

Whom Does a Corporation's Attorney Represent?

BY ROY SIMON

When an attorney represents an entity, does the attorney also represent others? For example, does the attorney represent shareholders? Sister and subsidiary corporations? Officers? Limited partners? This is a recurring question for lawyers who represent corporations and other entities. The question is important primarily when a court is deciding a motion to disqualify a lawyer or former lawyer based on a conflict of interest, but the question also arises in legal malpractice cases and in disputes over the attorney-client privilege and the no-contact rule.

This column takes up the question in light of our new Rules of Professional Conduct, especially Rule 1.13 ("Organization as Client"), and three recent cases – one from the New York Court of Appeals, one from the Second Circuit, and one from the Southern District of New York. To shed light on the question, I searched for every citation to Rule 1.13 in the New York Rules of Professional Conduct and the Comments to those Rules. In this article I discuss Rule 1.13 and many of the significant references to it in the Comments.

Rule 1.13(a) and Its Predecessor DR 5-109(A)

The New York Rules of Professional Conduct attempt to answer the question of client identity when a lawyer represents an organization. Rule 1.13(a) provides as follows:

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.]

This language is identical to old DR 5-109(A). The meat is in the emphasized language. I wish it were more direct, like ABA Model Rule 1.13(a), which states: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." We used to have similar language in EC 5-18 of the New York Code of Professional Responsibility, which began by stating: "A lawyer employed or retained by a corporation or similar entity owes allegiance to the entity and not to a shareholder, director, officer, employee, representative, or other person connected with the entity."

Regrettably, the straightforward formulation of EC 5-18 did not make it into the comments to the new Rules of Professional Conduct. Instead, New York generally followed the language of the comments to ABA Model Rule 1.13, but the ABA comments do not need the language of EC 5-18 because ABA Model Rule 1.13(a) itself is straightforward. However, the plain meaning of New York Rule 1.13(a) is that a

lawyer “employed” by an organization (meaning inside counsel) or “retained” by an organization (meaning outside counsel) “is the lawyer for the organization and not for any of the constituents.”

Now let’s turn to two cases that applied this principle.

Does a Corporation’s Lawyer Represent the Stockholders?

One of the most interesting Second Circuit decisions during 2009 was *In re MetLife Demutualization Litigation*, 09-3716-cv (2d. Cir., Sept. 29, 2009) (reprinted in N.Y.L.J. Sept. 30, 2009 but not available on Westlaw or Lexis). The case received a lot of press because it set out a “new formulation” for determining whether to disqualify a law firm by imputation under the advocate witness rule, Rule 3.7(b). But the case was also significant for its ruling that a lawyer for a corporation does not represent the shareholders.

The plaintiffs in *MetLife Demutualization* were a class of people who had been policyholders of Metropolitan Life Insurance Company when it was a mutual insurance company. The class members complained that they were misled and shortchanged in the transaction by which the company demutualized in 2000. Nine years after the action was commenced and five weeks before trial was scheduled to begin, plaintiffs moved to disqualify MetLife’s lead counsel, Debevoise & Plimpton LLP (“Debevoise”). The basis for the motion to disqualify was that Debevoise had represented MetLife as an entity in the underlying demutualization. The District Court (per Judge Platt) granted the motion to disqualify Debevoise on the ground that its representation of MetLife in the 2000 demutualization had made it counsel to the policyholders as well, and Debevoise was now opposing the policyholders in a substantially related matter. The district court’s decision is not available anywhere, but the Second Circuit quoted the following colloquy to explain the district court’s decision:

[MetLife]:...[B]ut Debevoise represents in this litigation MetLife Inc. and Metropolitan Life Insurance Company, and not the shareholders of MetLife Inc.

The Court: I understand that and that’s the result of the demutualization process, and I fully understand that. But the problem is whether your representation of the policyholders which turned into a representation of the corporation is tainted because of a conflict.

[MetLife]: And your Honor is aware that our position is that Debevoise & Plimpton never represented the policyholders of Metropolitan Life Insurance Company or – either before this litigation began or presently.

