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U.S. District Court Highlights Importance of Defining Client Decision-Maker

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A recent decision from the U.S. District Court in Seattle highlights the importance of defining the client decision-maker when dealing with small, closely-held corporations. *Kische USA LLC v. Simsek*, 2016 WL 7212534 (W.D. Wash. Dec. 13, 2016) (unpublished), primarily involved claims by a closely-held apparel company against two former employees who left to start a rival company. One of the allegations against the former employees was that the plaintiff’s “chief executive manager,” who was one of the two who left to start the rival, had transferred a registered trademark from the plaintiff to the new firm. The plaintiff also sued the company’s outside lawyer who had assisted with the transfer for legal malpractice and breach of fiduciary duty.

The defendant lawyer moved to dismiss—arguing that he was simply following the instructions of the manager and that the manager had reasonably appeared to be acting within the scope of his authority. The Court agreed and dismissed the claims against the lawyer.

Kische is a “pleadings case”—one dismissed on the face of the complaint rather than following discovery and additional factual development. As such, the result is case-specific. But, it does offer a useful lesson to lawyers who work with closely-held companies that it is often prudent to define the person or group at

the client authorized to direct the lawyer. With *Kische*, the operating agreement involved defined the role of the “chief executive manager” and that was central to the Court’s view that the manager had apparent authority to direct the lawyer. In other circumstances, however, careful lawyers will define the client decision-maker in an engagement agreement. That will both provide a clear line for communication and will also confirm the client’s authority for the particular person involved to direct the lawyer’s activities. That will not necessarily eliminate issues about whether the client decision-maker was acting within the authority conferred and related questions of good faith. But, with what can often be a comparatively “flat” organizational structure in a closely-held corporation, it will at least define who at the client has authority to give directions to the lawyer.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar’s *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB Ethical Oregon Lawyer, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005,

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