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The "Who Is the Client?" Question

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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.[1] In this article, we'll first look at the general rule for deciding whether an attorney-client relationship exists and then apply that rule in four common entity contexts: corporations and their affiliates; partnerships, joint ventures and trade associations; governmental entities; and estates and trusts.

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 when you have 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 you are 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 a nonclient to assert that you were also representing him or her if the nonclient doesn't like the result.[2]

The General Rule

In Idaho, whether an attorney-client relationship exists in a particular circumstance is a question of fact. *See Warner v. Stewart*, 129 Idaho 588, 593, 930 P.2d 1030 (1997); *accord O'Neil v. Vasseur*, 118 Idaho 257, 262, 796 P.2d 134 (Ct.App. 1990). Under Paragraph 17 of the Preamble to the Rules of Professional Conduct, this question is governed by case law rather than the RPCs: "[F]or purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists."

The Supreme Court in *Warner* discussed twin tests for whether an attorney-client relationship exists: (1) what is the client's subjective belief and is that subjective belief reasonable under the circumstances? and (2) was there some clear assent (either express or implied) to the representation by both the client and the lawyer? 129 Idaho at 593-94; *see also Podolan v. Idaho Legal Aid*

Servs., Inc., 123 Idaho 937, 942-43, 854 P.2d 280 (Ct.App. 1993) (examining the question in contractual terms); *accord Balvi Chemical Corp. v. JMC Ventilation Refrigeration, LLC*, No. CV-07-353-S-BLW, 2008 WL 131028 at *5 (D. Idaho Jan. 10, 2008) (unpublished) (discussing and applying *Warner*)[3]. Although the *Warner* court did not choose one test over the other, both tests contain a key element: regardless of the client's *subjective* belief, that belief must be *objectively* reasonable. *Id.*

In making this determination, the Supreme Court noted in *Stuart v. State*, 118 Idaho 932, 934, 801 P.2d 1283 (1990), that "[u]sually the payment of a fee or retainer is evidence of an attorney-client relationship, but it is not necessary." Rather, *Stuart* found that "[a]n attorney-client relationship can be established when the attorney is sought for assistance in matters pertinent to his profession." *Id.* Nonetheless, the Supreme Court in *Warner* later emphasized that "payment of … [a] fee is evidence that an attorney-client relationship exists." 129 Idaho at 594. Read in tandem, *Warner* and *Stuart* 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

RPC 1.13(a) 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] *See, e.g., Spur Products Corp. v. Stoel Rives LLP*, 143 Idaho 812, 153 P.3d 1158 (2007) (where the client

and the firm treated a corporate subsidiary as integrated with the parent for conflict purposes).

Again, an engagement letter clearly setting out the corporate client being represented can be a key piece of evidence in defending against an allegation that the lawyer supposedly represented another corporate entity or constituent. In *Wick v. Eismann*, 122 Idaho 698, 700, 838 P.2d 301 (1992) (legal malpractice claim), and *Blickenstaff v. Clegg*, 140 Idaho 572, 577-78, 97 P.3d 439 (2004) (breach of fiduciary duty claim), for example, the Supreme Court denied summary judgment to the defendant lawyers where, in the absence of clear agreements, there were fact disputes over whether the lawyers represented shareholders as well as the corporations involved.

Partnerships, Joint Ventures and Trade Associations

Partnerships generally present the same "who is the client?" question that corporations do under RPC 1.13(a).[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).[6]

Engagement agreements in the partnership context provide the same protections they do for corporate representation for the same reasons. In *Blough v. Wellman*, 132 Idaho 424, 426-27, 974 P.2d 70 (1999), for example, the Supreme Court denied summary judgment in a legal malpractice case involving a partnership because, lacking a definitive agreement, there was a fact dispute over the scope and duration of the lawyer's representation.

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. Comment 9 to RPC 1.13(a) frames both the clear issue and the imperfect answer:

> "The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. … 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. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau

> is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority."[7]

For in-house counsel at government agencies, the "who is the client?" question is usually straightforward. But, for outside law firms which represent government entities, defining the client is as important as it is in corporate or partnership representation.

Estates and Trusts

With an estate or trust, a lawyer represents, respectively, the personal representative or the trustee rather than the beneficiaries. The Court of Appeals in *Allen v. Stoker*, 138 Idaho 265, 267, 61 P.3d 622 (Ct.App. 2003), summarized this point:

> "This is so because heirs are *not* necessarily intended beneficiaries of the attorney's services and, in fact, are frequently in a position of conflict with the attorney's client, the personal representative. The attorney is not hired to benefit any particular heir, but to assist the personal representative in the performance of his or her duties. The imposition of a duty owed by the attorney to the heirs would create a conflict of interest whenever a dispute arose between the personal representative and an heir." (Emphasis in original.)[8]

Estate and trust work is a comparatively common backdrop for claims against lawyers because it often involves situations in which claimants contend

they were entitled to share in the assets involved. *See, e.g., Taylor v. Maile*, 142 Idaho 253, 127 P.3d 156 (2005); *Becker v. Callahan*, 140 Idaho 522, 96 P.3d 623 (2004). As with the other practice areas discussed, an engagement letter identifying the client and, where appropriate, nonrepresentation letters to other family members with whom the lawyer may have initially met along with the client, afford the lawyer a clear contemporaneous record if there are ever any questions later about who the lawyer was, and was not, representing.

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 benefit of RPC 1.13(a), the "who is the client?" question remains 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 their engagement agreement.

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[1] For a discussion of potential regulatory and liability consequences of unwaived conflicts, *see* Mark J. Fucile, "Why Conflicts Matter," September 2005 ISB *Advocate* at 23.

[2] For more on engagement letters, *see* Mark J. Fucile, "Defensive Lawyering: Why Engagement Letters Are a Lawyer's Best Friend," September 2004 ISB *Advocate* at 12.

[3] *See also Balvi Chemical Corp. v. JMC Ventilation Refrigeration, LLC*, No. CV-07-353-S-BLW, 2008 WL 313792 (Feb. 1, 2008) (unpublished) (also applying *Warner* in continuing the Court's analysis of disqualification issues).

[4] *See also* Restatement, *supra*, § 131, cmt. d at 367.

[5] Comment 1 to RPC 1.13 reads: "The duties defined in this Comment apply equally to unincorporated associations." *Accord* ABA Formal Ethics Op. 91-361 (1991) (addressing partnerships in particular).

[6] *Accord* ABA Formal Ethics Op. 92-365 (1992) (discussing trade associations); Restatement § 131, cmt. a.

[7] *See also* ABA Formal Ethics Op. 97-405 (1997) (discussing governmental representation); Restatement § 97, cmt. c (addressing client identity in the governmental context).

[8] The Supreme Court in *Harrigfeld v. Hancock*, 140 Idaho 134, 138-39, 90 P.3d 884 (2004), addressed the related question of whether a lawyer who prepares a will for a client owes any duty to a specific beneficiary if the lawyer errs in implementing the client's intent. In that instance, the Supreme Court recognized a narrow exception to the general requirement that only a lawyer's client has standing to assert a malpractice claim. In doing so, the Supreme Court emphasized that a beneficiary in that situation remains a nonclient.