The Court: You did represent the policyholders, because there was – they were the corporation. That’s the problem. The problem was that all of the former or the policyholders were the owners of the corporation. So you represented them and the track if you will because there was no – they were your clients.

In a bit of procedural drama, the District Court stayed its order disqualifying Debevoise and immediately certified the issue to the Second Circuit pursuant to 28 U.S.C. §1292(b). The Second Circuit accepted certification and promptly reversed. Writing for the court, Judge Jacobs said:

We conclude that plaintiffs were not clients of Debevoise. It is well-settled that outside counsel to a corporation represents the corporation, not its shareholders or other constituents. *Evans v. Artek Sys. Corp.*, 715 F.2d 788, 792 (2d Cir. 1983) (“A ‘corporate attorney’ – whether an in-house lawyer or a law firm that serves as counsel to the company – owes a duty to act in accordance with the interests of the corporate entity itself. [The] client is the corporation.”).

The court found the rule of *Evans v. Artek* to be “entirely consonant with Rule 1.13 of the New York Rules of Professional Conduct” and with Restatement (Third) of the Law Governing Lawyers, §96 cmt. B (explaining that a lawyer retained by a corporation has an attorney-client relationship with the corporation, but the lawyer “does not thereby also form a client-lawyer relationship with all or any individuals employed by it or who direct its operations or who have an ownership or other beneficial interest in it, such as shareholders”).

The Second Circuit said that these principles “apply as well to a mutual insurance company” because under New York law a mutual insurance company is “a cooperative enterprise in which the policyholders constitute the members for whose benefit the company is organized, maintained and operated.” But a policyholder – even in a mutual company, is “in no sense a partner of the corporation which issued the policy” The district court had reasoned that plaintiffs were clients of Debevoise during the demutualization “because they were MetLife’s beneficiaries and the beneficiaries of MetLife counsel’s advice.” But the Second Circuit said that “does not distinguish a mutual insurance company from any other corporation.” The Second Circuit continued:

Not every beneficiary of a lawyer’s advice is deemed a client. See N.Y. R. Prof’l Conduct 2.3(a) (“A lawyer may provide an evaluation of a matter affecting a client for the use of *someone other than the client* if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client.”) (emphasis added); *see also* ... N.Y. State Bar Ass’n, Comm. on Prof’l Ethics, Op. No. 477 (1977) (explaining that the lawyer for the executor of an estate need not provide substantive legal advice to potential beneficiaries because doing so would violate the lawyer’s duty to provide undivided loyalty to his client, the executor).

In light of these principles, and without any extraordinary circumstances raised by the parties, we conclude that the policyholders in this case were not clients of Debevoise. [Emphasis added by the Court; some citations omitted.]

The court did not hint at the factors that might create “extraordinary circumstances.”

Does a Partnership’s Lawyer Represent the Limited Partners?

The New York Court of Appeals weighed in on Rule 1.13 last summer in *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553 (2009). The suit arose out of the collapse of a hedge fund named Wood River Partners, LP, a limited partnership. Plaintiffs were 16 of Wood River’s limited partners. Defendant, the law firm of Seward & Kissel, LLP (“S & K”), had been Wood River’s legal counsel. In that capacity, Seward & Kissel had drafted the original and updated offering memoranda. The offering memoranda said that no more than 10% of the fund’s total assets would be invested in any individual stock at any given time. In violation of this provision, Wood River invested heavily in a company called Endwave Corporation, eventually committing about 65% of the fund’s total assets to Endwave stock. When

Endwave's share price plummeted, Wood River could not meet redemption requests. The fund collapsed and sixteen of Wood River's limited partners sued Seward & Kissel for \$200 million in damages for fraud, aiding and abetting fraud, and breach of fiduciary duty. All three counts were based on Seward & Kissel's alleged failure to disclose improper fund activities and its misrepresentations in the offering memoranda. (The fund manager of Wood River, John Whittier, later pled guilty to three counts of securities fraud.)

Seward & Kissel moved to dismiss the complaint. Judge Ramos, sitting in the Commercial Part of New York County Supreme Court, denied the motions. The Appellate Division reversed and granted the motions to dismiss. The Court of Appeals granted leave to appeal and affirmed dismissal of the suit. The Court of Appeals began its legal analysis by offering two different definitions of a fiduciary relationship:

A fiduciary relationship arises "between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." Put differently, "[a] fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other." Ascertaining the existence of such a relationship inevitably requires a fact-specific inquiry.

