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Who Is the Client?
Representing Closely Held Corporations

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One of the most fundamental questions in law firm risk management is: "Who is the client?" The answer is often more difficult than the question when representing small, closely held corporations. This difficultly was illustrated last year in an Oregon Court of Appeals decision involving a legal malpractice claim by two closely held corporations and their owners against a law firm: *O'Kain v. Landress*, 299 Or App 417, 450 P3d 508 (2019). In this column, we'll first briefly review *O'Kain* for context and then turn to the law firm risk management lessons it offers.

O'Kain

The facts in *O'Kain* were not novel. An investor and his wife controlled two limited liability companies that operated two apartment complexes in Salem. The LLCs defaulted on loans and were in foreclosure proceedings in Marion County. The investor and his wife consulted with a law firm about the possibility of putting the LLCs into bankruptcy so they could stay in control while reorganizing the debts. The investor was a California lawyer and his wife was an inactive member of the Oregon State Bar who had earlier worked as an associate for the law firm.

The law firm provided the investor and his wife with an engagement agreement that designated the LLCs as the clients (299 Or App at 421): "[The law firm] . . . was retained 'to represent [the LLC Plaintiffs] as legal counsel for research and advice concerning feasibility of Ch. 11 Bankruptcy filing.'" When the law firm met with the LLCs, it was through the investor and his wife—as were follow-on communications.

Later, the investor, his wife and the LLCs all brought legal malpractice claims against the law firm over the substance of the advice provided. Based on the engagement agreement, the law firm moved for summary judgment against the investor and his wife—arguing that they lacked the attorney-client relationship with the law firm generally required for a legal malpractice claim. The two individuals argued that they thought the law firm was also providing them with personal legal advice. The trial court granted the law firm summary judgment on the individuals' claims, but the Court of Appeals reversed.

In doing so, the Court of Appeals relied principally on the standard for an attorney-client relationship defined by the Supreme Court in *In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990). In *Weidner*, the Supreme Court articulated a two-pronged test: (1) does the putative client subjectively believe the lawyer is representing the client? (2) is that subjective belief objectively reasonable under

the circumstances? The Court of Appeals concluded that, notwithstanding the engagement agreement, fact issues precluding summary judgment existed on whether the two individuals reasonably understood that the law firm was also advising them personally.

Lessons

O'Kain offers two principal risk management lessons.

First, although an engagement agreement is an essential risk management tool, an engagement agreement standing alone may not be sufficient in defining—and *limiting*—the client for a particular representation. This is especially the case with a small, closely held corporation owned by a single person or a family whose interests are aligned. Under Oregon State Bar Formal Opinion 2005-85 (rev 2016), which, in turn, is based on *In re Banks*, 283 Or 459, 584 P2d 284 (1978), representation of a closely held corporation in that circumstance may be held to also embrace representation of the person or family involved unless the lawyer takes affirmative steps consistent with *Weidner* to limit the representation to the corporation. One approach is to add the word "only" to the description of the client in the engagement agreement so that it will be clear that the representation is limited to the corporation alone. Another approach is to send the individuals "nonengagement" letters that specifically inform them that

they are not clients of the firm in the matter involved. The Oregon State Bar Professional Liability Fund has template "nonengagement" letters available on its web site.

Second, the lawyer needs to act consistent with the engagement agreement—and any accompanying nonengagement letters. In *Jensen v. Hillsboro Law Group, PC*, 287 Or App 697, 403 P3d 455 (2017), for example, a lawyer tried to disclaim personal representation of the president of a corporate client, but the firm's internal records included the individual in the representation and the firm's bills were sent to the president with references that made them appear to be for personal representation. As a result, the Court of Appeals concluded that there was a fact issue on that point and reversed summary judgment that had been granted by the trial court. In *Lahn v. Vaisbort*, 276 Or App 468, 369 P3d 85 (2016), by contrast, a lawyer who had prepared loan documents for his client reminded a counterparty in a cover email forwarding the documents that he was not representing the counterparty. The Court of Appeals affirmed summary judgment for the lawyer when the counterparty later attempted to claim that she thought the lawyer was representing her, too. Echoing the *Weidner* test, the Court of Appeals in *Lahn* concluded (276 Or App at 479-80): "[P]laintiff's subjective belief that defendant acted as her lawyer in the transaction

is not accompanied by evidence from which a reasonable factfinder could conclude that the belief was objectively reasonable."

ABOUT THE AUTHOR

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