fucile & reising | LLP

December 2019-January 2020 WSBA *NWLawyer Ethics & the Law* Column

All in the Family: Corporate Affiliate Conflicts

By Mark J. Fucile
Fucile & Reising LLP

> "*Affiliate*: A corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or sibling corporation."
> ~Black's Law Dictionary

One of the most challenging exercises in conflict analysis is whether a law firm's representation of a corporate affiliate creates a potentially disqualifying conflict with other members of the affiliate's "corporate family." On one hand, Comment 34 to Washington RPC 1.7, which is based on its ABA Model Rule counterpart, notes that "[a] lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary." On the other, ABA Formal Opinion 95-390 (1995), which despite its age remains a leading resource in this area, counsels that absent a definitive agreement between a firm and its client, the answer may turn largely on the extent to which the entities involved share common operational and legal affairs management.

The risk to law firms if they do not proactively address this with clients at the outset is that a court may do it for them later on a disqualification motion in a matter that the law firm is handling against a client's corporate affiliate. To lessen this ambiguity in an environment where corporations frequently have a wide variety of affiliates, law firms should focus on two key documents: their own

engagement agreements and outside counsel guidelines provided by corporate clients. Engagement agreements allow a law firm to define the client served precisely and can offer a counterweight to "boilerplate" outside counsel guidelines. Washington disqualification decisions offer important lessons on both the risk of doing nothing and the interplay between engagement agreements and outside counsel guidelines.

Doing Nothing

REC Solar Grade Silicon, LLC v. Shaw Group, Inc., 2010 WL 11561252 (E.D. Wash. Nov. 5, 2010) (unpublished), illustrates the practical risk of the "do nothing" approach. The defendant sought the disqualification of the plaintiff's lead law firm in a commercial dispute. For several years, the London office of the large law firm involved had represented a wholly-owned subsidiary of the defendant in the Washington litigation called Shaw Overseas (Middle East), Ltd. in an arbitration in Britain over a construction project in India. During the London arbitration, the law firm's lead British lawyer interacted with the parent Shaw Group's in-house counsel and executives who were managing the arbitration.

The arbitration proceedings in Britain were still underway when a dispute arose between REC Solar and the Shaw Group in 2009 over materials supplied on a construction project in Moses Lake. REC Solar contacted the Houston

office of the law firm to represent it in the Washington commercial dispute. The firm ran a conflict check, but it was limited to Shaw Overseas. Concluding there was no conflict, the law firm took the matter on and filed a lawsuit on behalf of REC Solar against Shaw Group in federal court in Spokane.

Shaw Group moved to disqualify the law firm under the current client conflict rule—Washington RPC 1.7.[1] In relevant part, Shaw Group argued that the law firm's representation of its subsidiary in the London arbitration—including its interaction with Shaw Group's in-house counsel and executives—meant that the firm had effectively taken on the representation of the corporate family as a whole.

The law firm relied on Comment 34 to RPC 1.7 noted above along with RPC 1.13(a) that generally defines a lawyer's client in the entity context as the entity involved. The court, however, applied the general test for whether an attorney-client relationship exists in Washington as outlined in, among others, *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992), that examines the subjective belief of the client and whether that subjective belief is objectively reasonable under the circumstances. The court found that Shaw Group's subjective belief that the law firm was representing it was objectively reasonable in light of the law firm's interactions with Shaw Group's in-house counsel and

executives in the London arbitration. Having concluded that the Shaw Group was a current client, the court disqualified the law firm.

In doing so, the court did not cite ABA Formal Opinion 95-390. The ABA opinion, however, is premised on a reasonable expectations test that is functionally equivalent to *Bohn* in Washington. *REC Solar* underscores that if a law firm does not take affirmative steps to define the client, a court may do it for the firm.

Engagement Agreements

One of the key benefits of an engagement agreement is providing a venue for defining who the law firm is—and is not—representing in a given matter. When a firm has framed an engagement along the lines of "We represent the XYZ company only in this matter," it is difficult for a corporate cousin to claim later (assuming the law firm acted consistent with the engagement agreement) that the other corporate family member reasonably believed that the law firm was also representing it. This goes to the heart of the definition of the attorney-client relationship under both *Bohn* and ABA Formal Opinion 95-390.