Here, the Court of Appeals observed, plaintiffs did not allege that they had "direct contact or any relationship – contractual or otherwise – with S & K." Indeed, plaintiffs acknowledged that the offering memoranda advised prospective limited partners to consult their own legal counsel before investing. Nevertheless, plaintiffs contended that "Sewell & Kissel's attorney-client relationship with Wood River in and of itself created a fiduciary relationship between S & K and the limited partners themselves."

The Court of Appeals rejected plaintiffs' contention. Citing several cases and Mallen & Smith's famous treatise on legal malpractice, the Court noted that both the Appellate Divisions and federal courts applying New York law have held that "the fiduciary duties owed by a limited partnership's attorney to that entity do not extend to the limited partners." The Court then said:

We concur with these precedents, particularly given that we have found similarities between limited partners and the shareholders of a corporation. It is well settled that a corporation's attorney represents the corporate entity, not its shareholders or employees (see *Talvy v. American Red Cross in Greater N.Y.*, [citation omitted]; see also Rules of Professional Conduct Rule 1.13[a] [22 NY CRR 1200.13(a)]). We therefore hold that S & K's representation of this limited partnership, without more, did not give rise to a fiduciary duty to the limited partners. Hence, plaintiffs' breach of fiduciary duty claim against S & K was properly dismissed.

Plaintiffs' claims for fraud and for aiding and abetting, both predicated on S & K's silence, failed because the partnership itself had no duty to disclose. "In the absence of a fiduciary relationship," the Court said, "we perceive no legal duty obligating S & K to make affirmative disclosures to plaintiffs under the circumstances of this case."

What Should a Lawyer Explain to Constituents?

Based on the opinions in *MetLife Demutualization* and *Seward & Kissel*, we know that the policyholders of a mutual insurance company, the stockholders of a corporation, and the limited partners of a limited

partnership are not a lawyer's clients merely because the lawyer represents the corporation or the partnership. The policyholders, stockholders, and limited partners are constituents, not clients. Under Rule 1.13(a), when a lawyer for an entity is dealing with the organization's constituents and the lawyer perceives differences between the interests of the organization and the interests of its constituents, the lawyer must "explain that the lawyer is the lawyer for the organization and not for any of the constituents." What, exactly, must the lawyer explain? What should the lawyer say?

The New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC") added Comments [2A] and [2B] to Rule 1.13 to address this question. Those comments say:

[2A] There are times when the organization's interests may differ from those of one or more of its constituents. In such circumstances, the lawyer should advise any constituent whose interest differs from that of the organization: (i) that a conflict or potential conflict of interest exists; (ii) that the lawyer does not represent the constituent in connection with the matter, unless the representation has been approved in accordance with Rule 1.13(d); (iii) that the constituent may wish to obtain independent representation; and (iv) that any attorney-client privilege that applies to discussions between the lawyer and the constituent belongs to the organization and may be waived by the organization. Care must be taken to ensure that the constituent understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent, and that discussions between the lawyer for the organization and the constituent may not be privileged.

[2B] Whether such a warning should be given by the lawyer for the organization to any constituent may turn on the facts of each case.

(Note: Like all comments with a capital letter next to the number, Comments [2A] and [2B] have no counterpart in the ABA Model Rules.)

Rule 1.13(d), referred to in Comment [2A], provides as follows:

(d) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the concurrent 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.

Thus, under Rule 1.13(d), a lawyer for an organization may represent one or more of the organization's constituents simultaneously if certain conditions are met. But the focus of this article is on whether the lawyer automatically represents constituents by operation of law, even if the lawyer has not intentionally undertaken to represent them. The answer is usually "no." As a general rule, the lawyer for an entity does not automatically represent the entity's constituents. But sometimes the structure of a corporate family will create an attorney-client relationship with a corporation's affiliates or subsidiaries even though the lawyer's engagement letter says the lawyer does not represent them. That's what happened in the next case.

