

CHAPTER 2

WHO IS THE CLIENT?

Summary

- §2.1 Introduction
- §2.2 Reasonable Expectations Test
- §2.3 Was an Attorney-Client Relationship Formed?
- §2.4 Who Speaks for the Entity?

§2.1 INTRODUCTION

The most basic question of any conflicts analysis must be: Who is the client? Once this question is resolved, the process of identifying any conflicts of interest may begin. It is the client to whom the duties of confidentiality, loyalty, and independent judgment are owed.

In a non-business context, it may be somewhat easier to identify the client. However, in the current climate of C and S corporations, family limited partnerships, limited liability companies, limited liability partnerships, and other business entities, the attempt to identify a client can be a frustrating endeavor.

For instance, lawyers must take care to identify their clients when a transaction involves multiple parties. Challenges in identifying a client may arise in any one or more of the following situations: (1) some parties may not be represented; (2) other parties are successors in interest of one sort or another who may or may not “inherit” the representation of a particular lawyer; (3) an organization or entity may have an existence separate from the individuals involved with it; (4) there are parties with whom a lawyer has other than an attorney-client relationship; (5) one person or entity is paying the fees to establish another entity; or (6) a lawyer represents one party to a transaction that involves another party whom the lawyer previously represented or currently represents in a different type of matter.

Nonetheless, conflicts of interest problems necessarily involve at least one current client, former client, or prospective client (in the case of lawyer-versus-client conflicts) or two or more current, former, or prospective clients (in the case of multiple-client conflicts). This chapter reviews the basic issues of “who is the client” and the related question of duties owed to prospective clients.

§2.2 REASONABLE EXPECTATIONS TEST

Not surprisingly, it is not necessarily the lawyer who establishes whether there is an attorney-client relationship. The leading case in Washington is *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992). In that case, the court held:

§2.2 / WHO IS THE CLIENT?

The existence of the relationship ‘turns largely on the client’s subjective belief that it exists.’
...The client’s subjective belief, however, does not control the issue unless it is reasonably formed based on the attending circumstances, including the attorney’s words or actions.

The step between prospective client and actual client can, however, be a very small one. Under the so-called reasonable expectations test, an attorney-client relationship exists notwithstanding the absence of an express retainer or equivalent agreement if the putative client subjectively believes that an attorney-client relationship exists and if that subjective belief is sufficiently reasonable under the circumstances. *See, e.g., In re McGlothlen*, 99 Wn.2d 515, 663 P.2d 1330 (1983).

A good example of what can occur under the reasonable expectations test is provided by the Oregon case of *In re Baer*, 298 Or. 29, 688 P.2d 1324 (1984). Attorney Baer’s wife decided to purchase real property from a couple at an agreed-upon price. Baer then approached the couple and offered to prepare the paperwork in exchange for a reduced price to his wife. The couple agreed and Baer prepared the documents. Subsequently, however, the couple became dissatisfied with what Baer had done and filed a bar complaint. The Oregon Supreme Court held that under the circumstances, Baer’s clients included not only his wife but also the couple and that he, therefore, had a multiple-client conflict of interest, because he was representing both buyer and seller at the same time, and a personal or business conflict, because his wife was doing business with clients whom he was representing. *Cf.* Washington Rule of Professional Conduct (WRPC) 1.7 (discussed in chapter 3), WRPC 1.8 (discussed in chapter 4); *see also* WRPC 4.3 (requiring lawyers to make their roles clear to unrepresented nonclients when roles may be misunderstood).

Based upon the potentially broad reach of the reasonable expectations test, a lawyer who represents some but not all parties to a business transaction should send a nonrepresentation letter to anyone whom the lawyer does not represent and who is not otherwise represented by counsel. The mere fact of the nonrepresentation letter should make it extremely difficult for a putative client to assert a credible subjective belief that such a relationship existed, let alone that the belief was reasonable under the circumstances. Although it would remain theoretically possible for a lawyer who sends such a letter to undo its effect by actually giving legal advice to the putative client, this should be a very rare occurrence.

