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Who Does the General Business Attorney Represent?

by Daniel J. McDowell

General business practitioners retained as a company's outside counsel are in a somewhat precarious position. An attorney retained by an organization—be it a corporation, a limited liability company, a partnership, or another entity—represents the organization, not its shareholders, members, officers, directors, managers, or employees.[1] However, as a general business practitioner, you practice in the face of unique ambiguities that will make it difficult for many people to understand who your client is.[2] Unlike litigation counsel, clients usually do not retain you for a discrete task. The client may initially hire you to help redeem an owner's equity, but you may find yourself advising the same client on a wide range of legal issues. Unlike in-house counsel, you are not the client's employee. As a result, although your ethical and legal duties may be clear to you—and even that is not always straightforward—it is critical that you clearly communicate the bounds of your professional relationship to your clients and their constituents as well. We've all heard stories about employees or executives (or have dealt with them ourselves) who "trust the company attorney to look out for their best interest."[3] If you do not promptly, and clearly, correct this misunderstanding, you may face not only an angry call or email, but an ethics complaint to the Counsel for Discipline.

This article will first outline basic ethical principles in the Nebraska Rules of Professional Conduct (the "Rules") governing client identity and interaction when representing an organization; then, it will provide a list of practical steps to help the general business practitioner identify her client, and ensure her client's owners, directors, managers, officers and employees understand the attorney's role.

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1. Client Identity and Interaction

The first challenge you face when representing an entity is determining who has authority to act for your client. As previously noted, when you are retained by an organization, you represent the organization.[4] However, because an organization is only a "person" in the legal sense, it must act through its constituents: the officers, directors, employees, and shareholders of an organization, or any person with an equivalent role in an organization.[5] You should bear in mind that not every constituent has authority to act on behalf of an organization. For example, corporations generally act through their directors, rather than their shareholders.[6] As such, if you are representing a corporation, you should not assume that the shareholders have any authority to speak for the corporation. Always remember, you represent an organization acting through its constituents who are authorized to act on its behalf, and it is your duty to identify the authorized constituents.

Once you determine your client's authorized constituents, you still have to determine what authority they possess on your client's behalf. Constituents of an entity may derive their authority from statutory law, common law, and the entity's governing documents (including agreements between the entity and its constituents). The board of directors and officers of a corporation are authorized to act for a corporation by statute, as are the members or managers of a limited liability company, and the partners of a partnership.[7] Courts have further clarified the duties of shareholders, members, directors, and managers through case law.[8] Governing documents (bylaws, operating agreements, shareholder agreements, buy sell agreements, etc.) specify the authority granted to an organization's governing body under law, and they may identify persons granted special authority to act for the organization, and under what conditions (e.g., a partnership representative for tax matters).[9] If an organization keeps regular or annual minutes, these should also spell out the current officers, directors, and/or manag-

ers of the organization. In addition, and especially for larger organizations, or organizations where there are risks of internal conflict, legally authorized constituents may designate other specific persons with whom you should interact (e.g., a comptroller regarding payments to a departing owner, or the direct manager of an employee under investigation).

Once you identify the client's authorized constituents, and the scope of their authority, they will be your contact points with the client, and will direct the course of your representation. The authorized constituents, acting on the organization's behalf, direct your representation of the organization,[10] setting goals and making critical decisions. Additionally, the confidentiality Rules protect your communications with your client's authorized constituents.[11] Critically, this means that when you obtain information from an authorized constituent, it cannot be disclosed to other constituents, except as expressly authorized, impliedly authorized to carry out the representation, or as otherwise permitted under the Rules.[12]

Even though you know that the authorized constituents are not your clients by default, they very well may not know this, and you risk forming attorney-client relationships with the constituents if you do not take steps to clarify your relationship. If you know, or reasonably should know, that an organization's interests are adverse to a constituent with whom you are dealing, then you must explain to the constituent that you represent the organization.[13] If you don't clarify your relationship, and a constituent reasonably relies on what you tell them, even if you don't intend it as legal advice, you likely have formed an attorney-client relationship with that person.[14] Such attorney-client relationships will likely result in non-waivable conflicts, requiring your withdrawal from representing all parties concerned.[15] That being said, you may determine to represent one or more constituents as well as the organization, but such joint representations are subject to the conflict of interest Rules.[16]

