WALKING THE ETHICAL LINE

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A. Who is the Client? -- Rule 1.13

With any entity, there is a question of whether the lawyer represents the entity, as a whole, or one of the particular members. A lawyer employed or retained by an organization represents the organization *first and foremost* under Rule 1.13. *See Manion v. Nagin*, 394 F.3d 1062, 1068 (8th Cir. 2005) (corporate employee does not generally enjoy an attorney-client relationship with corporate counsel); s*ee also Humphrey v. McLaren*, 402 N.W.2d 535, 540 (Minn. 1987) (in representing a corporation against one of its officers or employees, corporate counsel's "allegiance is to the organization").

Minnesota Rules of Professional Conduct Rule 1.13(a) states, "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." The Comment to Rule 1.13 clarifies the meaning of the words "duly authorized constituents." For corporations, this term refers to "officers, directors, employees, and shareholders." For non-corporate entities, the term encompasses those individuals holding "the position equivalent to officers, directors, employees, and shareholders." In the case of an LLC, the equivalent positions are those of the employees, members, managers, and governors. Because the lawyer must consider each of these subgroups problems could arise with conflicts of interest.

1. Organization as the Client

Under the statutory laws of Minnesota, an LLC is a legal entity that is separate and distinct from its partners. *See Opus Corp. v. International Business Machines Corp.,* 956 F. Supp. 1503, 1508 (D. Minn. 1996). Thus, when a lawyer or firm represents a business entity, the client is the entity alone, and not the members, managers, partners, etc. *Id*.

When members of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. The organization must make its own decisions concerning policy and operations, including those decisions entailing serious risk. However, there are certain situations where it may be appropriate for a lawyer to take action. If a lawyer for an organization learns that an officer, employee, or other person associated with the organization is engaged in action or intends to act in a manner that is a violation of a legal obligation to the organization or a violation of law that can reasonably be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. Minn. R. Prof. Conduct 1.13(b). In determining how to proceed, the lawyer should give due consideration to:

(1) the seriousness of the violation and its consequences;

(2) the scope and nature of the lawyer's representation;

(3) the responsibility in the organization and all the apparent motivation of the person involved;

(4) the policies of the organization concerning such matters; and,

(5) any other relevant considerations.

Id. Any measures taken by an attorney must be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons

outside the organization, or even persons within the organization. *Id.*; *see also Opus*, 956 F. Supp. at 1508.

In addition to informing individuals of the consequences of an adverse action or potential conflicts, measures taken to dissuade a member from acting in a manner which could substantially injure the organization may include among others:

> (1) asking for 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,
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> (3) referring the matter to a higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

Minn. R. Prof. Conduct 1.13(b). The higher authority referred to could be the board of directors or a similar governing body. In addition, the stated policies of an organization may define circumstances and prescribe channels for review. If it does not, a lawyer should encourage the formulation of such a policy. At some point it may be useful or essential to obtain an independent legal opinion.

The comments to Rule 1.13 indicate that clear justification should exist for seeking review over the head of the member normally responsible for the organization. Care must be taken to assure that the individual understands that when there is such adversity of interest the lawyer for the organization cannot provide legal representation for the individual. In addition, discussion between the lawyer for the organization and the individual may not be privileged. Whether the lawyer should give a warning to the organization regarding an individual may turn on the facts of each case.

A government lawyer has greater authority than a private lawyer to question a client's conduct because public business is involved. *Brainerd Daily Dispatch v. Dehen*, 693 N.W.2d

435, 443 (Minn. Ct App. 2005). Courts take very seriously the fact that attorneys working for such an entity have an ethical duty to assure that the laws are properly applied. *Id*. In the *Brainerd Daily Dispatch* case, a newspaper sued city council members under a state open-meeting law, when it was denied access to a meeting involving the city council members and the city's legal counsel. In the end, the Court concluded that the respondents invoked the attorney-client privilege in good faith and not to thwart the purpose of the Minnesota Open Meeting Law. *Id*. at 444. Therefore, the meeting remained closed.

2. Representation of Individuals

In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer must explain the identity of the client when it appears that the organization's interests are adverse to those of the organization's. Minn. R. Prof. Conduct 1.13(d). Nonetheless, a lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the consent provisions of Rule 1.7. If the organization's consent to 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.

Issues arise when a number of individuals wish to form an entity and one of the individuals is the lawyer's original client. If the lawyer has been selected to draft the entity agreement for all the parties, it is important for the lawyer to clearly identify who is the client and for all parties to have an understanding of whether the lawyer represents the individual or the entity.

