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AVOID GETTING BETWEEN A ROCK AND A HARD PLACE: DON'T BECOME A CLIENT'S SURROGATE IN COMMUNICATING WITH THE GOVERNMENT

By David F. Axelrod and Adam M. Galat[1]

Sometimes, even seemingly innocuous acts can cause intractable problems. In one recent tax case, *United States v. Matsa*, S.D. Ohio No. 09-297, 2010 WL 4117548 (Oct. 19, 2010), a simple letter from an attorney to the government concerning a records custodian's document production caused the lawyer's disqualification and exposed him to criminal prosecution.

It is well known that a corporate custodian cannot resist a subpoena for corporate records on Fifth Amendment grounds, even if they incriminate the custodian personally, no matter how small the corporation. *See Braswell v. United States*, 487 U.S. 99, 102 and 117, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988) (subpoena to the president, sole shareholder and only individual with authority over the corporation's affairs). Corporations are artificially created entities that have no Fifth Amendment privilege. *Id.* at 102, *citing Bellis v. United States*, 417 U.S. 85, 88, 94 S.Ct. 2179, 2182, 40 L.Ed.2d 678 (1974). When a custodian responds to a subpoena for corporate records, he acts in a representative rather than a personal capacity. *Braswell* at 110.

Issues surrounding document production by a corporate custodian may be fraught with peril. No attorney wants to have a client – especially one with any exposure at all – actually

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appear before a grand jury, even if just to authenticate corporate records. An attorney may therefore be tempted to intercede in the hope of avoiding such an appearance. This may include an attorney delivering subpoenaed records to the prosecutor or, as in the case discussed below, providing information about a client's inability to produce certain records. Providing this sort of assistance should be handled with great caution, lest it cost the client his or her choice of counsel and expose the attorney to a risk of prosecution.

Matsa illustrates some of the risks. The case resulted from a subpoena *duces tecum* issued to attorney Aristotle Matsa as custodian of records for specified business entities and individuals. *Id*. at *1. In response, Matsa's attorney sent a letter to the government explaining that Matsa was not a custodian for the majority of the entities listed in the subpoena, and neither possessed nor controlled their records. *Id*.

Matsa was later indicted for a smorgasbord of offenses, including obstructing the administration of the Internal Revenue Laws (18 U.S.C. §7212(a)), aiding and assisting in the preparation of false tax returns (26 U.S.C. §7206(2)), failing to file a report of a foreign bank account (31 U.S.C. §§5314 and 5322(b)), conspiring to commit offenses against the United States (18 U.S.C. §371), witness tampering (18 U.S.C. §1512(b)), making a false statement to a the government (18 U.S.C. §1001) and obstructing justice (18 U.S.C. §1503(a)). The letter formed the basis of the conspiracy and obstruction counts of the indictment, which alleged that Matsa conspired to obstruct and obstructed justice by virtue of the letter. *Id*. at *2.

Subsequently, the government moved to disqualify Matsa's attorney based upon the attorney's involvement in drafting the letter. The court granted the motion, citing multiple grounds.

The court was first concerned about the obvious potential for the lawyer to have testified in support of an advice of counsel defense. Additionally, the government reserved the right to call the lawyer, even if Matsa elected not to do so.[2] *Id.* at *3. The court was also concerned about the potential for the lawyer's witness examinations and argument to have become, in effect, unsworn testimony that was not subject to cross-examination. *Id.* at *4-5, *citing United States v. Locascio*, 6 F.3d 924, 933 (2d Cir.1993). Because of his involvement in crafting the letter, a jury might also have connected the lawyer to conduct charged in the indictment. *Id.* at *5.

Another consideration was that the lawyer's personal involvement might have impaired his performance as advocate. For instance, he might have been constrained from making certain arguments on his client's behalf because of his own involvement. He might also have been tempted to minimize his own conduct at his client's expense. 2010 WL 4117548 at *5. *See also United States v. Wilson*, E.D. MI No. 10-20581, 2011 WL 740200 at *10-11 (Feb. 24, 2011) (attorney disqualified in a criminal case because of his lengthy representation of businesses involved in the case), *citing Matsa* and *Locascio* (which it described as the "preeminent case on the unsworn witness issue").

The court found that any of these scenarios would have risked undermining the public's perception of the integrity of the proceedings, and might have impaired the fairness of the trial.

[2] The government might have argued that Matsa gave false information to the lawyer, intending that it be repeated to the government. If so, otherwise privileged attorney-client communications about the letter might have become fair game under the "crime-fraud" exception to the attorney-client privilege. *See, e.g., United States v. Jacobs*, 117 F.3d 82, 87 (2d Cir. 1977); *United States v. Kerik*, 531 F. Supp.2d 610, 617 (S.D.N.Y. 2008); *United States v. Lopez*, S.D.N.Y. No. 97-1191, 1998 WL 142338 (Mar. 27, 1998). Generally, the exception permits testimony about otherwise privileged communications that were intended "to facilitate or conceal ongoing or contemplated criminal or fraudulent activity." *Kerik* at 617, *citing In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995). It may apply even where the attorney is an unwitting participant in the criminal activity. *Id., citing In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983*, 731 F.2d 1032, 1038 (2d Cir. 1984).

