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December 2006 OSB *Bar Bulletin Managing Your Practice* Column

Drawing a Bright Line: The "Who Is the Client?" Question

By Mark J. Fucile
Fucile & Reising LLP

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. This, in turn, has important consequences when assessing conflicts across a spectrum from regulatory compliance for bar discipline to civil liability for legal malpractice or breach of fiduciary duty because the duties of loyalty and confidentiality in most situations flow to our clients alone. 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 three common entity contexts: corporations and their affiliates; partnerships, joint ventures and trade associations ; and governmental entities.

With all of these entities, 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.

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 that party if the result is not to the nonclient's liking.

The General Rule

The general rule for determining whether an attorney-client relationship exists was set out in *In re Weidner* 310 Or 757, 770, 801 P2d 828 (1990).[1] 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, the Supreme Court noted in *In re Mettler*, 305 Or 12, 18, 749 P2d 1010 (1988), that "[a] formal agreement to pay a fee is not a prerequisite to the relationship." Rather, *Mettler* found that an attorney-client "relationship can be inferred from the conduct of the parties."[2] At the same time, the Supreme Court also noted in *Mettler* that "it is unlikely that a lawyer-client relationship will exist when neither the lawyer nor the 'client' intend such [a]

relationship."[3] Read in tandem, *Weidner* and *Mettler* underscore both the practical effect and the practical utility of the combination of a clear written engagement agreement with the client and nonrepresentation letters to any nonclients with whom the lawyer met preliminarily.

Corporations and Their Affiliates

The Oregon Supreme Court offered an important clarification to the "who is the client question?" in the corporate context when it adopted RPC 1.13 as a part of the switch from the Disciplinary Rules to the Rules of Professional Conduct in 2005. New RPC 1.13(a), which did not have a corresponding predecessor under the old DRs, 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 (2000) 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 individual 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.[4]

Oregon has an important 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. In analyzing *Banks*, Oregon State Bar Formal Ethics Opinion 2005-85 concluded, however, that (absent the Supreme Court speaking further to this point), there is no "reverse *Banks* rule." In other words, representation of a corporation's shareholder will not automatically be deemed to also constitute representation of the corporation. *Banks* also highlights the practical importance of clearly identifying who the client is in the initial engagement agreement. Although *Banks* 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.

Partnerships, Joint Ventures and Trade Associations

Partnerships generally present the same "who is the client?" question that corporations do under RPC 1.13(a) and OSB Formal Ethics Op 2005-85.[5] 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.

Joint ventures and trade associations are generally treated the same as corporations and partnerships in this context under 1.13(a) and OSB Formal Ethics Opinion 2005-27.[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."[7]

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."[8] 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.

Summing Up

In some areas, the RPCs, ethics opinions and case law draw a bright line between who a lawyer does and does not represent in an entity setting. In many other contexts, 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 all 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.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the

quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.

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[1] *Accord* OSB Formal Ethics Op 2005-46; *Admiral Insurance Co. v. Mason, Bruce & Girard, Inc.*, 2002 WL 31972159 (D Or 2002) (applying *Weidner*).
[2] *Id.*
[3] *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).
[4] *See also* Restatement, *supra*, § 131, cmt d at 367.
[5] Accord ABA Formal Ethics Op 91-361 (1991) (addressing partnerships in particular); Restatement §131, cmt a.
[6] *Accord* ABA Formal Ethics Op 92-365 (1992) (discussing trade associations); Restatement § 131, cmt a.
[7] *Id.* at 322 (footnote omitted).
[8] *Id*. at 322 n.2; s*ee also* ABA Formal Ethics Op 97-405 (1997) (discussing governmental representation); Restatement § 97, cmt c (addressing client identity in the governmental context).