Avocent Redmond Corp. v. Rose Electronics, 491 F. Supp.2d 1000 (W.D. Wash. 2007), illustrates the power of an engagement agreement to control the

outcome in this context—albeit in a backhanded way. The Seattle office of a large law firm took on the representation of a high-tech company, OSA Technologies, that was a wholly-owned subsidiary of Avocent Corporation. Later, the law firm was retained to defend Rose Electronics in a suit by Avocent Redmond Corporation—which was another subsidiary of Avocent Corporation—that was pending in the federal district court in Seattle. Avocent Redmond moved to disqualify the law firm under RPC 1.7 for a current client conflict. Avocent Redmond argued that the firm had taken on the entire Avocent "corporate family" through its work for OSA.

The court in *Avocent Redmond* looked to *Bohn* and ABA Formal Opinion 95-390 to determine whether there was an attorney-client relationship between the law firm and the Avocent corporate family. Unlike *REC Solar*, the law firm's engagement agreement did define the client. Rather than narrowly limiting the client to the affiliate the law firm clearly represented, however, the law firm's engagement agreement gratuitously defined the client broadly: "OSA Technologies, Inc., a wholly owned subsidiary of Avocent Corporation, and its affiliates." Having cast the client to include the entire Avocent corporate family, the court held the law firm to its own engagement agreement and disqualified the firm.

The central lesson from *Avocent Redmond* is that courts applying the test for an attorney-client relationship under *Bohn* and ABA Formal Opinion 95-390 will look closely at any engagement agreement involved. This suggests that a narrowly tailored definition of the client—absent subsequent conduct to the contrary—will be respected just as the broader one in *Avocent Redmond*.

Outside Counsel Guidelines

In some instances, the attorney-client relationship is defined by a sophisticated corporate client rather than the law firm through what are often called "outside counsel guidelines" that are provided unilaterally by the client and are intended to govern how a matter is handled. *Atlantic Specialty Insurance Company v. Premera Blue Cross*, 2016 WL 1615430 (W.D. Wash. Apr. 22, 2016) (unpublished) offers a telling example.

The Portland office of a large Seattle-based law firm had opened a coverage case in the federal district court in Portland for an affiliate of OneBeacon Insurance Group, LLC. The law firm did not send an engagement agreement in the Oregon matter. Instead, it received a set of guidelines from the carrier involved that defined the client broadly to include "OneBeacon Insurance, and its specialty business segments." While the Oregon matter was still pending, the firm's Seattle office took on a coverage case in the federal district court in

Seattle for a long-time firm client against another OneBeacon affiliate—apparently missing the connection in its conflict check. The OneBeacon affiliate in the Seattle case moved to disqualify the law firm under RPC 1.7.

Like its counterparts in *REC Solar* and *Avocent Redmond*, the court in *Atlantic Specialty* looked to *Bohn* for the definition of the attorney-client relationship in Washington and also examined the factors identified in ABA Formal Opinion 95-390. The court noted the OneBeacon guidelines provided to the firm evidenced the belief that the firm was representing the entire corporate family and the fact that the firm dealt with a single internal unit within the parent that handled coverage litigation across its subsidiaries reinforced that view.

The court concluded that the firm's representation encompassed all of OneBeacon's corporate family and, as a result, disqualified the firm. In doing so, the court noted pointedly that the firm never tried to limit the scope of OneBeacon's guidelines through an engagement letter of its own: "At the end of the day . . ., this concurrent conflict could have been avoided entirely if . . . [the law firm] . . . had executed a formal engagement letter at the outset of the firm's representation of . . . [the affiliate in the Oregon litigation]—a new firm client—in the . . . [Oregon] matter."[2] Although an engagement agreement may not always trump outside counsel guidelines, it will at least offer the counterargument that

the parties progressed beyond the boilerplate guidelines to negotiate an understanding specific to the matter involved.

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, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.

---

[1] Federal courts in Washington apply the Washington RPCs under, respectively, Eastern District Local Civil Rule 83.3(a) and Western District Local Civil Rule 83.3(a). Although the determination of whether an attorney-client relationship exists is defined by substantive law rather than the RPCs, Washington's federal courts also typically apply Washington state appellate authority on this associated point. *See, e.g., Jones v. Rabanco*, 2006 WL 2237708 at *3 (W.D. Wash. Aug. 3, 2006) (unpublished).

[2] 2016 WL 1615430 at *13.