In considering the potential implications of the reasonable expectations test, business attorneys may find it helpful to distinguish between three overlapping, but arguably distinct, situations. The first situation—and one in which the reasonable expectations test can readily be applied to uphold an attorney-client relationship—involves an attorney who decides to represent fewer than all of a small group of would-be owners in starting a new business enterprise and who nonetheless provides, or may appear to be providing, information or analysis that is circulated to and relied upon not only by the attorney’s own clients but also by other unrepresented individuals.

The second situation, in which the reasonable expectations test is far less likely to be successfully applied, involves officers or employees of existing clients who may, in fact, be the conduits through whom legal advice is given to the client. Unlike the multiple would-be owner situation, the law here is fairly clear that individual officers or employees who speak to company counsel about matters that they know to be company business will find it very difficult to assert that they became individual clients of the lawyer. In other words, the entity, and not its representatives, is the lawyer’s client. *See, e.g., In re Grand Jury Subpoenas*, 144 F.3d 653, 659 (10th Cir. 1998); Oregon State Bar Legal Ethics Opinion 1991-85 (available on Westlaw and on the Oregon State Bar’s website).

A third situation can be said to blend the entity theory and the reasonable expectations theory. Suppose, for example, that 100 percent of the stock of a lawyer's corporate client is owned by a single individual but that lawyer has never done any personal work for the client. Is representation of the corporation nonetheless equivalent to representation of the individual as a matter of law? *See, e.g., In re Banks*, 283 Or. 459, 474–75, 584 P.2d 284 (1978); *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1268 (7th Cir. 1983); *Rosman v. Shapiro*, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987). The same result may or may not follow, however, when one business is owned by another business rather than by an individual. *Cf.* ABA Committee on Ethics and Professional Responsibility, Formal Op. 390 (1995); Cal. Ethics Op. No. 1989-113. On the other hand, suppose that a corporation or partnership has two or more unrelated owners rather than just one. In this case, as in cases in which the number of owners increases to greater than two, the argument against holding that representation of the entity is representation of its owners is a strong one unless there is some independent basis on which to conclude that the attorney also represents one or more owners. *See, e.g., Oregon State Bar Legal Ethics Op. No. 1991-85; In re Kinsey*, 294 Or. 544, 660 P.2d 660 (1983).

§2.3 WAS AN ATTORNEY-CLIENT RELATIONSHIP FORMED?

Did an attorney-client relationship exist? Usually it is fairly clear whether such a relationship existed. There are some gray areas, however. For example, if an attorney declines to represent someone after an initial consultation, and the matter was discussed in such detail that confidences or secrets were imparted in good faith, an attorney-client relationship may exist for some purposes under the Conflicts Rules.

“Beauty contests” create the risk that an unintended attorney-client relationship may be formed. When a prospective client interviews several firms to handle a particular matter, it and the law firms know that an attorney-client relationship will result with only one firm. The firms participating in the beauty contest should each obtain in advance a written agreement with the prospective client. The agreement should clarify that information disclosed in the process will be used to perform conflicts checks and provide the firm with the background necessary to fashion a response to the request for proposals to represent the client, but that such information will not be confidential and may not serve as the basis to disqualify the firm from subsequent representations adverse to the client. Prospective clients should monitor closely the nature of the information being disclosed in the process. If in-house counsel is involved, it may be appropriate for that counsel to screen the information before it is submitted to the participating law firms.

§2.4 WHO SPEAKS FOR THE ENTITY?

As discussed in §2.2, a lawyer who represents a business entity will generally represent only the entity and not its officers or employees. This is consistent with the approach taken in ABA Model Rule 1.13.

**ABAMODEL RULE 1.13
ORGANIZATION AS CLIENT**

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT at 195 (ABA 4th ed. 1999).

Although this rule was not adopted in Washington, ABA Model Rule 1.13 should be understood and used as a guide in representing entities.