BY JOHN F.X. PELOSO AND BEN A. INDEK

Ethical Minefield: Multiple Representation in Government Probes

In a recent decision, the U.S. Court of Appeals for the Fourth Circuit rejected an argument by three former AOL Time Warner (AOL) employees that interviews between them and AOL lawyers during an internal investigation were subject to their individual attorney-client privilege.

The case is interesting because it naturally leads to a discussion of the issues that arise when a lawyer seeks to have the ability to represent both a corporate client and its employees in a governmental investigation.

John F.X. Peloso

Ben A. Indek

'In re Grand Jury Subpoena'

In re Grand Jury Subpoena, 415 F3d 333 (4th Cir. 2005), concerned events that started in March 2001 with an internal investigation of facts, not relevant to our discussion, but which implicated possible violations of law. Three employees were interviewed separately by AOL inside and outside counsel and each was advised that the lawyers represented AOL, that the interviews were privileged but that the privilege belonged to AOL, which also could waive it. The lawyers also told one of the employees that they "could" represent him as well "as long as no conflict appeared," and another that "we can represent [you] until such time as there appears to be a conflict of interest…but the attorney-client privilege belongs to AOL and AOL can decide whether to keep it or waive it."

Several months after the commencement of the internal investigation, the Securities and Exchange Commission (SEC) began an investigation of the matter. At least two of the three individuals testified before the SEC staff represented by their own counsel and declined to testify about their AOL interviews asserting that, at the time, they thought the AOL lawyers represented them as well as AOL and that each of them had an individual attorney-client privilege.

Subsequently, AOL waived whatever privilege it had to the interviews and agreed to produce memos of these interviews in response to an SEC subpoena, which the three employees moved to quash. The District Court denied these motions, holding that the employees failed to show that they enjoyed a client relationship with the AOL lawyers. The Circuit Court affirmed, finding the District Court's view of the facts appropriately supported by the evidence. Essentially, the court agreed there was no evidence of a mutual understanding between the AOL lawyers and the employees that an individual client relationship existed. The court accepted the distinction between "we could" or "we can" represent you and "we do" represent you, regarding the former phrases as simply hypothetical.

But the most interesting part of the decision is a dictum where the court said, "If there was any evidence that the investigating attorney had said 'we do represent you,' then the outcome of this appeal might be different." Expanding on that hypothetical, the court said:

> It is a potential legal and ethical minefield. Had the investigating attorneys, in fact, entered into an attorney-client relationship with appellants…they would not have been free to waive the appellants' privilege when a conflict arose…they could not have jettisoned one client in favor of another. Rather, they would have had to withdraw from all representation and to maintain all confidences. Indeed, the court would be hard pressed to identify how investigating counsel could robustly investigate and report to management or the board of directors of a publicly-traded corporation with the necessary candor if counsel was constrained by ethical obligations to individual employees.

This scenario, which is not uncommon today, raises a number of questions in connection with multiple representations in governmental investigations: one, under what circumstances can a lawyer represent both the corporation and one or more of its employees; two, if a multiple representation is undertaken, does the employee then have a prospective personal attorney-client privilege and control its waiver; and three, what considerations must be addressed to insure that a prospective waiver by the employee is effective to enable the lawyer to continue to represent the corporation when the interests of the clients diverge.

Representing Corporation and Employee

• ***When Can a Lawyer Represent Both the Corporation and the Employee?*** This subject is treated in Canon 5 of the New York Code of Professional Responsibility and related Ethical Considerations (EC) and Disciplinary Rules (DR). The subject is crystallized in DR 105, which essentially says that a lawyer may undertake multiple representations if a "disinterested lawyer" would believe that the lawyer can competently represent the interest of each client and each consents after full disclosure of the implications, the advantages and the risks.

In June 2004, the Association of the Bar of the City of New York issued an opinion directly addressing multiple representation in government investigations, stating it was aware of no other ethical opinion on the subject. See The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Formal Opinion 2004-02, available on the Web at http://www.abcny.org/ethics/eth2004-2.html. The opinion is most helpful in working through the relevant code provisions, but leaves the reader with the view that multiple representations in governmental and internal investigations really is an "ethical minefield."

Before a multiple representation can be undertaken, the lawyer must apply the "disinterested lawyer" test in DR 105(c). A disinterested lawyer is defined in the opinion as "an objective, hypothetical lawyer whose aim would be to give a client the best advice possible about whether the client should consent to a conflict or potential conflict." It is almost a given in today's regulatory climate, that if an employee is even tangentially involved in the facts under investigation, there is the potential for conflict.

The opinion recognizes that the disinterested lawyer's analysis turns on a number of factors: the spe-

John F.X. Peloso *is senior counsel and* **Ben A. Indek** *is a partner at Morgan, Lewis & Bockius.*

Continued on page 7

Continued from page 3

cific knowledge of the employee, the law and regulations implicated and the perceived scope of the government investigation. Obviously, to make this determination requires obtaining facts—usually from the employee.