In *Opus Corp. v. International Business Machines Corp.*, 956 F. Supp. 1503 (D. Minn. 1996) a law firm represented IBM in the formation of a partnership with another company. After

the partnership was formed, the firm assumed the role as the Partnership's counsel, as well as continuing to represent IBM in IBM's capacity as general partner and as an investor in the partnership. In this latter capacity, the firm represented IBM, on certain occasions, in a manner that was adverse to the interests of the other corporate partner. Difficult issues arose relating to attorney-client privilege during subsequent litigation between IBM and its corporate partner. These issues could have been avoided if the firm had been more observant about representing the partnership and one of its corporate partners.

A lawyer for an organization is not barred from accepting representation that is potentially adverse to the organization. However, attorneys have to be wary about providing advice to employees of the entities they represent. In *Manion v. Nagin*, an attorney agreed to represent an individual in creating a business. 394 F.3d 1062 (8th Cir. 2005). The individual later became a majority shareholder, and the attorney continued to represent the business. The attorney eventually provided the shareholder with advice about his personal interest in the company and its management structure. The Court indicated that this behavior was beyond the scope of the attorney's job as the company's attorney, and perhaps contrary to it. *Id*. at 1069.

If the attorney was truly working exclusively as the entity's lawyer, he should have responded to the shareholder’s personal questions by clarifying the fact that he worked only for the company and he should have suggested that the individual seek outside counsel. *Id*. (citing Minn. R. Prof. Conduct 1.13(d), which requires corporate counsel who is dealing with a shareholder or employee to "explain the identity of the client when it appears that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing"). The individual advice given by the attorney was sufficient to establish that an attorney-client relationship existed. *Id*. at 1069. However, the shareholder was unable to state a

claim for relief, or else the attorney could have been held liable for malpractice, breach of contract, or some other legal claim.

3. Representation of Affiliates Under Rule 1.13

A lawyer who represents an organization does not necessarily represent any affiliated organization, such as a parent or subsidiary. Minn. R. Prof. Conduct 1.13(a). The lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated manner, unless:

(1) the circumstances are such that the affiliates should also be considered a client of the lawyer;

(2) there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates; or

(3) the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

In *Bieter Co. v. Blomquist*, 132 F.R.D. 220 (D. Minn. 1990), the court found that a law firm was not disqualified from representing a shopping center developer in its action for alleged interference with its relationship with a prospective tenant even though the firm represented a different joint venture in a similar matter. The defendants were constituents of the joint venture during contract negotiations with the tenant, so they requested that the firm be disqualified from representing the plaintiff. However, the court held that the constituents of the joint venture were not clients of the firm, only the joint venture was. *Id*. at 225. Therefore, disqualification was not necessary. *Id*.

B. Conflicts and Waivers

1. Conflicts of Interest in General -- Minn. R. Prof. Conduct 1.7

Minn. R. Prof Conduct 1.7 states that a lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

> (1) the lawyer reasonably believes that the representation will not adversely affect the relationship with the other client; and,
>
> (2) each client consents after consultation.

In addition, a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation.

Id. When representation of multiple clients in a single matter is undertaken, the consultation must include explanation of the implications of the common representation and the advantages and risks involved.

2. Sources of Conflict and Consent of Client

The first step in guarding against conflicts of interest is to identify all of their possible sources. Intake forms are useful to inquire about all parties related, including adverse parties and their counsel. Further steps are recommended to compare information on new matters with information on matters other individual attorneys, and the firm as a whole, have handled for other clients. Lawyers should perform a new conflict screen whenever additional parties join during representation.

According to the Comment to Minn. R. Prof. Conduct 1.7, the relevant factors in determining whether there is a potential for adverse effect include:

> (1) the duration and intimacy of the lawyer's relationship with the client or clients involved;

(2) the functions being performed by the lawyer;

(3) the likelihood that actual conflict will arise; and

(4) the likely prejudice to the client from the conflict if it does arise.

Even non-direct conflicts of interest should be recognized if a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities of interest. Substantial risk that a conflict could interfere with the lawyer's independent professional judgment is the basis for this determination.

A client does have the option of consenting to representation notwithstanding the conflict. This consent must be confirmed in writing by each client. A writing by the attorney identifying the conflict does not replace the lawyer's responsibility to talk directly with the client and explain the risks and advantages to the representation in addition to the burden of the conflict on the client and available alternatives. Minn. R. Prof. Conduct 1.0.

A lawyer cannot ask for consent if a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances. Such as situations where the clients are hostile it would then be unlikely that the lawyer could be impartial between the clients.

3. Prohibited Transactions -- Minn. R. Prof. Conduct 1.8

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents thereto in writing.

