permit a lawyer to give only very limited advice to a nonclient without raising the prospect of being deemed the person's lawyer and jeopardizing the corporation's interests. And sometimes, giving even this limited advice can land the lawyer in hot water.

To understand the ethical implications better, let's review the pertinent rules and their application to the corporate client.

Rule 4.3 of the *Model Rules of Professional Conduct* regulates a lawyer's communications with an unrepresented person:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. 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.[1]

Unlike its predecessor under the Model Code,[2] which prohibited the lawyer only from giving advice to unrepresented persons whose interests conflicted with those of the client, Model Rule 4.3 is broader in scope, applying to any unrepresented person, whether adverse or not, and to any type of communication made on behalf of a client, whether it is advice or not. Thus, although Rule 4.3 does not expressly prohibit the lawyer from giving advice,[3] the official comment to the Model Rule recommends that "the lawyer should not give advice to the unrepresented person, except the advice to obtain counsel." Even this standard, however, has been modified in many jurisdictions.[4]

The principal point to glean from Model Rule 4.3 is that its focus is on the unrepresented person's understanding, not whether the lawyer intended to mislead the nonclient.[5] For that reason, whenever a lawyer acting on behalf of a client "knows or reasonably should know"[6] that the unrepresented person misunderstands the lawyer's role, the lawyer is obligated to take "reasonable efforts" to correct the misunderstanding.[7] This rule may require in-house counsel to clarify their roles and the identities of their clients and to explain that they do not represent individuals.[8]

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A second, even more difficult question is that of what in-house counsel can tell current and former employees about responding to government inquiries. The touchstone for this analysis is Model Rule 3.4:

John K. Villa, "What Can You Tell Your Employees When the Feds Arrive to Question Them?" *ACCA Docket* 20, no. 1 (2002): 90–92.

Fairness to Opposing Party and Counsel

A Lawyer shall not . . .

(f) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or another agent of a client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

The commentary to Model Rule 3.4(f) states that "paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client." Corporate counsel may ethically ask all corporate employees, including those who are not members of the control group, to refrain from talking to opposing counsel without the corporation's lawyer present. Given the different status normally accorded to former employees, however, it is doubtful whether this rule would permit corporate counsel to ask former employees not to cooperate with opposing counsel.

What about government investigators? In principle, there should be no difference for ethical purposes between asking corporate employees not to talk to opposing parties in civil litigation and making the same request of corporate employees when the opposing party is a federal or state government investigating or prosecuting the corporation. In practice, however, there are sound reasons for a corporation in a criminal investigation not to instruct its employees to refuse to talk to federal or state law enforcement officers or prosecutors. The company and any officers who would give such instructions could face obstruction of justice claims, *see* 18 U.S.C. § 1512, although we are aware of no prosecutions of corporate counsel on this theory. On the other hand, it is proper for the corporation to inform employees that they may be contacted by law enforcement officers, that it is entirely their choice whether or not to grant an interview, that they may wish to consult with counsel before deciding whether or not to grant an interview, and that, if they choose to grant an interview, they must tell the truth.

In view of the potential for misunderstanding in the context of a corporate investigation, in-house counsel should take the following preventive measures before an investigation in order to ensure compliance with Rules 4.3 and 3.4(f):

- In instances in which the corporation has decided against retaining counsel for its employees, in-house counsel should, after having informed the employees of the existence of the investigation and the fact that a government agent may contact them for an interview, advise the employees that in-house counsel represents the corporation, not the individual employees, and explain that, because the privilege for any communications with in-house counsel is held by the corporation and not the employee, only the corporation can assert or waive the privilege.
- If the investigation is conducted by a law enforcement agency, in-house counsel should not advise, recommend, or suggest that the employee refuse to cooperate.
- Although in-house counsel may also inform the employees of their right to decide whether to speak with the government agent, in-house counsel should also explain that separate counsel, if retained by an employee, is the person to consult for advice on whether and how to respond in any investigation.

The implementation of these measures, together with in-house counsel's reiteration of the corporate attorney's role, whenever necessary, will help ensure compliance with the *Model Rules*

and prevent the unwitting creation of an attorney-client relationship with potentially adverse consequences for the corporate client. It will also help protect the corporation and its lawyers from claims of interfering with law enforcement investigations.

Note: In a future column, we will examine the ethical restrictions on government lawyers and investigators when contacting corporate employees. So stay tuned.

NOTES

1. *ABA Model Rules of Professional Conduct*, Rule 4.3 (2001).
2. *ABA Model Code of Professional Responsibility*, DR7-104(A)(2).
3. What constitutes advice, as opposed to the mere provision of information, depends upon the circumstances in the given case and, consequently, is subject to varying interpretations. *See, generally,* "Communications with Persons Unrepresented by Counsel: Practice Guide," 71 *ABA/BNA Lawyer's Man. on Prof'l Conduct 501* (1998).
4. Some jurisdictions that have adopted the Model Rules have altered Model Rule 4.3 by including the prohibition against giving advice as set forth in DR7-104. *See, e.g., Colo. Disciplinary Rules of Professional Conduct*, Rule 4.3 (2001); *Mass. R. Prof'l Conduct*, Rule 4.3(b) (2001); *Va. R. Prof'l Conduct*, Rule 4.3(b) (2000). In the District of Columbia, for example, the prohibition against giving advice expressly applies only to unrepresented persons whose interests are adverse to those of the lawyer's client. *See D.C. R. Prof'l Conduct*, Rule 4.3(a) (1999).
5. *See* Attorney Q v. Mississippi State Bar, 587 So. 2d 228 (Miss. 1991); In re Air Crash Disaster, 909 F. Supp. 1116, 1125 (N.D. Ill. 1995).
6. As defined in the Terminology section of the *Model Rules*, the phrase "reasonably should know," as applied to a lawyer, "denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question." *ABA Model Rules of Professional Conduct* (2001). In the case of Rule 4.3, a lawyer should reasonably know of a non-client's misunderstanding from the nature of the questions asked by the individual, *see* In re Faraone, 722 A.2d 1, 3 (Del. 1998) (questions concerning the unrepresented person's potential liability with respect to certain transactions), or from the individual's known inexperience with the law and the context in which the contact with the lawyer takes place. *See ABA Model Rules of Professional Conduct*, Rule 4.3, cmt.
7. *Id.*, Rule 4.3.
8. *See* Brown v. St. Joseph County, 148 F.R.D. 246, 254 (N.D. Ind. 1993).