It is clear that in any initial interview, without facts, the lawyer cannot offer to represent the employee at that stage and should, as the opinion recognizes, state that he represents the corporation alone which owns and can waive the attorney-client privilege. These statements cannot be ambiguous without seriously disadvantaging the employee (as the Fourth Circuit case demonstrates) and the corporation, as Footnote 5 of the Bar Association opinion shows. Nor, says the opinion, should the lawyer in the initial interview even advise the employee whether he should consult separate counsel because to do so may disadvantage the corporate client under EC 5-18.

Thus, in the initial interview, a lawyer cannot safely offer the potential for multiple representation nor the comfort of any kind of individual privilege or confidentiality other than under the umbrella of the corporate privilege, which may be cast aside by the corporate employer if it chooses to do so in its own best interest. With government prosecutors routinely expecting a privilege waiver as evidence of cooperation, that scenario today is more than likely.

Disclosure, Consent

If the interviews proceed and counsel concludes that the situation passes the disinterested lawyer test, then the code requires that there be consent by both the corporation and the employee after full disclosure of the implications, the risks and the advantages to multiple representation by one lawyer. Full disclosure and informed consent raises several difficult issues:

- To begin with, the analysis should be viewed through the prism EC 5-15, which requires that all doubts should be resolved against the propriety of the multiple representation.
- In governmental investigations, because the corporate client will often have a strong interest in negotiating a settlement at the end of the investigation, the individual will have to weigh carefully whether it is likely that his interest may differ from the corporate strategy, thus requiring the corporate lawyer to withdraw, an event that could disadvantage the individual at that late stage.
- Although there are obvious advantages to both the corporation and the employee, e.g., avoiding or limiting expense, mutual knowledgeable counsel, avoiding the suggestion of division of interest, the risks may be considerable. For example, if a conflict should arise that was not foreseen (and not effectively dealt with in a prospective waiver), the corporation's counsel may not be able to continue to represent the corporation without the employee's consent, and may be forced to withdraw from all representation in the matter.
- There is a potential loss of credibility with the government lawyers because the corporate lawyer may not be completely free to report facts to the government without the consent of the employee/client.
- The government may regard with suspicion testimony of employees represented by corporate counsel, a danger to the employee, who may be seen as under the control of the corporate counsel; and to the corpo-

ration, who may be seen (albeit without justification) to be paying for favorable testimony.

- It is not entirely clear whether, and under what circumstances, an employee in a multiple representation may enjoy his own privilege and there could be complications in whether it is in the best interest of the employee for his lawyer to report to the corporate employer incriminating facts learned after the commencement of the dual representation.
- Absent an effective prospective waiver, there may be complications with corporate counsel complying with various corporate reporting requirements when he is simultaneously representing an employee whose interests may not be served by such disclosures.

Many of these issues might be resolved in a number of ways. One would be to have shadow counsel representing the interests of the employee and available if a conflict should actually arise or to counsel the employee on other matters that may present themselves during the course of the representation. The opinion recommends this.

Another is a prospective waiver executed by the employee, which not only waives any potential conflict but would permit corporate counsel to withdraw and continue to represent the corporation if an actual conflict should arise. The opinion observes that generally there is no ethical bar to this but that it should be in writing. However it does advise that, to be effective, there must be full disclosure perhaps to the same extent as would occur with a concurrent waiver, where the parties would have all the facts before them before making a waiver decision. While the opinion notes that this may be a difficult standard to meet (because at the outset of the investigation, when the waiver should be considered, the parties may not be able to determine all the facts nor anticipate what will come out as the investigation progresses), the lawyer can do so by advising the client of the types of future adverse representations that counsel envisions, the kinds of matters that may present conflicts and the measures that will be taken to protect the client should such a conflict arise. The opinion also notes that even if the prospective waiver meets these standards, the lawyer must revisit the issues at the time the actual or potential conflict arises.

Conclusion

The City Bar Association opinion is a helpful guide in working through the first issue—when can multiple representation be undertaken, and the Fourth Circuit illustrates some of the pitfalls that can occur in any representation (in connection with an internal investigation or a governmental investigation) when there exists some ambiguity about counsel's role.

The City Bar Association opinion suggests that, absent some clear understanding to the contrary, if multiple representation is undertaken, the individual client at that point or perhaps even in the discussion whether to undertake it, may have his own attorney-client privilege and even if the dual-client lawyer withdraws later on, he may be bound to keep confidences shared by the employee after the multiple representation is undertaken. The Fourth Circuit opinion would seem to support this view.

Finally, although prospective waivers can be helpful and effective, they must be drawn with precision to satisfy the disclosure issues highlighted by the Bar Association opinion and should be re-evaluated as the investigation proceeds to monitor for the potential that the original circumstances that allowed for multiple representation may have changed.