

Who Is Your Client In Small Business Matters?

BY ROY SIMON

When you are handling matters for a small corporation, who is your client? This is not a trick question. You should know the answer. As DR 5-109(A) states:

When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents. [Emphasis added.]

The same idea is captured in EC 5-18, which states: "A lawyer employed or retained by a corporation or similar entity owes allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and the lawyer's professional judgment should not be influenced by the personal desires of any person or organization."

Misunderstanding By Client

The problem is that clients don't necessarily know the answer. If an individual owns a controlling interest in a corporation and runs its day-to-day affairs, that individual may think that you are not just the corporation's lawyer but also his lawyer. The confusion is especially great if you also handle some matters for the individual personally, such as drafting a will or handling traffic tickets.

When such a client thinks you represent him personally but you think you represent only the corporation, the client may feel aggrieved when a problem arises. If something goes wrong that benefits the corporation but not the individual, the individual may eventually sue you for malpractice for failing to protect his personal interests.

That's what happened in a case recently decided by Judge Cedarbaum, *Catizone v. Wolff*, QDS: 02761810, N.Y.L.J. Nov. 18, 1999 (S.D.N.Y. 1999). The case arose out of some complex corporate transactions involving companies owned in whole or in part by the plaintiff, Pasquale Catizone. Attorney Gary Wolff represented the corporation, and along the way he occasionally represented Mr. Catizone personally in a few matters, including "a handful of securities matters."

When things went wrong with the corporate deals, Mr. Catizone personally sued Wolff for legal malpractice and breach of fiduciary duty in connection with two corporate transactions in which Catizone contended that Wolff acted as his lawyer. Wolff denied that he represented Catizone personally in the transactions.

Court Analyzes Six Factors

The details of the underlying transactions are not important, but the case is instructive because of the careful way in which Judge Cedarbaum analyzed whether attorney Wolff had a personal attorney-client relationship with Mr. Catizone in the transactions. In this connection, Judge Cedarbaum wrote (with all citations omitted):

Under New York law, "the relationship of an attorney and client is contractual, and the rules governing contract formation determine whether such a relationship has been created." Thus, "an attorney-client relationship...arises only when one contacts an attorney in his capacity as such for the purpose of obtaining legal advice or services." However, formality is not an essential element in the employment of an attorney, and since the initial arrangements for representation are often informal, it is necessary to look at the words and conduct of the parties.

[T]he factors that many courts have considered in determining the existence of an attorney-client relationship include: "1) whether a fee arrangement was entered into or a fee paid; 2) whether a written contract or retainer agreement exists indicating that the attorney accepted representation; 3) whether there was an informal relationship whereby the attorney performed legal services gratuitously; 4) whether the attorney actually represented the individual in an aspect of the matter (e.g., at a deposition); 5) whether the attorney excluded the individual from some aspect of a litigation in order to protect another (or a) client's interest; 6) whether the purported client believed that the attorney was representing him and whether this belief was reasonable."

After analyzing each of these six factors, Judge Cedarbaum concluded that attorney Wolff had not represented Mr. Catizone personally in the transactions, and in particular that "Catizone's belief that Wolff was representing him was not reasonable."

Plaintiff Asserts Claim Of Fiduciary Duty

That did not end Judge Cedarbaum's analysis, however, because Mr. Catizone had also alleged a breach of fiduciary duty. The court noted that most cases establishing a breach of fiduciary duty are premised on an attorney-client relationship, which Mr. Catizone had failed to establish. However, in one case cited by Catizone, - *Croce v. Kurnit*, 565 F. Supp. 884, 890 (S.D.N.Y. 1982), *aff'd*, 7373 F.2d 229 (2d Cir. 1984) - a case that has been followed by several other courts, the defendant attorney was treated as a fiduciary of the plaintiffs even though they were not his clients.

The *Croce* court held that "the attorney's introduction to the plaintiffs by his business partners as 'the lawyer,' his explanation to the plaintiffs of the terms of several contracts that the plaintiffs signed, his interest as a principal in the transactions, and his failure to advise the plaintiffs to obtain outside counsel, taken together, established both a fiduciary duty on the part of the attorney to the plaintiffs and his breach of that duty." Judge Cedarbaum quoted from the *Croce* court that "a fiduciary duty arises when a lawyer deals with persons who, although not strictly his clients, he has or should have reason to believe rely on him." Because Catizone had not shown that Wolff "had or should have had reason to believe that Catizone was relying on him," Judge Cedarbaum found the *Croce* case to be distinguishable.

Sound Advice

I often say to my students: "You don't want to win a legal malpractice suit. [Dramatic pause.] You want to *avoid* a legal malpractice suit."

If you want to avoid a legal malpractice suit in the small business setting, be sure to make clear both at the beginning of the representation and throughout the representation that you represent the organization, not the individuals-and put it in writing. Attorney Wolff manage to "win" his suit, but no doubt it caused him a good deal of anxiety and wasted a lot of his professional time. Perhaps he could have avoided the suit altogether if he had clearly spelled out exactly whom he represented at all times.

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