CHAPTER 5

IDENTIFICATION OF THE CLIENT IN ORGANIZATIONAL SETTINGS

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I. (§5.1) INTRODUCTION

This chapter looks at what is often called the “who is the client?” question. It lies at the heart of conflicts analysis because without multiple clients, by definition there cannot be a multiple client conflict. Determining who a client is in a given representation is also important from the perspective of minimizing the risk of civil liability because it tells the lawyer to whom the duties of loyalty and confidentiality are owing, and to whom they do not.
This chapter examines three facets of the “who is the client?” question. First, the general rule for determining whether an attorney-client relationship exists is set out. Second, the “who is the client?” question is then surveyed in several common organization settings: corporations and corporate affiliates, partnerships and trade associations, governmental entities, estates and trusts and insurance defense. Third, the related issue of who is a “represented party” in an organizational setting for purposes of RPC 4.2’s “no contact” rule is outlined.

In the organizational context, Oregon advanced in an important way with the adoption of the Rules of Professional Conduct in 2005. Before that time, Oregon did not have a specific professional rule dealing with representing entity clients. The adoption of the RPCs brought with it RPC 1.13, which provides specific guidance to lawyers operating in the entity context. Although Oregon did not adopt official comments to the RPCs, the comments accompanying the analogous ABA Model Rule from which RPC 1.13 is drawn offer useful insights for applying RPC 1.13.

Although this chapter focuses on Oregon law in addressing this issue, it also discusses parallel authority in the Northwest from Washington and Idaho and from Oregon’s other reciprocity partner, Utah.

II. (§5.2) GENERAL RULE FOR DETERMINING WHETHER AN ATTORNEY-CLIENT RELATIONSHIP EXISTS

In Oregon as in most jurisdictions nationally, determining whether an attorney-client relationship exists is defined by case law rather than the RPCs.

The general rule in Oregon for determining whether an attorney-client relationship exists was set out in In re Weidner 310 Or 757, 770, 801 P2d 828 (1990); accord OSB Formal Ethics Op 2005-46; Admiral Insurance Co. v. Mason, Bruce & Girard, Inc., 2002 WL 31972159 (D Or 2002) (applying Weidner). It is sometimes called the “reasonable expectations of the client” test and has two parts. The first is subjective: does the client subjectively believe that the lawyer is representing the client? The second is objective: is the client’s subjective belief objectively reasonable under the circumstances? Both elements of the test must be satisfied for an attorney-client relationship to exist.

In making this determination, “[a] formal agreement to pay a fee is not a prerequisite to the relationship.” In re Mettler, 305 Or 12, 18, 748 P2d 1010 (1988). Similarly, an attorney-client “relationship can be inferred from the conduct
of the parties.” *Id.* At the same time, “it is unlikely that a lawyer-client relationship will exist when neither the lawyer nor the “client” intend such [a] relationship. *Id.* at 20; see also *Lord v. Parisi*, 172 Or App 271, 280, 19 P3d 358 (2001) (fact that a lawyer prepared a document for his client that a nonclient also signed did not create an attorney-client relationship with, or other duties to, the nonclient).

PRACTICE TIP: Engagement letters provide an excellent venue for defining who the client is in a given representation. This is particularly important if the lawyer has initially met with more than one person as part of the background context of a representation and will only be representing one. Examples include multiple company founders, a developer and a property owner or several family members. Depending on the setting, polite “nonrepresentation” letters to those not being represented offer a useful supplement to an engagement agreement to let the nonrepresented parties know which side the lawyer is on. In the face of an engagement agreement with the client, conduct consistent with that agreement and, depending on the circumstances, nonrepresentation letters, it will be difficult for another party to assert that the lawyer was also representing him or her under the *Weidner* test. *See generally* Mark J. Fucile, “Starting Right: Using Engagement Letters as a Risk Management Tool,” 65 Oregon State Bar Bulletin 35 (July 2005).

RPC 1.18 deals with the related issue of prospective clients. Under RPC 1.18(a), a prospective client is defined as “[a] person who discusses with a lawyer the possibility of forming an attorney-client relationship with respect to a matter[.]” Even where an attorney-client relationship does not result, a lawyer is generally required to maintain the confidential information that the prospective client shared with the lawyer. *See RPC 1.18(b)-(d).*

PRACTICE TIP: The names of prospective clients should be entered in a lawyer’s conflict system so the lawyer can be alerted later to potential conflicts that may result from earlier meetings with prospective clients that did not result in attorney-client relationships. *See generally In re Knappenberger*, 338 Or 341, 108 P3d 1161 (2005) (discussing the need for law firm conflict checking systems); *accord Philin v. Westhood, Inc.*, 2005 WL 582695 (D Or 2005) (illustrating the need to enter prospective clients in a law firm’s conflict system).