Minn. R. Prof. Conduct 1.8. Rule 1.8 makes it clear that a lawyer should be wary of getting involved in business deals with their clients. If such a deal is made, proper means should be used to guarantee that there is no appearance or impropriety or unfairness. A writing from the lawyer to the client is required, along with a separate writing from the client which indicates whether or not the lawyer is looking out for the client's interest in the transaction, the nature of the conflicting interest, and any reasonably foreseeable risks for the client have been discussed. The lawyer should employ all possible safeguards to ensure that the deal is recognized as one that is fair, reasonable, and in the interests of the client.

4. Lawyer as a Member of the Board of Directors

Ethical issues can also arise when a lawyer representing an entity also serves as a member of its board of governors or directors. If the situation does arise, the lawyer should consider carefully the language contained in the Comment to Minn. R. Prof. Conduct 1.7, which reads as follows:

> A lawyer for a corporation or other organization who is also a member of the board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called upon to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the [company's] obtaining legal advice from another lawyer in such situations. If there is a material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as director.

5. After Termination of Representation

Conflict of interest concerns continue after termination of an attorney-client relationship. After termination of a client-lawyer relationship, a lawyer may not represent another client

except in conformity with Minn. R. Prof. Conduct 1.9. A lawyer who has formerly represented a client in a matter shall not thereafter:

> (1) represent another person in the same or a substantially related matter that is materially adverse to the interests of the former client unless the former client consents after consultation; or
>
> (3) use information relating to the representation to the disadvantage of the former client except as Minn. R. Prof. Conduct 1.6 would permit with respect to a client or when the information has become generally known.

Minn. R. Prof. Conduct 1.9. Note that the principles in Minn. R. Prof. Conduct 1.7 continue to determine whether interests of the present and former client are adverse.

The scope of a "matter" for purposes of Minn. R. Prof. Conduct 1.9(a) may depend on the facts of a particular situation or transaction. As the law first developed, disqualification was found quite readily, since the integrity of the profession in the eyes of the public was paramount, and often the mere appearance of impropriety was enough. *In re Schroll*, 499 N.W.2d 475, 491 (Minn. Ct. App. 1993). In more recent years, attention has also been given to countervailing interests, having in mind the organization and structure of today's law practice with the increase in size of law firms and the mobility of lawyers among firms. *Id.* Thus, it is recognized that disqualification separates the client from his chosen counsel, causes delay, and may subject both the client and the disqualified lawyer to significant economic hardship. *Id*.

Someone seeking to disqualify counsel under Minn. R. Prof. Conduct 1.9 must show that:

> (1) The moving party and opposing counsel actually had a prior attorney client relationship;
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> (2) The interests of opposing counsel's present client are adverse to the movant; and
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> (3) The matters involved in the present underlying lawsuit are substantially related to the matters for which the opposing counsel previously represented the moving party.

Bieter Co. v. Blomquist, 132 F.R.D. 220, 223 (D. Minn. 1990). When a lawyer has been directly involved in a specific transaction, however, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. *In re Schroll* involved a Law firm's former representation of a trust beneficiary. 499 N.W.2d 475 (Minn. Ct. App. 1993). The Court found that disqualification of the law firm as counsel for a trustee was not required where the law firm drafted trust instruments and represented trustee extensively in certain matters, while its representation of the beneficiary was on personal matters not related to trust itself. *Id*. at 492.

The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

C. COMMUNICATION, CONFIDENTIALITY, AND COMPETENCE

1. Communication -- Minn. R. Prof. Conduct 1.4

As a representative and advocate for the client's interests, it is imperative that a lawyer keep the members updated on the status of their rights and obligations. Minn. R. Prof. Conduct 1.4 states:

> (1) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
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> (2) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

When representing an organizational client, it is important to remember that you are acting as the representative of all of the organization's constituents. The lawyer's duty to

communicate may extend to a number of individuals within the entity. Knowing the roles of each of the individuals involved will facilitate the flow of information and allow the client to make the best decisions regarding the future of the organization.

2. Lawyer as Advisor -- Minn. R. Prof. Conduct 2.1

Minn. R. Prof. Conduct 2.1 states, "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice." "In rendering candid advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation." *Id.*

Part of a lawyer's role is to serve as an advisor. As an advisor, a lawyer must provide the client with an informed understanding of his or her legal rights and obligations. The lawyer must also explain the practical implications of these rights and obligations. The comment to Minn. R. Prof. Conduct 2.1 indicates, "[p]urely technical legal advice . . . can sometimes be inadequate." When supplying advice to any business entity, it is important to take into account the ultimate goals and direction of the organization. Lawyers who can supplement their legal knowledge with an understanding of the client's business needs and objectives will be more likely to produce positive results for the client. This, in turn, will reinforce the client's confidence and trust in the lawyer and foster a more productive working relationship.

