The Importance of Knowing Who Is, and Who Is Not, Your Client

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Lawyers must be able to identify who is, and who is not, their client in order to comply with their professional obligations. Lawyers owe fiduciary duties *to their clients*,[1] including the duties of loyalty and confidentiality, which the California Supreme Court considers to be the most fundamental qualities of the attorney-client relationship.[2] These duties to the *client* are embodied in the California Rules of Professional Conduct (the "Rules"), most notably in Rule 1.6 (Confidential Information of a Client) and Rule 1.7 (Conflict of Interest: Current Clients).

Rule 1.6, together with Business and Professions Code section 6068(e)(1), obligates a lawyer "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her *client*,"[3] "unless the *client* gives informed consent."[4] To comply with this mandate, a lawyer must be able to identify who is their client, so as to ensure whose confidences and secrets are to be protected, and to ensure that the proper person has authorized any disclosure of such information.[5]

Rule 1.7 provides that:

> a lawyer shall not, without informed written consent from each *client* […], represent a *client* if the representation is directly adverse to another *client* in the same or a separate matter [or] if there is a significant risk the lawyer's representation of the *client* will be materially limited by the lawyer's responsibilities to or relationships with another *client*, a former *client* or a third person, or by the lawyer's own interests.[6]

In order to comply with Rule 1.7, and avoid impermissible conflicts of interest, lawyers must be able to properly identify who their clients are.[7]

Similarly, the conflict of interest rule pertaining to former clients, Rule 1.9 (Duties to Former Clients), requires that a lawyer be able to identify who is a former client of the lawyer: "A lawyer who has formerly represented a *client* in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the *former client* unless the *former client* gives informed written consent."[8]

Other Rules also require a lawyer to be able to properly identify the client. For example: Rule 1.8.10 (Sexual Relations with Current Client) generally provides that "a lawyer shall not engage in sexual relations with a current *client*," subject to certain specified exceptions; Rule 1.4 (Communication with Clients) requires that a lawyer "keep the *client* reasonably informed about significant developments relating to the representation"; Rule 1.8.1 (Business Transactions with a Client) provides that "a lawyer shall not enter into a business transaction with a *client*" unless certain specified conditions are satisfied; and Rule 1.8.3 (Gifts from Client) generally provides that "a lawyer shall not […] solicit a *client* to make a substantial gift, including a testamentary gift, to the lawyer."[9]

Certain Rules also require a lawyer to be able to identify who is *not* a client of the lawyer. For example: Rule 1.8.6 (Compensation from One Other than Client) mandates that "a lawyer shall not […] accept compensation

for representing a client from one *other than the client*" unless certain specified conditions are satisfied;[10] Rules 4.2 (Communication with a Represented Person) and 4.3 (Communicating with an Unrepresented Person) generally restrict a lawyer's communications with a *non-client*; and Rule 7.3 (Solicitation of Clients) generally provides that "a lawyer shall not solicit professional employment" from a *non-client* unless certain specified conditions are satisfied.

So how does a lawyer properly identify who is (or was) a client of the lawyer? In most instances, this is a relatively simple inquiry: the lawyer and client enter into a retention agreement that evidences an attorney-client relationship for a specific matter.[11] But sometimes it is not entirely clear whether an attorney-client relationship has been established. And, even if an attorney-client relationship has been established, it may not be entirely clear who the client is.

California courts have held that an attorney-client relationship can be created only by contract.[12] However, the formation of an attorney-client relationship does not require an express contract; such a relationship can be formed implicitly, as evidenced by the intent and conduct of the parties.[13] While the lawyer and the purported client may have their own subjective views as to whether an attorney-client relationship has been formed and with which client(s), courts generally will apply an objective test. Thus, despite the subjective view of the lawyer to the contrary, the reasonable perception of the purported client may determine that they are a client of the lawyer.[14]

The question as to who is, and who is not, the client is further complicated when the lawyer is associated with a law firm and when the client is an organization or associated with an organization.

When a lawyer is associated with a law firm, a client of any lawyer in the law firm is generally considered, from a practical perspective, to be a client of all of the lawyers in the law firm, at least with respect to conflicts of interest. In accordance with Rule 1.10 (Imputation of Conflicts of Interest: General Rule): "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rules 1.7 or 1.9," unless certain specified exceptions apply. The attorney-client relationship, and resulting potential conflict of interest, of one lawyer in the firm is essentially imputed to all lawyers in the firm.

The imputation of an attorney-client relationship also applies with respect to certain other prohibitions under the Rules. For example, the limitation on business transactions with a client set forth in Rule 1.8.1 applies not just to the lawyer who has an attorney-client relationship with the client, but to all other lawyers associated in the same law firm: by application of Rule 1.8.11 (Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9), a prohibition under Rule 1.8.1 "that applies to any one of them shall apply to all of them."