III. THE “WHO IS THE CLIENT?” QUESTION IN SPECIFIC ORGANIZATIONAL CONTEXTS

A. (§5.3) CORPORATIONS AND CORPORATE AFFILIATES

Under RPC 1.13(a), a lawyer for a corporation generally represents the entity only and not its shareholders. Accord OSB Formal Ethics Op 2005-85; see generally Restatement (Third) of the Law Governing Lawyers (“Restatement”) § 96(1) (2000). In doing so, however, a lawyer represents a corporation through its authorized constituents such its directors, officers and employees. Id. RPC 1.13(a)’s “entity approach” is consistent with the application of the attorney-client privilege in the corporate setting. Under OEC 503(1)(a), “client” is defined to include corporations. OEC 503(1)(d), in turn, defines “representative of the client” to include “an employee, an officer or a director of the client” who occupies the “client” side of the attorney-client privilege.

COMMENT: On a related note, lawyers who serve as directors of client corporations need to be attuned to the interplay and the potential conflicts in their dual roles. See generally OSB Formal Ethics Op 2005-91 (discussing the role of lawyer-directors); ABA Formal Ethics Opinion 98-410 (1998).

The distinction between the entity and its constituent members can have important practical consequences for both. RPC 1.13(f), therefore, imposes a duty on corporate counsel to explain to corporate constituents that they represent the corporation only and not constituents as individuals.

PRACTICE TIP: If a lawyer is handling a matter where a corporate constituent might likely seek individual legal advice from the lawyer, such as in an investigation of potential wrongdoing within the corporation, the lawyer must explain the lawyer’s role as counsel for the corporation before conducting interviews with corporate personnel. Sometimes called “Mirandizing” in reference to Miranda warnings, an explanation of this kind can avoid having a corporate constituent believe that the lawyer is
representing the constituent personally, confiding personal confidential information to the lawyer and creating a resulting conflict for the lawyer.

In adopting the entity approach to corporate representation, RPC 1.13(g) does not preclude joint representation of both the corporation and one of its constituents. See also Restatement § 96 cmt h. In those instances, however, any dual representation would be subject to RPC 1.7’s multiple client conflict rules.

PRACTICE TIP: If the lawyer is asked to form a corporation by a group of investors, three general avenues are available to address potential conflicts. First, the lawyer may represent the entity to be formed. Second, the lawyer may represent one of the investors with the others either separately represented or unrepresented. Third, if the interests of the investors are aligned fully, the lawyer may represent the investors jointly. Which avenue works best in a given situation is a fact-specific question. In any event, however, the lawyer would be prudent to confirm precisely who the lawyer is, and is not, representing in a set of engagement and nonrepresentation letters. See generally OSB Formal Ethics Op 2005-123; Mark J. Fucile, “Keeping Company: Managing Conflicts When Representing Start-Ups in Good Times and Bad,” 65 Oregon State Bar Bulletin 15, 17 (April 2002).

Oregon recognizes a judicial exception to the entity approach to corporate representation. Under In re Banks, 283 Or 459, 584 P2d 284 (1978), the Oregon Supreme Court held that representation of a closely-held corporation wholly owned by either an individual noncorporate shareholder or a unified family will normally constitute representation of the shareholders as well. See OSB Formal Ethics Op 2005-85 (discussing the “Banks rule”). OSB Formal Ethics Op 2005-85 suggests, however, that there is no “reverse Banks rule:” “[T]here is no reason for a reverse imputation.” Accordingly, representation of a corporation’s shareholder should not automatically be deemed to also constitute representation of the corporation.

PRACTICE TIP: The Banks rule highlights the practical importance of clearly identifying clients in the initial engagement agreement with the client. Although the Banks rule is the “default” position in Oregon corporate representation, that can be modified by agreement with the client so that the lawyer will represent the corporate entity only. In the face of an engagement agreement limiting the representation to the corporation only and conduct on the lawyer’s part consistent with the engagement agreement, it would be
difficult for the shareholder to claim successfully later under Weidner’s “reasonable expectations of the client” test that the lawyer was representing both the corporation and the individual or family shareholders. See OSB Formal Ethics Op 2005-85.