Additionally, allowing the lawyer to serve a dual role would have violated Ohio R. Prof. Conduct 3.7, which prohibits attorneys from serving in that dual capacity. *Id*. at *2-3.[3] Matsa, however, argued that disqualification would cause substantial hardship, which is a recognized exception to disqualification under Ohio R. Prof. Conduct 3.7(a)(3).[4] Despite the lawyer's lengthy representation of Matsa, and the historical knowledge acquired during that representation, the court found that disqualification, while inconvenient, would not cause substantial hardship. *Id.* at *3-4. *See also, Wilson,* 2011 WL 740200 at *10-11. *But see United States v. Cardin*, E.D. Tenn. No. 1:11-CR-93, 2012 WL 2906693 at *5 (July 16, 2012) (motion to disqualify denied despite "serious potential for conflict at every stage of the trial" because "maintaining current counsel [was] likely both easier and more fair to Cardin than compelling him … to obtain new representation").

Although Matsa apparently did not offer a conflict waiver, it is doubtful whether, had he done so, it would have been accepted. Courts are not required to accept such waivers because the question of disqualification implicates the integrity of the process, as well as the Sixth Amendment. *Id.* In rejecting them, courts often cite the "whipsaw" nature of such waivers: "If a trial court disqualifies counsel, [the] defendant will argue … a violation of his Sixth Amendment right to counsel of his choice. If a trial court refuses to disqualify an attorney, a defendant may later attempt to raise an ineffective assistance of counsel claim based on conflict

[3] Most states that have adopted the ABA Model Rules of Professional Conduct have rules the same as or similar to Ohio's. For instance, states that have adopted Rule 3.7 ("Lawyer as Witness") include Florida, New York, Massachusetts, Illinois and Colorado.

[4] Each of the states listed in note 3 also has a "substantial hardship" exception. Among them, New York's rule is slightly different because it provides, "A lawyer shall not act as advocate *before a tribunal* in a matter in which the lawyer is likely to be *a witness on a significant issue of fact*" (emphasis added). Conversely, the other states' rules provide, "A lawyer shall not act as advocate *at a trial* in which the lawyer is likely to be *a necessary witness"* (emphasis added). California has not adopted the model rules, and while it has a "member as witness" rule codified as Rule 5-210, it does not have a "substantial hardship" exception, but generally allows attorney testimony with the "informed, written consent of the client."

of interest, asserting that his waiver was not knowingly or voluntarily made." *Wilson*, 2011 WL 740200 at *2, *citing Serra v. Michigan Dep't of Corrections,* 4 F.3d 1348, 1353-54 (6th Cir. 1993) and *Wheat v. United States*, 486 U.S. 153, 161-62, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). *But see Cardin*, 2012 WL 2906693 at *5 (waiver accepted despite "serious potential for conflict at every stage of the trial"). Concerns include a client's inability, while represented by the subject attorney, to knowingly and intelligently waive the right to present an advice of counsel defense. This is especially true at the pretrial stage, when the facts are typically unclear and the government's trial strategy unknown. *Wilson*, 2011 WL 7401200 at *6.

Drafting the letter presented greater risks to the lawyer than disqualification, however. Had the Government believed the lawyer knew the letter contained false information, he could have faced criminal prosecution under, among other statutes, 18 U.S.C. §1001(a)(3), which bars the use of false writings and documents in matters within the jurisdiction of the federal government.[5]

The court in *Matsa* emphasized its reluctance to disqualify the lawyer, who had, "in his usual custom, acted in a wholly professional manner,… made all necessary efforts to disclose all pertinent information, and … sought to advance the best interests of his client." 2010 WL 4117548 at *5. This reluctance may have been reflected in the court's taking a full eight months to decide the disqualification motion. Emphasizing that its decision was "in no part based on any improper conduct" by the lawyer, the court described its opinion as simply "follow[ing] a disagreement between the parties involving the limits of representation by an attorney who has knowledge of disputed facts." *Id.*

[5] Had this occurred, the lawyer would probably have been permitted to disclose otherwise privileged communications to defend himself. *See United States v. Amrep Corp*., 418 F.Supp. 473, 474 (1976), *citing Meyerhofer v. Empire Fire and Marine Ins. Co.*, 497 F.2d 1190 (2d Cir.1974) (attorney facing criminal charges may reveal necessary exculpatory information acquired through privileged communications with a client).

What should the lawyer have done instead of writing the letter? There are several obvious possibilities. For instance, the lawyer could have sought the government's agreement to have an alternate custodian produce the documents and attest to the completeness of the production, if such a custodian existed. *See generally*, *Braswell*, 487 U.S. at 116-17. The government might also have accepted a document production outside the grand jury, with an affidavit or cover letter from Matsa – not the lawyer – attesting to the completeness of the production. At worst, Matsa could have appeared before the grand jury, produced the records of which he was custodian, attested to the completeness of the production, and refused on Fifth Amendment grounds to answer further questions about his relationship to the subject entities or possession of other records. Under *Braswell*, the government could have made no evidentiary use of Matsa's individual act of production against him. 487 U.S. at 118.

Matsa demonstrates that even well intentioned conduct by highly reputable counsel may result in disqualification, despite a court's reluctance to take such drastic action. Counsel would therefore be well advised to exercise caution in making factual representations of any kind to the government that may appear to be a firsthand knowledge concerning a client or the facts of a case.