fucile & reising | LLP

December 2011 *Multnomah Lawyer Ethics Focus*

All in the Family: Conflicts in Closely Held Corporations

By Mark J. Fucile
Fucile & Reising LLP

When a lawyer or firm represents a corporation, the corporation is considered the client for conflict purposes under RPC 1.13(a). This rule holds true regardless of whether the corporation is big or small. When the corporation is closely held (regardless of size), however, lawyers can face unique conflict issues flowing from the oftentimes fundamental association between the corporation and its owners. In this column, we'll first examine the nuances of the "who is the client?" question in the context of closely held corporations. We'll then turn to the consequences that can befall lawyers who don't carefully delineate who their client is—and is not—in this setting.

Who Is the Client?

When Oregon moved to the RPCs in 2005, the new rules included RPC 1.13 that specifically addresses entity representation. RPC 1.13(a) makes clear that a lawyer or firm representing a corporation generally represents the entity only and not its constituents (even though the lawyer receives direction from, as appropriate, the corporation's board, officers or other management). Although new to our professional rules, the Oregon Supreme Court in *In re Campbell*, 345 Or 670, 681, 202 P3d 871(2009), noted that RPC 1.13(a) largely codified earlier decisional law.

Notwithstanding the clarity of the rule, there are two exceptions that warrant highlighting when representing closely held corporations. One is unique to Oregon and the other is not.

The "Oregon-centric" exception is the so-called "*Banks* rule" named for *In re Banks*, 283 Or 459, 584 P2d 284 (1978). In *Banks*, the Supreme Court concluded that for conflict purposes representation of a closely held corporation owned by a single individual or a small, unified family would also be considered representation of the individual or family. Therefore, as was the case in *Banks*, corporate counsel is faced with a significant conflict if a dispute arises between the corporation and the shareholder(s). Although *Banks* was decided under the former DRs, the Oregon State Bar in Formal Ethics Opinion 2005-85 (2005) observed that until the Supreme Court revisits this issue under the RPCs, *Banks* remains "good law." Ethics Opinion 2005-85 suggests that to avoid the "*Banks* rule," corporate counsel should clearly advise the individual shareholder or family (preferably in writing) that the lawyer or firm only represents the company and not the shareholders.

The more general exception is found in RPC 1.13(g). This provision allows corporate counsel to also represent an entity "constituent" such as an officer, director or shareholder as long as the dual representations are otherwise permitted by the conflict rules. For example, corporate counsel could do a will for the company president. The problem, however, is that if while the work on the

will is underway the company wants advice on firing the president, the lawyer has a conflict (that, from a practical perspective, is not likely to be waived even though the matters are unrelated). In other circumstances, a corporate officer may seek "informal" personal legal advice from corporate counsel. Even without a fee or a formal agreement, a lawyer may (under *In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990)) "inadvertently" turn someone such as the corporate officer into a client if the "client" reasonably believes that the lawyer is providing personal legal advice.

Consequences

As Ethics Opinion 2005-85 advises, it is often critical for corporate counsel to make plain precisely who the lawyer does (and does not) represent. If corporate counsel clearly defines who the lawyer represents (preferably in writing) and then acts consistent with that delineation, it will be difficult for a corporate "constituent" to claim later that the lawyer was also representing the constituent and has a resulting conflict. The consequences of failing to define the client are several and are not mutually exclusive. They all flow from the resulting conflict and range from regulatory discipline to disqualification to civil damage claims for breach of fiduciary duty.

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.