May a Lawyer Oppose a Corporate Client's Affiliate?

One of the most difficult questions to answer is whether a lawyer who represents a corporation may accept or continue a representation adverse to an affiliate of the lawyer's corporate client. In ABA Formal Ethics Op. 95-390 (1995), one of only a handful of ABA ethics opinions with multiple dissents, the ABA ethics committee opined that a lawyer who represents a corporate client "is not by that fact alone necessarily barred from a representation that is adverse to a corporate affiliate of that client in an unrelated matter." (One dissenter argued that "the suit against the subsidiary will always have a direct impact on it and no matter what the majority opines, will be a conflict of interest.") However, the majority also said that a lawyer "may not accept such a representation without consent of the corporate client if the circumstances are such that the affiliate should also be considered a client of the lawyer"

In 2002, when the ABA comprehensively amended the ABA Model Rules along the lines recommended by the ABA Ethics 2000 Commission, the ABA added a new Comment [34] to Rule 1.7 that largely codified Opinion 95-390. That comment, which is now Comment [34] in New York's Rules, provides in relevant part as follows:

[34] A lawyer who represents a corporation [or other organization] does not, simply by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Although a desire to preserve good relationships with clients may strongly suggest that the lawyer should always seek informed consent of the client organization before undertaking any representation that is adverse to its affiliates, Rule 1.7 does not require the lawyer to obtain such consent unless: (i) the lawyer has an understanding with the organizational client that the lawyer will avoid representation adverse to the client's affiliates, (ii) the lawyer's obligations to either the organizational client or the new client are likely to adversely affect the lawyer's exercise of professional judgment on behalf of the other client, or (iii) *the circumstances are such that the affiliate should also be considered a client of the lawyer. Whether the affiliate should be considered a client will depend on the nature of the lawyer's relationship with the affiliate or on the nature of the relationship between the client and its affiliate.* For example, the lawyer's work for the client organization may be intended to benefit its affiliates. The overlap or identity of the officers and boards of directors, and the client's overall mode of doing business, may be so extensive that the entities would be viewed as "alter egos." Under such circumstances, the lawyer may conclude that the affiliate is the lawyer's client despite the lack of any formal agreement to represent the affiliate. [Emphasis added.]

COSAC did not consider that enough guidance, however, so COSAC added a new Comment [34A] that provides:

[34A] Whether the affiliate should be considered a client of the lawyer may also depend on: (i) whether the affiliate has imparted confidential information to the lawyer in furtherance of the representation, (ii) whether the affiliated entities share a legal department and general counsel, and (iii) other factors relating to the legitimate expectations of the client as to whether the lawyer also represents the affiliate. Where the entities are related only through stock ownership, the ownership is less than a controlling interest, and the lawyer has had no significant dealings with the affiliate or access to its confidences, the lawyer may reasonably conclude that the affiliate is not the lawyer's client.

Some years ago, I wrote in these pages about New York state and federal cases granting or denying motions to disqualify when a law firm is adverse to an affiliate of one of its corporate clients. See *Assessing Conflicts Issues Within The Corporate Family* (NYPRR, Jan. 2003). The most recent addition to this line of cases is *GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C.*, 644 F.Supp.2d 333 (S.D.N.Y. 2009). In that case, GSI Commerce Solutions, Inc. (“GSI”), a subsidiary of the baby-care giant Johnson & Johnson, successfully moved to disqualify the law firm of Blank Rome. The case is interesting because Blank Rome’s Engagement Agreement with Johnson & Johnson, which was seemingly written with ABA Formal Ethics Op. 95-390 and Comment [34] to Rule 1.7 in mind, stated as follows:

Unless agreed to in writing or we specifically undertake such additional representation at your request, *we represent only the client named in the engagement letter, and not its affiliates, subsidiaries, partners, joint venturers, employees, directors, officers, shareholders, members, owners, agencies, departments, or divisions.* If our engagement is limited to a specific matter or transaction, and we are not engaged to represent you in other matters, our attorney-client relationship will terminate upon the completion of our services with respect to such matter or transaction whether or not we send you a letter to confirm the termination of our representation. [Emphasis added.]