Oregon law also recognizes the special circumstance of derivative litigation. In that context, the minority shareholder bringing the derivative suit claims to be doing so on behalf of the corporation. In re Kinsey, 294 Or 544, 555-56, 660 P2d 660 (1983). Where the conduct of directors, officers or majority shareholders are at issue, corporate counsel may have conflict under RPC 1.7 if the lawyer represents both the corporation and the directors, officers or majority shareholders whose actions are alleged in the derivative suit to have caused the corporation harm. Id.; see also ABA Model Rule 1.13, cmt 14.

Another difficult issue in the corporate setting is whether representation of one corporate affiliate will be deemed representation of an entire “corporate family.” Although Oregon has not addressed this issue, the ABA has in Formal Ethics Opinion 95-390 (1995). See also Restatement § 131, cmt d. ABA Formal Ethics Opinion 95-390 concludes that representation of one corporate affiliate might, but will not necessarily, be considered representation of a broader corporate family:

“It is the Committee’s opinion that the Model Rules of Professional Conduct do not prohibit a lawyer from representing a party adverse to a firm) represents, in an unrelated matter, another corporation that owns the potentially adverse corporation, or is owned by it, or is, together with the adverse corporation, owned by a third entity. The fact of corporate affiliation, without more, does not make all of a corporate client’s affiliates into clients as well. Nonetheless, the circumstances of a particular representation may be such that the corporate client has a reasonable expectation that the affiliates will be treated as clients, either generally or for purposes of avoidance of conflicts, and the lawyer is aware of the expectation.” Id. at 3.

As this passage from ABA Formal Ethics Opinion 95-390 implies, determining whether representation of one corporate affiliate will extend further up or down the family tree is very fact-specific. Formal Ethics Opinion 95-390 surveys a number of factors that would normally be taken into account. They include whether the affiliates are operated independently or in concert, whether they share common management personnel, and whether internal legal advice
comes from a central legal department or whether each affiliate handles its legal operations separately. On the broader question of common ownership, Formal Ethics Opinion 95-390 finds that even this factor is not necessarily dispositive:

“The fact that the corporate client wholly owns, or is wholly owned by, its affiliate does not itself make them alter egos. However, whole ownership may well entail not merely a shared legal department but a management so intertwined that all members of the corporate family effectively operate as a single entity; and in those circumstances representing one member of the family may effectively mean representing all the others as well. Conversely, where two corporations are related only through stock ownership, the ownership is less than a controlling interest and the lawyer has had no dealing whatever with the affiliate, there will rarely be any reason to conclude that the affiliate is the lawyer’s client. Id. at 10-11 (footnote omitted).


B. (§5.4) PARTNERSHIPS AND TRADE ASSOCIATIONS

Partnerships generally present the same “who is the client?” question that corporations do. See generally RPC 1.13(a); OSB Formal Ethics Op 2005-85 (discussing both partnerships and corporations); ABA Formal Ethics Op 91-361 (1991) (addressing partnerships in particular); Restatement §131, cmt a. The analytical framework for working through this question in the partnership context is generally the same as well:

• The representation of a partnership will normally be limited to the entity and will not extend as a matter of law to the individual partners.
• The converse is also true—representation of an individual partner will normally be limited to that individual only and will not be construed as extending to the partnership as a whole.

• A single lawyer, subject to the conflict constraints imposed by RPC 1.7, could in theory jointly represent both a partnership and one or more individual partners. *Id.*

Trade associations, too, are generally treated the same as corporations and partnerships in this context. *See generally* RPC 1.13(a); OSB Formal Ethics 2005-27 (addressing trade associations); ABA Formal Ethics Op 92-365 (1992) (discussing trade associations); Restatement § 131, cmt a.

As with corporations, the approach to partnership or trade association representation in Washington and Idaho is similar to Oregon. Washington did not adopt ABA Model Rule 1.13 when it moved to the RPCs in 1985. *See generally* Robert H. Aronson, “An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed,” *supra*, 61 Wash L Rev at 829-30. It has, however, generally approached this area from the entity perspective. *See generally* WSBA Legal Ethics Deskbook, § 10.3(2)-(3). The amendments to Washington’s RPCs currently pending before the Washington Supreme Court include a version of RPC 1.13 closely resembling the ABA Model Rule 1.13. Idaho adopted the current version of ABA Model Rule 1.13 when it updated its rules in 2004. Utah essentially did so as well when it amended its rules in 2005.