Lastly, there are particular issues associated with engagements to form new organizations. If a group of founders hire you to advise them on entity choice and tax matters, then you must determine whether you represent some or all of the founders, or the entity itself (on a to-be-formed basis). If there is only one founder, the issue is not critical, because the interests of the founder and the organization are essentially aligned. Questions arise when there are multiple founders. There is legal authority to support an attorney in claiming to represent the entity. The argument is that an organization should be retroactively deemed an attorney's client from the outset of representation where the organization's founders retain the attorney solely for the purpose of forming the organization, and the attorney limits her activities to forming the organization.[17] However, there are authorities arguing that the proper approach is to represent the founders, as individuals or potentially as a partnership, for the sole purpose of forming the organization, and then be separately retained to represent the organization.[18] Neither approach is perfect. The former risks forming a de facto attorney-client relationship with the founders, in potential conflict with representing the organization, and the latter is often impractical for large groups of founders. Absent a change in Nebraska law, you, or your firm, must choose the most reasonable approach and be prepared to defend it if necessary.

2. Practical Steps

a. **Use an engagement letter every time you are retained**. Engagement letters are not required for Nebraska attorneys, but they should be used to set your client's expectations.[19] A well drafted engagement letter will:

i. identify the client;

ii. delineate the scope of your representation;

iii. state the legal fees and costs which you will assess for your services;

iv. state when and how your fees and costs are to be paid; and

v. state who is responsible for paying your fees and costs.[20]

b. **Update the terms of your engagement as needed, in writing**. As an attorney, you are responsible for clarifying the existence and scope of your attorney-client relationships.[21] It is not uncommon for the scope of your engagement to change after you have been initially retained. New matters arise that clients want you to address, and you may have a client that reaches out to you for different matters over time. As you accept new matters from your clients, you should update the terms of your engagement, in writing.

For example, if you are initially retained to draft a buy sell agreement, and then later asked to assist with a business acquisition by the same client, specify *in writing* the new scope of representation, and any changes to fees that apply. This could be done by executing a new letter of engagement, amending your previous letter, or outlining these details in an email to the client and having the client give their written assent to the new terms. You must know your client and carefully consider the circumstances to determine the appropriate course. You need to consider the timing of the additional work, what it will cost your client, and the complexity, duration, and difficulty of the additional tasks. If months have elapsed since your previous work, or the new assignment will dramatically change the time or cost of your representation, a new letter may be worthwhile. For smaller tasks that won't greatly increase your fees, a detailed email may suffice.

c. **Set expectations up front**. An ounce of prevention is worth a pound of cure, and that is especially true in respect to attorney-client relationships. The engagement letter is the first and primary way you set expectations, but an attorney's duty to clarify her relationship with her clients does not end there. Any time you interact with any representative or employee of your client, be clear who you represent. For example, if you're on a call with an employee, consider whether you need to explain that you represent their employer. If the conversation is, or could become, adversarial (e.g., you are assisting with an internal investigation, the employee is being terminated, or the conversation is related to a potential lawsuit), consider leading off the conversation by telling the employee that you don't represent them, and if they want representation they will need to retain their own attorney. On other occasions, this conversation won't be necessary. For example, if you're meeting with a company's management team to discuss updates to the business's commercial lease, or obtaining contracts for review from your client's sales team, there may be a lower risk of any conflict or misunderstanding. Use your professional judgment and remember that clarifying your attorney-client relationship is a critical part of your duties to your client.

d. **Be prepared for pushback, questions, and misunderstandings**. Most people, even if they are experienced businesspersons used to dealing with counsel, will not understand that you don't necessarily represent them: they will ask you what you think they should do, they will ask you to "look out for their best interest," they will say they didn't understand that you didn't represent them. Be firm, but polite, and stick to your ethical obligations. Remember it is your license and reputation on the line.