In June 2005, Blank Rome and Johnson & Johnson entered into an amendment to the Engagement Agreement in which Johnson & Johnson reaffirmed that Blank Rome represented only Johnson & Johnson and not its subsidiaries, etc.

Even though Johnson & Johnson was the only client specified in the Engagement Agreement, Johnson & Johnson periodically asked Blank Rome to provide legal advice relating to Johnson & Johnson’s subsidiaries and affiliates on specific matters or transactions. In fact, “[m]ost of the work Blank Rome performed pursuant to the Engagement Agreement was for J & J’s operating companies rather than for J & J itself.” Blank Rome even did some legal work at one time for BabyCenter, a Johnson & Johnson subsidiary. That work had ended, however, so BabyCenter was Blank Rome’s former client, not its current client – or so Blank Rome thought.

At some point, GSI got into a contract dispute with BabyCenter and asked Blank Rome to file a claim against BabyCenter in an arbitration proceeding. BabyCenter, however, refused to proceed with the arbitration as long as GSI was represented by Blank Rome. (This wasn’t a sideshow to avoid arbitration – both parties agreed that GSI’s underlying breach of contract claim against BabyCenter was governed by an arbitration provision in the contract between GSI and BabyCenter, and both parties were fully prepared to arbitrate GSI’s claim. The only sticking point was Blank Rome’s representation of GSI.) BabyCenter was not claiming that Blank Rome was opposing a former client in a substantially related matter – all parties to the dispute agreed that the present contract dispute between GSI and BabyCenter bore no relation to Blank Rome’s past representation of BabyCenter. Rather, BabyCenter contended that it should be considered a current client of Blank Rome, thus disqualifying Blank Rome from representing GSI against it because Blank Rome could not simultaneously represent adverse parties without consent.

GSI countered that BabyCenter was a former client whose relationship with Blank Rome had ended in 2006, thus rendering disqualification unnecessary and improper. Judge Rakoff elaborated on GSI’s position as follows:

In arguing that BabyCenter should not be considered a current client of Blank Rome, GSI relies heavily on the parties' Engagement Agreement, which, with certain exceptions, limited Blank Rome's representation to J & J and disavowed any representation of J & J's "affiliates, subsidiaries, partners, [or] joint venturers." In that respect, GSI observes that a "lawyer who represents a corporation or other organization does not, simply by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary," New York R. of Prof'l Conduct 1.7, comment 34, and that it is well-established that lawyers are permitted to limit the scope of their representation of a client as long as the limitation is reasonable under the circumstances and the client gives informed consent. [Citation omitted.]

The reference to limiting the scope of representation was apparently referring to New York Rule 1.2(c), which provides that a lawyer "may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel."

In Judge Rakoff's view, however, GSI was reading the Engagement Agreement "more broadly than its language justifies." In particular, Blank Rome could not fairly read the Engagement Agreement to limit Blank Rome's duty of loyalty to those Johnson & Johnson's subsidiaries that it undertook to represent, nor to authorize Blank Rome to sue those companies at the same time it was representing them. Then, casting doubt on the validity of nearly all advance conflict waiver agreements, Judge Rakoff said: "Indeed, it would be a strange agreement – and one of doubtful enforceability – that would permit a law firm to sue the very company it is currently representing absent the most express and unequivocal waiver by all concerned."

In my view, Judge Rakoff's broadside attack on advance waiver agreements was missing the point. Blank Rome was not asserting that BabyCenter had waived the conflict in advance. Rather, Blank Rome was asserting that there was no conflict at all because BabyCenter was not a current client, so Blank Rome was not suing "the very company it is currently representing." Rather, Blank Rome was merely opposing a former client in a matter that was not substantially related. Judge Rakoff tackled this issue head on, identifying the "real issue" as "whether BabyCenter should be considered a current client for disqualification purposes." He continued:

Although the specific matter as to which Blank Rome represents BabyCenter allegedly ended in 2006, for purposes of disqualification, *the Court must also examine the extent to which BabyCenter and J & J must be considered essentially the same client* for purposes of the instant litigation, for if they are, the conflict is palpable, since it is undisputed that Blank Rome continues to represent J & J in various matters.