C. (§5.6) GOVERNMENTAL ENTITIES

Under RPC 1.13(a), the entity approach applies to governmental representation and the “client” is the governmental entity and not its constituent members. The often more difficult question in the governmental context is which agency or level of government a lawyer will be deemed to represent. OSB Formal Ethics Opinion 2005-122 frames both the clear issue and the imperfect answer:

“Within the context of the governmental entity, the client will sometimes be a specific agency, will sometimes be a branch of government, and will sometimes be an entire governmental level (e.g., city, county, or state) as a whole. ABA Model Rule 1.13 comment [9] (‘Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole.’). In essence, it is up to the lawyer and the government ‘client’ to define who
or what is to be considered the client, much as the process works in private-
side representations of for-profit entities.” Id. at 322 (footnote omitted).

PRACTICE TIP: The passage quoted from OSB Formal Ethics Opinion 2005-122 highlights the importance of defining the client in the initial 
engagement agreement. Another area of potential importance when a lawyer 
represents both government agencies and private clients before those 
agencies is what will be deemed by the parties to be sufficient adversity to 
constitute a conflict. Formal Ethics Opinion 2005-122 notes, for example, 
that representing a private client in litigation or a transaction with a 
governmental unit that the lawyer represents on unrelated matters would 
constitute a conflict under RPC 1.7. But, it also concludes that simply 
“appearing on behalf of a private party before a state agency which may 
adjudicate a matter between that private party and a third party would not, by 
itself, constitute representation adverse to a state.” Id. at 323. To the extent 
that there are areas where the governmental unit is willing to give advance 
consent to conflicts, obtaining such consent at the outset of the 
representation of the governmental client is the ideal time to do so. Id. at 324 (discussing advance waivers with governmental clients).

OSB Formal Ethics Opinion 2005-122 also notes that “[r]epresentation of a 
state does not constitute representation of political subdivisions of the state, and 
vice versa.” Id. at 322 n.2. Therefore, representation of the State of Oregon would 
not mean that a lawyer was deemed as a matter of law to also represent its counties. 
The same would apply to cities. Id. See generally ABA Formal Ethics Op 97-405 
(1997) (discussing governmental representation); Restatement § 97, cmt c 
(addressing client identity in the governmental context).

Washington differs in its approach by including a specific provision in its 
RPCs that generally limits governmental representation to the specific agency or 
unit that has retained the lawyer. This very useful provision is found at RPC 1.7(c) 
in the current Washington rules and will be at RPC 1.13(h) if the Washington 
Supreme Court adopts the amendments that are presently pending before it. Idaho 
has adopted both ABA Model Rule 1.13 and its comments. Comment 9 to Idaho 
RPC 1.13, therefore, generally adopts the entity approach to governmental 
representation and recommends clarifying in the initial engagement agreement 
precisely what unit or level of government the lawyer will be representing. Utah’s 
version of RPC 1.13 contains a specific provision—RPC 1.13(h)—adopting the 
entity approach to governmental representation.
D. (§5.7) ESTATES AND TRUSTS

Oregon law defines the lawyer’s client in the fiduciary setting: the personal representative in the estate context and the trustee in the trust context. See In re Phelps, 306 Or 508, 517, 760 P2d 1331 (1988); Roberts v. Fearey, 162 Or App 546, 552-56, 986 P2d 690 (1999); OSB Formal Ethics Ops 2005-62, 2005-119. OSB Formal Ethics Opinion 2005-62, in turn, notes that although the lawyer’s client in this context is, respectively, the personal representative or the trustee, the lawyer may still owe fiduciary duties to the estate, the trust and the beneficiaries involved. See also Roberts v. Fearey, supra, 162 Or App at 556-57 (discussing lawyer fiduciary liability to beneficiaries).


E. (§5.8) INSURANCE DEFENSE

Although not an organizational conflict issue as such, insurance defense is an area in which practitioners frequently confront the “who is the client?” question: the insured who is being defended, the insurer who is paying for that defense, or both? States vary in their approach to this issue, with some holding that an insurance defense counsel represents both the insured and the insurer and others limiting the representation to the insured only and treating the insurer as a third-party payor.