Conclusion

As a business attorney, when you are retained by an organization, be it a corporation, a partnership, a limited liability company, or another form of entity, you represent the organization, acting through its authorized constituents (as laid out in applicable law and the organization's governing documents), not its individual members, owners, shareholders, employees, officers, or agents of any kind.

As an organization's attorney, you should make sure that your client's officers, managers, employees, and owners understand this fact. Doing so starts with a well-drafted engagement letter, updated and clarified as the terms and scope of your engagement change over time. Be aware of your interactions with your client's constituents, and when necessary, clarify that you don't represent any individual constituent. Clarifying your attorney-client relationship, and doing so clearly and consistently, may turn out to be as important to your client as the substantive work for which they retained you in the first place.

Endnotes

1 Neb. Ct. R. of Prof. Cond. § 3-501.13(a).

2 John M. Burman, *Ethical Considerations When Representing Organizations*, 3 Wyo. L. Rev. 581, 583-84 (2003).

3 Burman, *supra* note 2, at 592. ("Many, if not most, of an organization's constituents will assume the lawyer represents them and the organization, and not just the organization.").

4 Neb. Ct. R. of Prof. Cond. § 3-501.13(a).

5 Neb. Ct. R. of Prof. Cond. § 3-501.13 cmt. 1.

6 *See* Neb. Rev. Stat. § 21-284(b) ("All corporate powers shall be exercised by or under the authority of the board of directors of the corporation.").

7 Burman, *supra* note 2, at 592; Neb. Rev. Stat. § 21-284(b); Neb. Rev. Stat. § 21-136(a); and, Neb Rev. Stat. § 67-421(6).

8 *See, e.g., Dick v. Koski Professional Group, P.C.*, 950 N.W.2d 321, 363-64 (Neb. 2020) (noting that, traditionally, corporate officers and directors owe fiduciary duties to shareholders, but shareholders do not owe duties to each other).

9 *See* Burman, *supra* note 2, at 592; *see, e.g.*, Neb. Rev. Stat. § 21-136(a) (noting that a limited liability company's operating agreement can designate managers to manage the company).

10 Neb. Ct. R. of Prof. Cond. § 3-501.2.

11 Neb. Ct. R. of Prof. Cond. § 3-501.6.

12 Neb. Ct. R. of Prof. Cond. § 3-501.13 cmt. 2.

13 Neb. Ct. R. of Prof. Cond. § 3-501.13(f).

14 Burman, *supra* note 2, at 594; *State ex rel. Counsel for Discipline of Nebraska Sup. Ct. v. Chvala*, 935 N.W.2d 446, 471-474 (Neb. 2019) ("An attorney-client relationship with respect to a particular matter may be implied from the conduct of the parties."); *McVaney v. Bair, Holm, McEachen, Pedersen, Hamann & Strasheim*, 466 N.W.2d 499, 506 (Neb. 1991) (citations omitted).

15 Burman, *supra* note 2, at 598.

16 Neb. Ct. R. of Prof. Cond. § 3-501.13(g).

17 *Jesse by Reinecke v. Danforth*, 485 N.W.2d 63, 67-68 (Wisc. 1992); *but see Manion v. Nagin*, 394 F.3d 1062 (8th Cir. 2005) (declining to apply the *Jesse* rule where an attorney provided advice on maintaining control of an entity to a founder).

18 *See, e.g.*, Burman, *supra* note 2, at 589-91; Paul R. Tremblay, *The Ethics of Representing Founders*, 8 Wm. & Mary Bus. L. Rev. 267, 274-82 (2017).

19 Neb. Ct. R. of Prof. Cond. § 3-501.5 cmt. 2.

20 *See* Burman, *supra* note 2, at 585.

21 *See* Neb. Ct. R. of Prof. Cond. § 3-501.3 cmt. 4.