From Deal to Dispute: Ethics Lessons in Business Transactions

SPEAKERS

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What We'll Cover Today

- "What happens when a carefully negotiated higher education business deal turns into litigation?"
- **Part 1: The Deal and the First Red Flag**
  - Ethical Duties of Trustees and Attorneys Supporting Them
- **Part 2: Warning Signs and Internal Pressure**
  - Ethical Duties of Attorneys Supporting Clients Responding to Crises
- **Part 3: Litigation, Privilege and Exposure**
  - Ethical Duties of Attorneys Asserting Privilege
- **Conclusion**

Part 1: The Deal and the First Red Flag

You are the General Counsel of Midstate University. The Board of Trustees of Midstate University is considering constructing a new Life Sciences building on an undeveloped parcel it owns in a strategic partnership with a local developer. During a Facilities Subcommittee meeting, Sarah mentions she recalls hearing a rumor years ago about possible soil erosion issues on the site, though nothing was documented.

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Part 1: The Deal and the First Red Flag (cont.)

Another Subcommittee member, Tom, suggests an environmental engineer he knows who can "take an unofficial look." The engineer provides an oral "all-clear," and the Subcommittee recommends moving forward. The Board approves the project, and you, as General Counsel, oversee negotiation of a sophisticated development agreement.

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Part 1: The Deal and the First Red Flag (cont.)

At the groundbreaking, within your earshot, Sarah thanks the engineer for easing her concerns about "the old rumor." The engineer responds that he was "happy to do a solid for his partner," and that he and Tom "have been working together on deals for years, and both their wallets appreciate it."

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Spotting the Issues

- What are your top 2–3 concerns right now?
- Who is your client in this situation, practically speaking?
- Do you escalate immediately or investigate first?
- What facts do you need before acting?

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Knowing the Rules

- **Duty of Care:** To ensure prudent use of assets, including financial resources, human resources, and goodwill
- **Duty of Loyalty:** To act in the best interests of the organization, and to recognize and disclose any conflicts of interest
- **Duty of Obedience:** To ensure institutional compliance with law and regulation and trustee compliance with same, and with institutional bylaws/charter/articles

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I'm not a Board Member!
What am I supposed to do with this?

Model Rule* 1.13: Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

****** Model Rules cited herein excerpted.*

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Part 2: Warning Signs and Internal Pressure

You speak to the Board Chair and the President about what you heard at the celebratory ground-breaking. You agree on next steps to address Tom's conflict of interest, but take no further action with respect to the soil erosion issue, reasoning that, aside from the conflict issue, there is no clear basis to question the engineer's conclusions.

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Part 2: Warning Signs and Internal Pressure (cont.)

Construction continues apace, with only one small incident of contained damage to the foundation of a building adjoining the parcel. The owner investigates and determines that the damage was attributable to a soil erosion issue resulting from Midstate's development, of which the developer denies any knowledge. Midstate's Assistant Director of Risk and Insurance notifies Midstate's insurer of the incident as a matter of course, and when asked in a follow-up communication from the insurer whether there was any prior knowledge of the soil erosion problem says – truthfully, in light of her limited knowledge – that there was not.

Part 2: Warning Signs and Internal Pressure (cont.)

You raise concerns with the Board Chair and President about this statement, and they tell you to "stay in your lane," "don't over-think it," and take no further action. You are uncomfortable but unsure whether this rises to the level requiring further escalation.

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Spotting the Issues

- Has this become a legal issue, not just a business issue?
- Are you at risk of assisting a misrepresentation?
- Do you have an obligation to revisit the soil issue?
- How do you respond when leadership tells you to "stay in your lane"?

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Knowing the Rules

Model Rule 4.1: Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) 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 Rule 1.6, [Confidentiality of Information].

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Knowing the Rules

Model Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation....

Knowing the Rules

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(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

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Knowing the Rules

Model Rule 2.1: Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Part 3: Litigation, Privilege, and Exposure

Times have gotten tough for Midstate. The owner of the neighboring parcel has sued both Midstate and the developer. The developer proposes a litigation cooperation agreement without fully addressing potential conflicts or privilege implications. The President and Board Chair are eager to do so, as they think this will "save money" and "we're all on the same side." You raise concerns about the non-disclosure of the soil erosion "rumor," engineer's oral report, and identified conflict of interest, as well as the Assistant Director's statements to the insurer.



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Part 3: Litigation, Privilege, and Exposure (cont.)

Outside counsel, a transactional lawyer brought on to work on the deal, tells you not to worry and they “can handle it” because “it will likely settle anyway.” Feeling troubled, you check your email, and there is correspondence from counsel for the neighbor, who has apparently told their attorney that Midstate must have known about the soil erosion problem because Sarah is on the Board, and “would have heard all about it.” You are increasingly concerned about your own ethical obligations.

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Spotting the Issues

- Can you and prior counsel continue in this matter?
- Are there conflicts between the institution and individuals?
- What are the risks of entering a cooperation agreement? Are you actually on the "same side?"
- What happens to privilege when sharing information with the developer?
- Do you need separate counsel?

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Knowing the Rules

Model Rule 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Knowing the Rules

Model Rule 3.3: Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

Knowing the Rules

Model Rule 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized…or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

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Model Rule 1.7: Conflicts of Interest

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

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Spotting the Issues: Opposing POV

If I were opposing counsel in this case, I would:

- Use the engineer relationship to argue undisclosed conflicts
- Use the "unofficial" report to argue breach in duty of care
- Use internal discussions to challenge credibility
- Focus on what was known and when
- Test privilege boundaries aggressively

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Spotting the Issues: Back to Our Side

If I were Midstate's General Counsel:

- What would I do now?
- What would I have done differently?

Knowing the Rules

Navigating Ethical Issues in Active Litigation:
Ethics Takeaways

1. When an organization is the client, you have an obligation to act in the best interest of the institution, including going up the ladder when necessary (Model Rule 1.13).
2. You cannot ignore facts that may make a statement misleading, even if you did not personally make the statement (Model Rule 4.1).
3. You must allow the client to make decisions regarding the objectives of the representation, but these must never include criminal or fraudulent conduct (Model Rule 1.2).
4. If you do not have the knowledge or skill necessary to handle a matter as it changes shape, you need to make sure your client is being taken care of by someone who does (Model Rule 1.1).
5. Not correcting a false statement to the tribunal is the same as making one to begin with (Model Rule 3.3).

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Questions?

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