Imputation under Rule 1.8.11, however, does not extend to the prohibition on sexual relations with a client, "since the prohibition in [Rule 1.8.10] is personal and is not applied to associated lawyers."[15] But it is important to note that the term "client" has a unique meaning in the context of Rule 1.8.10 when the client is an organization. Solely for purposes of prohibited sexual relations under Rule 1.8.10, "a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters" is deemed to be a *client* of the lawyer—even if the lawyer has no attorney-client relationship with that individual.[16]

When a lawyer is working with an organization, the analysis as to the identity of the client may be further complicated by such factors as the working relationship and the ownership and structure of the organization. When a lawyer is retained by an organization, Rule 1.13 (Organization as Client) mandates that the lawyer "conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized […] constituents overseeing the particular engagement." Further, when dealing with such constituents, the lawyer must "explain the identity of the lawyer's client whenever the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing."[17] But even when the lawyer has an attorney-client relationship with an organization, the lawyer may also have an attorney-client relationship with any of its constituents (subject to the Rules pertaining to conflicts of interest).[18]

As a result, when working with organizations, a lawyer should clearly delineate, both to himself or herself and to the various constituents, who is, and who is not,

the lawyer's client. This may be particularly challenging in a number of common situations. For example, when the organization is closely held, the owner(s) may be so closely identified with the organization itself that either the owner(s) or the lawyer, or both, may have difficulty distinguishing who is, and who is not, the client. This can be especially difficult if the lawyer is working with the owner(s) of a to-be-formed business: although the owner(s) and the lawyer may expect and agree that the organization will be the client of the lawyer, the identity of the client for the pre-formation work (before the organization exists) may well be the owner(s) (because the formation work is being done for the benefit, and at the direction, of the owner(s)). Even with respect to established business organizations with multiple subsidiaries and affiliated entities, the determination of which entities are, and which are not, clients of the lawyer may be unclear.

The fiduciary duties owed by lawyers to their clients, as well as the protections afforded under the Rules to clients, require that lawyers at all times be able to clearly answer the question: *Who is, and who is not, my client?*

Endnotes

1 *See, e.g.*, Lee v. State Bar, 2 Cal. 3d 927 (1970).

2 *See* Flatt v. Super. Ct. (Daniel), 9 Cal. 4th 275 (1994) ("One of the principal obligations which bind an attorney is that of fidelity" [internal quotes and citation omitted]); *See also* CAL. RULES OF PROF'L CONDUCT r. 1.7, cmt. n. [1] ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."); Cal. State Bar Form. Opn. 1984-83 ("Perhaps the most fundamental quality of the attorney-client relationship is the absolute and complete fidelity owed by the attorney to his or her client.").

3 CAL. BUS & PROF. CODE § 6068(e)(1) (italics added).

4 CAL. RULES OF PROF'L CONDUCT r. 1.6(a) (italics added). *See also* r. 1.8.2 (Use of Current Client's Information) ("A lawyer shall not use a *client*'s information protected by Business and Professions Code section 6068, subdivision (e)(1) to the disadvantage of the *client* unless the *client* gives informed consent" (italics added)).

5 In addition, the existence of an attorney-client privilege pursuant to California Evidence Code section 954 depends upon the existence and identity of a client. The term "client" is defined in Evidence Code section 951 as "a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity."

6 (Italics added). *See also* CAL. RULES OF PROF'L CONDUCT r. 1.18 (Duties to Prospective Client) (which extends, to the extent set forth therein, the protections of Rule 1.6); CAL. BUS. & PROF. CODE § 6068(e)(1) (to a "prospective client" (as defined)).

7 *See* MODEL RULES OF PROF'L CONDUCT r. 1.7 (Conflict of Interest: Current Clients), cmt. n. [2] ("Resolution of a conflict of interest problem under this Rule requires the lawyer to […] clearly identify the client or clients.").

8 Italics added.

9 Italics added.

10 Italics added.

11 It is good practice for a retention agreement to be in writing. In fact, certain engagements must be evidenced in a writing. *See* CAL. BUS. & PROF. CODE § 6146 (with respect to contingency fees), § 6148 (where reasonably foreseeable attorney fees and expenses exceed $1,000 and the client is not a corporation).

12 *See, e.g.*, Koo v. Rubio's Rests., Inc., 109 Cal. App. 4th 719 (2003).

13 *See, e.g.*, Lister v. State Bar, 51 Cal. 3d 1117 (1990) ("No formal contract or arrangement or attorney fee is necessary to create the relationship of attorney and client." [internal quotes and citation omitted]); Hecht v. Super. Ct. (Ferguson), 192 Cal. App. 3d 560 (1987) ("It is the intent and conduct of the parties which is critical to the formation of the attorney-client relationship."). *See also* RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS § 14(1) ("A relationship of client and lawyer arises when […] a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services").

14 *See* Responsible Citizens v. Super. Ct. (Askins), 16 Cal. App. 4th 1717 (1993) ("one of the most important facts involved in finding an attorney-client relationship is the expectation of the client based on how the situation appears to a reasonable person in the client's position." [internal quotes and citation omitted]); *See also* Sky Valley Ltd. P'ship v. ATX Sky Valley, Ltd., 150 F.R.D. 648 (N.D. Cal. 1993) ("the courts have focused on whether it would have been reasonable, taking into account all the relevant circumstances, for the person who attempted to invoke the joint client exception [to the attorney-client privilege] to have inferred that she was in fact a 'client' of the lawyer.").

15 CAL. RULES OF PROF'L CONDUCT r. 1.8.11, cmt.

16 r. 1.8.10, cmt. n. [2].

17 r. 1.13(f). *See also* Upjohn Co. v. United States, 449 U.S. 383 (1981).

18 CAL. RULES OF PROF'L CONDUCT r. 1.13(g).