FORMAL OPINION NO 2005-85

Identifying the Client: Corporations and Partnerships

Facts:

Corporation has two shareholders, *A* and *B*, who are not members of the same family. Partnership has two owners, *C* and *D*, who are not members of the same family.

Questions:

1. Does representation of Corporation automatically constitute representation of *A* and *B*?

2. Does representation of Partnership automatically constitute representation of *C* and *D*?

3. Does representation of *A* or *B* automatically constitute representation of Corporation?

4. Does representation of *C* or *D* automatically constitute representation of Partnership?

Conclusions:

1. No.

2. No.

3. No.

4. No.

Discussion:

Identifying the client is essential to a proper determination of matters such as to whom the lawyer owes a duty of confidentiality under ORS 9.460(3) and Oregon RPC 1.6 and whether a current- or former-client conflict exists under Oregon RPC 1.7, Oregon RPC 1.8, and Oregon RPC 1.9. *Cf.* OSB Formal Ethics Op No 2005-62; OSB Formal

Ethics Op No 2005-119; *In re Morris*, 326 Or 493, 953 P2d 387 (1998); *In re Henderson*, 10 DB Rptr 51 (1996).

A lawyer who represents an entity, such as a corporation or partnership, generally represents that entity only and not its employees, shareholders, or owners. See Oregon RPC 1.13(a), which provides that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." See also *In re Weidner*, 310 Or 757, 801 P2d 828 (1990), and OSB Formal Ethics Op No 2005-46, in which we noted that the modern test for the presence or absence of a lawyer-client relationship is, in essence, the reasonable-expectations test.

In *In re Banks*, 283 Or 459, 584 P2d 284 (1978), the court observed that, in general, representation of an entity, such as a corporation, does not automatically constitute representation of its shareholders. Nevertheless, the court held that representation of a corporation whose stock was owned by a single person or by a single person and member of the person's family constituted representation of the person when, at the time of the legal work in question, the person "*was* the corporation" and had "*no real reason . . . to differentiate in his mind between his own and corporate interests.*" *In re Banks*, 283 Or at 472, 474 (emphasis in original). On the other hand, the court in *In re Kinsey*, 294 Or 544, 562 n 10, 660 P2d 660 (1983), noted that the normal entity theory applied when a corporation was owned by shareholders who were not members of the same family. The opinions in both *Banks* and *Kinsey* represent applications of the reasonable-expectations test.[1]

[1] The *Banks* rule should not apply, for example, when the sole shareholder is a major corporation and its subsidiary is itself a major corporation that is independently run and is in an altogether different line of business. *Hartford Acc. & Indem. Co. v. RJR Nabisco, Inc.*, 721 F Supp 534, 540 (SDNY 1989); *Am. Special Risk Ins. Co. v. Delta Am. Re Ins. Co.*, 634 F Supp 112, 120 n 14 (SDNY 1986); *Pennwalt Corp. v. Plough, Inc.*, 85 FRD 264, 268–69 (D Del 1980). The *Banks* rule also may not apply if the "family" of shareholders is an extended and fractious family rather than a family whose interests are aligned, as was the case in *Banks.*

On the facts presented, and based on the foregoing discussion, representation of a corporation or partnership with two shareholders or owners who are not family members does not automatically constitute representation of the shareholders or owners. A contrary rule could well require the lawyer to withdraw whenever the two shareholders disagreed on a matter. *Cf.* OSB Formal Ethics Op No 2005-40; DC Bar Ethics Op No 216 (1991). If, however, a lawyer tells the shareholders or owners that they are individual clients or otherwise leads the shareholders or owners reasonably to believe that they are also the lawyer's clients, they will be held to be clients.[2]

Similarly, there is no reason for a reverse imputation. In other words, representation of one of two unrelated shareholders or owners should not be deemed as a matter of law to constitute representation of Corporation or Partnership. Once again, however, a lawyer who reasonably leads Corporation or Partnership (or the other shareholder or owner) to believe that they are clients will be held to have additional clients.

Approved by Board of Governors, August 2005.

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[2] A lawyer who wishes to negate any possible application of the *Banks* outcome would be well advised to send the shareholders or owners a letter to the effect that they are not the lawyer's clients.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 5.1 to § 5.3-2 (client identification) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 14 (2000) (supplemented periodically); and ABA Model RPC 1.7–1.8.