Oregon falls into the first category: the “default” position is that an insurance defense counsel in Oregon has two clients, the insured and the insurer. See OSB Formal Ethics Ops 2005-30, 2005-77 and 2005-121.

PRACTICE TIP: Although Oregon uses the “two client” approach in insurance defense, that can be modified by agreement so that the lawyer only represented the insured and not the insurer. See ABA Formal Ethics Op 96-
403 (1996); see also OSB Formal Ethics Op 2005-121 n. 3. Structuring the representation in this way would leave the lawyer free to offer the insured coverage advice without having a conflict with the insurer. At the same time, privilege should still apply to reports and other communications with the insurer under the “common interest doctrine.” See Interstate Production Cr. v. Fireman’s Fund Ins., 128 FRD 273, 280 (D Or 1989).


IV. (§5.9) THE “NO CONTACT” RULE IN THE ORGANIZATIONAL SETTING

Oregon’s “no contact” rule is found at RPC 4.2. A key question in applying the "no contact" rule in the organizational context is: who is the represented party? Or stated alternatively, if the corporation is represented, does that representation extend to its current and former officers and employees?

Oregon has a series of ethics opinions and decisions that have developed some relatively "bright line" distinctions. OSB Formal Ethics Opinion 2005-80 addresses corporate employees and OSB Formal Ethics Opinion 2005-152 does the same for governmental employees. Both Formal Ethics Opinions 2005-80 and 2005-152 set out four categories of employees and then define whether they are "fair game" or "off limits:"

Current Management Employees. Current corporate officers, directors and managers are swept under the entity’s representation and, therefore, are "off limits" outside formal discovery such as depositions. Applying the rule to corporate officers and directors is straightforward. Deciding who is a "manager" for purposes of the rule, however, can be more difficult: Formal Ethics Opinion 2005-80 notes that it is a fact-specific exercise and depends largely on the duties of the individual in relation to the issues in the litigation. See also OSB Formal Ethics Op 2005-144.

Current Employees Whose Conduct Is At Issue. Current employees whose conduct is at issue are treated as falling within the entity’s representation. Therefore, an employee whose conduct is attributable to the corporation will fall within the company’s representation. For example, if a company truck driver runs a red light, causes an accident, jumps out of the cab and yells "it’s all my fault," that
employee will fall within the company’s representation and will be off limits outside formal discovery.

Current Employees Whose Conduct Is Not at Issue. Current employees whose conduct is not directly at issue are generally "fair game." To return to the truck driver example, let’s add the twist that another company driver was following behind and both witnessed the accident and heard the admission. The second driver would simply be an occurrence witness and would not fall within the company’s representation.

Former Employees. Former employees of all stripes are "fair game" as long as they are not separately represented in the matter by their own counsel. The only caveat is that a contacting lawyer cannot use the interview to invade the former employer’s attorney-client privilege or work product protection. See Brown v. State of Or., Dept. of Corrections, 173 FRD 265, 269 (D Or 1997) (applying former DR 7-104(A)(1) in the entity context).

Washington and Idaho’s approach is generally consistent with Oregon’s, but with some variations. Their versions of RPC 4.2 are relatively similar to Oregon RPC 4.2. In Washington, however, the scope of employees who fall within the corporate counsel’s representation is somewhat narrower. In Wright v. Group Health Hospital, 103 Wn2d 192, 200-01, 691 P2d 564 (1984), the Washington Supreme Court drew a narrow circle of employees who fall within corporate counsel’s representation and generally limited it to those who are “speaking agents” under the Washington evidence rules, which would exclude line-level employees who do not have the authority to speak officially for the corporation. The explicit reliance on substantive evidence law in Wright has been interpreted such that in Washington federal court cases the broader federal evidentiary rule on party admissions would sweep line level employees whose conduct is at issue within corporate counsel’s representation. See Robert H. Aronson, The Law of Evidence in Washington 801-27 through 28 (4th ed 2004); see also Mark J. Fucile, “Who’s Fair Game? Who You Can and Can’t Talk to on the Other Side,” July 2005 Washington State Bar News at 36. Idaho, by contrast, adopted official comments to its version of RPC 4.2 that generally create the same four-layer hierarchy as in Oregon. See Idaho RPC 4.2, cmt 6. Utah has its own version of RPC 4.2 that contains a specific, and relatively narrow, definition of “control group” whose members fall within corporate counsel’s representation.