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The “Who Is the Client?” Question

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One of the key elements in analyzing conflicts is identifying who your client is in a given representation. Sometimes that task is easy: it's the single person sitting across the desk from you. But many times it's not. Physically or virtually there may be several people sitting across the desk from you—a family, business partners, a government agency or a corporate affiliate. The “who is the client?” question looms large in many situations because it tells us to whom we owe our duties of loyalty and confidentiality—and to whom we do not.

In this column we'll first look at the general rule for deciding whether an attorney-client relationship exists and then apply that rule in four contexts: corporations and their affiliates; partnerships; governmental entities; and insurance defense.

The General Rule. The general rule for determining whether an attorney-client relationship exists was set out in *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992).ⁱ The Supreme Court in *Bohn* outlined a two-part test. The first element is subjective: does the client believe that an attorney-client relationship exists? Or, as the Supreme Court put it: “The existence of the relationship ‘turns largely on the client’s subjective belief that it exists.’”ⁱⁱⁱ The second element is objective: is the client’s subjective belief objectively reasonable under the circumstances? Or, as the Supreme Court put it: “The client’s subjective belief,

however, does not control the issue unless it is reasonably formed based on the attending circumstances, including the attorney's words or actions."ⁱⁱⁱ

The Supreme Court in *Bohn* and other courts that have subsequently applied *Bohn*'s two-part test have emphasized that whether an attorney-client relationship exists is ultimately a question of fact.^{iv} A written engagement agreement that sets out the nature and scope of the relationship in detail will likely be dispositive on this issue. But many situations either do not involve written agreements or, even if they do, the written agreements may not be sufficiently detailed to conclusively answer the question. In that event, the existence or absence of an attorney-client relationship will be inferred from the parties' conduct as viewed through the prism of *Bohn*'s two-part test.

Corporations and Their Affiliates. As I write this, the proposed amendments to the Rules of Professional Conduct are pending before the Supreme Court. If adopted, the new rules will offer a significant clarification to the "who is the client?" question in the corporate context. New RPC 1.13(a) adopts the "entity approach" to corporate representation: a lawyer representing a corporation is deemed to represent the corporation rather than its individual shareholders or officers. This is the same tact taken by Section 131 of the Restatement (Third) of the Law Governing Lawyers and the ABA's Model Rules of Professional Conduct. The "entity approach" doesn't preclude joint representation of both the corporation and one of its constituent members, such

as an officer or director. But in those instances, any dual representation would be subject to RPC 1.7's multiple client conflict rules.

A related and often more difficult issue is whether representation of one corporate affiliate will be deemed representation of the entire "corporate family." There is no hard and fast rule. ABA Formal Ethics Opinion 95-390 (1995), which analyzes this issue in detail, suggests two measures that will weigh on the side of considering all elements of a corporate family to be the same for conflict purposes. First, if the client has informed the lawyer that the corporate family should be considered a unified whole, then it will generally be treated as such. Second, even absent such an agreement, a corporate affiliate may be treated as a member of a broader corporate family when it shares common general and legal affairs management. At the same time, such affiliate relationships are most often found to constitute a single client when control is exercised through majority ownership of the affiliate by the corporate parent.^v

Partnerships. Partnerships generally present the same "who is the client?" issues that corporations do. If approved, RPC 1.13(a) would adopt the "entity approach" in the partnership context, too, and would mirror the view taken in the ABA's Model Rules, ABA Formal Ethics Opinion 91-361 (1991) and Section 131 of the Restatement. Under that approach, the representation of a partnership will normally be limited to the entity and will not extend to the individual partners. A lawyer or law firm could jointly represent both a

partnership and one of its individual partners, but the joint representation would be subject to RPC 1.7's multiple client conflict rules.

Governmental Entities. The Washington RPCs in both their current and proposed amended form differ from the ABA Model Rules in a significant way in the area of governmental representation. Current RPC 1.7(c) and proposed RPC 1.13(h) generally limit the "client" in governmental representation (absent some other arrangement in writing) to the specific agency for which the work is being handled rather than the broader governmental entity of which the agency is a part.

Insurance Defense. Although not an organizational conflict as such, insurance defense is an area where lawyers frequently encounter the "who is the client?" question: the insured who is being defended, the insurer who is paying the bill for that defense, or both? States vary in their approach on this issue, with some saying that an insurance defense counsel represents both the insured and the insurer and some limiting representation to the insured only and treating the insurer as a third-party payor. Washington falls into the second group under *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 388, 715 P.2d 1133 (1986), and WSBA Formal Ethics Opinion 195 (1999). In Washington, therefore, an insurance defense counsel has only one client—the insured whose interests the lawyer is directly defending in the matter involved.

Summing Up. In some areas, such as insurance defense, the RPCs or cases draw a bright line between who a lawyer does and does not represent. In many other contexts, notably corporate affiliate representation, the line is much less distinct. Even with the adoption of RPC 1.13(a), the “who is the client?” question will remain a very fact-specific exercise. With any of these areas, however, lawyers can help answer that question by carefully defining the client in a written engagement letter and then handling the representation consistent with the engagement agreement.

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ⁱ See also *Teja v. Saran*, 68 Wn. App. 793, 795-96, 846 P.2d 1375, rev. denied, 122 Wn.2d 1008 (1993) (applying *Bohn*); accord *Oxford Systems, Inc. v. CellPro, Inc.*, 45 F. Supp. 2d 1055, 1059 (W.D. Wash. 1999) (also applying *Bohn*).

ⁱⁱ 119 Wn.2d at 363 (citation omitted).

ⁱⁱⁱ *Id.*

^{iv} *Id.* accord *Teja v. Seran*, *supra*, 68 Wn. App. at 795-96; *Oxford Systems, Inc. v. CellPro, Inc.*, *supra*, 45 F. Supp. 2d at 1059.

^v See also Restatement, *supra*, § 131, comment d at 367.