Q&A

LAWYER LIABILITY AND ETHICS

Knowing Who Your Client Is—Sometimes Harder Than It Seems

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Representing individual clients rarely causes confusion to attorneys about who precisely their client is. However, attorneys who represent institutional, private or government clients may run into situations where they have to determine whether an employee or representative of the client can speak for the client.

When your client is a legal entity, like a corporation, government entity, or a nonprofit organization, you will be working closely with representatives of that organization. It is important to make sure those representatives know that your duty is to the corporation or entity and not to the representative individually. If the representative believes you are his or her personal attorney, you may find yourself in a conflict situation.

The State Bar of Arizona Ethics Committee held in Ethics Opinion 02-06 that at attorney should include the nature of the representation in the engagement letter with the entity and should also regularly remind entity constituents (meaning anyone who works for the organization or holds an interest in it) that the attorney is not counsel to these individuals, but rather is the attorney to the organization. Comment 11 to ER 1.13 reiterates this important consideration and suggests that the attorney might even need to advise these individuals to retain their own counsel, if necessary.

Another situation that might arise is where an attorney discovers that one or more of the constituents in an entity is engaging in conduct that harms or may harm the entity. For example, if an attorney discovers a constituent embezzling company money, the attorney has a duty to the entity client under ER 1.13(b) to act in the client's best interest, which in that case likely means reporting the wrongdoing to the decision-makers in the entity.

If the employee's conduct does not necessarily cause harm to the entity client, the attorney's duty might differ. Comment 4 to ER 1.13 explains that the attorney may first counsel the constituent to reconsider the course of conduct. If the attorney reasonably thinks the constituent will change his or her behavior after counseling, the attorney may choose to meet with that individual and give additional guidance before possibly reporting the matter to higher powers. If, despite the counseling, the constituent persists in the harmful behavior, the attorney should then report the behavior.

If the client-decision makers are the individuals participating in wrongdoing that amounts to criminal conduct, the attorney may have a duty to report the wrongdoing to law enforcement, in order to protect the entity client. ER 1.13(c) allows attorneys, under certain circumstances, to do that without the fear of violating ER 1.6.

However, for all other scenarios not including the threat of criminal conduct, ER 1.6 and the attorney-client privilege are still applicable, and the attorney cannot break the entity client's confidences. It is imperative to explain to entity client representatives that communications are protected by the attorney-client privilege and are client confidential information and should not be shared with anyone outside the organization. However, the representatives should also know that anything they tell the attorney with regards to the entity will be shared with other client entity representatives for decision-making purposes.

Good communication marks successful attorney client relationships, whether with individual clients or entity clients. As an entity's attorney, attorneys must communicate to the client representatives: (1) that you, as the attorney, represent the entity and not individuals employed by or associated with the entity, (2) that entity constituents have the right to their own counsel if they believe their interests are or may be adverse to the entity, (3) that any information the constituents give to you as the entity's attorney is not confidential within the entity, and (4) any information you give them may not be shared with anyone outside the entity in order to preserve the attorney-client privilege. ■

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Attorneys Sought to Supervise Qualified Law School Graduates Under Supreme Court Rule 39 and Admin Order 2020-80

In May, Administrative Order 2020-80 was issued in response to Governor Doug Ducey declaring a statewide public health emergency:

Due to concern for the spread of COVID-19 in the general population, the Governor of the State of Arizona has declared a statewide public health emergency pursuant to A.R.S. § 26-303 and in accordance with A.R.S. § 26-301(15).

On April 6, 2020, the Supreme Court entered "Order Amending *Rule 39 of the Arizona Rules of the Supreme Court on an Emergency Basis" (the "Order"). Among other things, the Order authorized the limited practice of law by law graduates upon the individual meeting certain conditions.

One of the conditions is that the law graduate sit for the first Arizona uniform bar examination for which the law graduate is eligible (Rule 39 (c)(5)(G)(vi)). Arizona is scheduled to administer the uniform bar examination on July 28 and 29, 2020.

The Court understands that some eligible law graduates may have concerns about sitting for the July 2020 bar examination given the current health emergency. While law graduates will eventually have to decide when to take the bar exam or lose their eligibility under this rule, a temporary exception to this specific Rule 39 condition is warranted.

Therefore, pursuant to Article VI, Sections 3 of the Arizona Constitution,

IT IS ORDERED that:

(1) A law graduate, who is eligible to sit for the July 2020 bar examination and who otherwise satisfies the requirements of Rule 39(c)(5)(G), may continue the limited practice of law as authorized by Rule 39(c)(5)(G) provided the law graduate sits for their first uniform bar examination no later than February 2021.

(2) To continue the limited practice of law if the law graduate does not sit for the July 2020 bar examination, the law graduate must file a notice with the Clerk of the Supreme Court and the Committee on Examinations prior to July 28, 2020. The notice shall state that because of concerns related to COVID-19, the law graduate has elected not to sit for the July 2020 uniform bar examination and intends to sit for a uniform bar examination no later than the February 2021.

(3) No other provision of Rule 39 as adopted by the Order is modified by the terms of this Administrative Order.

Attorneys and law firms interested in supervising a law graduate under the court rule are encouraged to email their name, law firm name, and preferred contact information to the MCBA at lwilliams@maricopabar.org. Law graduates interested in practicing under the court rule are encouraged to attach their resume to an email with their name and preferred contact information to the same email inbox. The MCBA will forward graduate inquiries to participating attorneys.

**Rule 39 can be found at govt.westlaw.com/azrules/*

The Ahmaud Arbery Shooting

continued from page 1

so in Arizona, you can probably count on Reckless Driving, A.R.S. § 28-693, as also being a "misdemeanor amounting to breach of the peace" with regard to a citizen arrest made pursuant to A.R.S. § 13-3884.

Georgia's citizen's arrest statute, by contrast, makes no distinction with regard to the type of (***non***-felony) offense observed by the citizen making the arrest, where Arizona does (it must be a "breach of the peace" misdemeanor.)

Similar to Georgia's statute, the latter part of Arizona's statute infers that the citizen knows that (1) a felony has "*in fact*" been committed, ***AND*** (2) that the citizen has reasonable grounds to believe that the arrested person did it. That is a lot of presumption for the citizen making an arrest, and therein lies the ultimate danger to the citizen who makes that decision to act.

Regardless of whether the citizen making the arrest is in Georgia or Arizona, that citizen ***BETTER*** be right! As the McMichaels have found out, if the citizen making the arrest is wrong, or if his or her conduct does ***NOT*** fit the specific requirements of the citizen's arrest statute, the citizen opens themselves up for criminal prosecution by the State as well as to civil remedies available to the wrongly arrested person (in other words, the citizen making the arrest can have their pants sued off of them in civil court). ■

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