Although technically BabyCenter is a wholly owned subsidiary of J & J, as a practical matter it is part and parcel of J & J. Among other things, BabyCenter shares accounting, audit, cash management, employee benefits, finance, human resources, information technology, insurance, payroll, and travel service and systems with J & J. *Of particular relevance here, BabyCenter does not maintain its own legal department, but instead relies on J & J's Law Department for legal services (along with outside counsel retained by it or by it through J & J).* Further, the agreement between GSI and BabyCenter that is the subject of the underlying arbitration was negotiated by an attorney in J & J's Law Department, together with businesspeople from BabyCenter. Indeed, it is undisputed

that members of J & J's Law Department have been involved in this action on behalf of BabyCenter since the parties' dispute arose in October 2008, and Blank Rome acknowledges that it has dealt with J & J attorneys during the pendency of this action. ... [Citations omitted; emphasis added.]

That was enough, in Judge Rakoff's mind, to establish an identity between Johnson & Johnson and BabyCenter. By opposing BabyCenter, Blank Rome was really opposing its current client Johnson & Johnson. The reasoning was sound, based on solid facts, and simply reflected existing precedent. But then Judge Rakoff once again went too far, stating:

Further, since BabyCenter is a wholly owned subsidiary, its liabilities directly impact J & J's. *See, e.g., Stratagem Dev. Corp. v. Heron Int'l N.V.*, 756 F.Supp. 789, 792 (S.D.N.Y.1991) (a lawyer's duty of loyalty "applies with equal force where the client is a subsidiary of the entity to be sued," and where the liabilities of a wholly owned subsidiary "directly affect the bottom line of the corporation parent").

Judge Rakoff was quoting *Stratagem* correctly, but he was also leaving out numerous authorities on the other side of the debate, including Rule 1.7 cmt. [34] and ABA Formal Ethics Op. 95-390 (both of which rejected Judge Rakoff's facile bottom line test), as well as the leading New York case on the corporate family issue, *Brooklyn Navy Yard Cogeneration Partners, L.P. v. PMNC*, 174 Misc.2d 216, 663 N.Y.S.2d 499 (N.Y. Sup. Ct. 1997). In that case, in which the LeBoeuf firm was opposing the parent of a subsidiary that was still one of LeBoeuf's current clients, the court denied the parent's motion to disqualify LeBoeuf, stating:

[T]his Court is rejecting, *ab initio*, the theory propounded by the defendants that the two corporations [the parent and the subsidiary] should be treated as one entity for conflicts purposes since no evidence has been submitted to demonstrate that the "dominion [of the parent over the subsidiary is] so complete, [the] interference so obtrusive" as to rebut the presumption that they are separate and distinct legal entities.

Without citing or distinguishing *Brooklyn Navy Yard*, Judge Rakoff summed up his opinion in the following paragraphs:

In short, notwithstanding the scope of representation set forth in the Engagement Agreement, the Court is satisfied that the relationship between BabyCenter and J & J is sufficiently "close as to deem them a single entity for conflict of interest purposes." [Citations omitted.]

Judge Rakoff therefore concluded that BabyCenter must be considered a current client of Blank Rome for purposes of disqualification. Accordingly, Judge Rakoff said, "disqualification must follow absent the most express of waivers." He cited New York Rule 1.7, Comment [6], which says that "absent consent, a lawyer may not advocate in one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated." Because the Engagement Agreement failed to provide the "unequivocal express waiver that would be necessary to prevent Blank Rome's disqualification here," the court granted the motion to disqualify. Judge Rakoff's opinion is loosely written and goes too far in its dicta concerning advance waivers and the "bottom line" test, but the core holding of the opinion is likely to have a strong influence on other courts. The main lesson of the case is that a lawyer who represents corporations whose relationships with its affiliates and subsidiaries are like

Johnson & Johnson's – including a common legal department – will be deemed to represent the corporation's subsidiaries – absent "the most express of waivers" – despite Rule 1.13(a).

How Does a Law Firm Check for Conflicts?