3. Confidentiality -- Minn. R. Prof. Conduct 1.6

The attorney-client privilege protects private information and communications from being made public or from being used in a court proceeding. Similarly, a lawyer has a duty to protect private information gained through representation of a client. Except when permitted under Minn. R. Prof. Conduct 1.6(b), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of a client;

(2) Use a confidence or secret of a client to the disadvantage of the client;

(3) Use a confidence or secret of a client for the advantage of the lawyer or a third person, unless the client consents after consultation.

Rule 1.6(b) indicates that a lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after consultation with them;

(2) Confidences or secrets when permitted under the Rules of Professional Conduct or required by law or court order;

(3) The intention of a client to commit a crime and the information necessary to prevent a crime;

(4) Confidences or secrets necessary to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used;

(5) Confidences or secrets necessary to establish or collect a fee or to defend the lawyers or employees or associates against an accusation of wrongful conduct;

(6) Secrets necessary to inform the Office of Lawyers Professional Responsibility of knowledge of another lawyer's violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. *See* Minn. R. Prof. Conduct 8.3.

A lawyer must exercise reasonable care to prevent employees, associates and others whose services the lawyer utilizes from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information as allowed by paragraph through an employee. Minn. R. Prof. Conduct 1.6(c). "Confidence" refers to information protected by the attorney-client privilege under applicable law. Minn. R. Prof. Conduct 1.6(d). In addition, "Secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to detrimental to the client. *Id*.

When one of the members of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by

Minn. R. Prof. Conduct 1.6. Thus, by way of example, if members of an organizational client request its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Minn. R. Prof. Conduct 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose such information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise provided by Rule 1.6.

A lawyer may not disclose or use information gained from a client to the advantage of the lawyer in a professional or personal setting. A lawyer may be privy to information that could potentially have adverse effects on the client, or that could provide financial benefits for the lawyer. Such information cannot be used or disclosed by the lawyer or those working with/for the lawyer. For example, an attorney was publicly reprimanded and suspended from practicing law for nine months after trading stock based on confidential information obtained through legal work being done by his law firm. *In re Petition for Disciplinary Action Against Marick*, 546 N.W.2d 299 (Minn. 1996).

There are limited occasions when an attorney can or must reveal confidential information gained from a client. In general, a lawyer has a duty to reveal information gained through a client that indicates future criminal activity, or information pertaining to improper behavior by another lawyer. Additionally, a lawyer may reveal confidential information gained from a client upon court order or if the client consents after an informational consultation.

4. Competence -- Minn. R. Prof. Conduct 1.1

Minn. R. Prof. Conduct 1.1 states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

To provide competent representation, a lawyer must have a strong command of the legal issues that affect the client, but there are a number of ways in which a lawyer can attain the requisite level of competence. Ideally, a lawyer has required personal experience and firsthand knowledge of the legal issues surrounding the creation and maintenance of an organization. Conducting legal research may also provide the required level of competency. The utility of research depends largely on the novelty and complexity of the issues at hand. Many questions and concerns can be solved through the lawyer's own independent research. Other issues may be more challenging and may require the assistance of another lawyer who has expertise in the specific area.

5. Liability for Noncompliance

Pursuant to Minn. R. Prof. Conduct 1.3, a lawyer must act with reasonable diligence and promptness in representing a client. A lawyer is subject to sanctions for failing to act in accordance with the diligence rule. *E.g. In re Discipline of Hartke*, 529 N.W.2d 678 (Minn. 1995). In *Hartke*, the Minnesota Supreme Court held that a lawyer's repeated and continued neglect of client matters warrants severe sanctions, absent mitigating circumstances. *Id*. at 683. In a disciplinary proceeding, a defendant lawyer's neglect of client matters involving patterns of procrastination, delay, lack of concern, and other dereliction resulting in financial loss to the clients, warranted an indefinite suspension from the practice of law. *See In re Levenstein*, 438 N.W.2d 665, 668 (Minn. 1989).

Failure to comply with the ethical standards in the Rules of Professional Conduct opens the door for imposition of liability. When considering whether a lawyer's behavior has risen to the level of professional misconduct, Minnesota courts consider the following factors:

(1) the nature of the offending lawyer's conduct;

(2) the cumulative weight of the disciplinary violation;

(3) the harm caused to the public because of the conduct; and

(4) any harm brought upon the legal profession because of the conduct.

See In re Olsen, 577 N.W.2d 218, 220-221 (Minn. 1998) (a lawyer's failure to cooperate with investigatory and disciplinary processes, misappropriation of client funds, and failure to maintain proper trust account books and records warranted disbarment); *see also In re Weiblen*, 439 N.W.2d 7, 12 (Minn. 1989) (where a pattern of misconduct, involving multiple offenses, existed, and the attorney refused to acknowledge violation of his ethical responsibility, suspension was necessary to protect the public and ensure the integrity of the judicial system itself).

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