If Judge Rakoff's expansive (and I think wrongheaded) view of corporate clients in *GSI Commerce Solutions* is accepted, then checking for conflicts may not be too difficult – any wholly owned subsidiary of a corporate client is automatically a client because "its liabilities directly impact" the parent's bottom line. But that was just dicta. The real focus of the opinion, as it was in Judge Rakoff's earlier opinion in *JPMorgan Chase Bank v. Liberty Mutual Insurance Co.*, 189 F. Supp.2d 20 (S.D.N.Y. 2002), was the practical day-to-day interaction between the parent and the subsidiary – whether the subsidiary "shares accounting, audit, cash management, employee benefits, finance, human resources, information technology, insurance, payroll, and travel service and systems" – and especially a legal department – with the parent. How does a law firm keep track of those factors? In my discussions with lawyers who serve on a law firm conflict committee or who deal frequently with conflict matters, checking on those factors is next to impossible.

Comment [9F] to New York Rule 1.10 is more realistic. It says:

[9F] Representation of corporate or other organizational clients makes it prudent for a firm to maintain additional information in its conflict-checking system. For example, absent an agreement with the client to the contrary, a conflict may arise when a firm desires to oppose an entity that is part of a current or former client's corporate family (e.g., an affiliate, subsidiary, parent or sister organization). See Rule 1.7, Comments [34]-[34B]. Although a law firm is not required to maintain records showing every corporate affiliate of every corporate client, if a law firm frequently represents corporations that belong to large corporate families, the law firm should make reasonable efforts to institute and maintain a system for alerting the firm to potential conflicts with the members of the corporate client's family.

But even complete records showing "every corporate affiliate of every corporate client" may not be adequate when we turn to small corporations. There, a different problem arises. As Comment [9F] to Rule 1.10 explains:

[9G] Under certain circumstances, a law firm may also need to include information about the constituents of a corporate client. Although Rule 1.13 provides that a firm is the lawyer for the entity and not for any of its constituents, confusion may arise when a law firm represents small or closely held corporations with few shareholders, or when a firm represents both the corporation and individual officers or employees but bills the corporate client for the legal services. In other situations, a client-lawyer relationship may develop unintentionally between the law firm and one or more individual constituents of the entity. Accordingly, *a firm that represents corporate clients may need a system for determining whether or not the law firm has a client-lawyer relationship with individual constituents of an organizational client.* If so, the law firm should add the names of those constituents to the database of its conflict-checking system. [Emphasis added.]

That is a tremendous challenge, and law firms that represent small or closely held corporations will have to spend a lot of time and effort to meet it.

Conclusion: Large and Small Problems of Client Identity

The discussion in this article suggests that the problems of client identity are sometimes easy and sometimes hard.

Representing large organizations presents some small problems of client identity that are easily solved by reference to clear rules, but presents other problems that are nearly insurmountable. The article also suggests that representing small organizations will often add additional challenges.

A lawyer who represents a large organization like MetLife, for example, will not be considered the lawyer for the shareholders absent “extraordinary circumstances.” Likewise, a lawyer who represents a sizeable limited partnership will not automatically be considered the lawyer for the limited partners. Those are easy problems because the rules are clear and simple.

But a law firm that represents a large corporation like Johnson & Johnson, which has many subsidiaries, will face daunting challenges in checking for conflicts, because courts may examine minute details (*e.g.*, employee benefits, finance, human resources, information technology, and insurance) regarding the ties and the working relationships between the parent and its subsidiaries. Even a plainly written engagement agreement identifying the parent as the only client – and expressly excluding the subsidiaries – may not be sufficient to avoid disqualification in a suit adverse to a subsidiary unless the engagement agreement also contains “the most express of waivers” (to borrow Judge Rakoff’s phrase) because the court may find that a given subsidiary is an integral, inseparable part of the parent for conflict of interest purposes.

The most difficult problems of client identity may be the ones that received the least attention in this article – the problems of representing small or closely held corporations with few shareholders. I have written on that topic before in this newsletter – see *Who Is Your Client in Small Business Matters?* (NYPRR Dec. 1999) (discussing *Catizone v. Wolff*, 71 F. Supp.2d 365 (S.D.N.Y. 1999)) – but there is much more to say, and I will return to that issue in the future.

For the present, it is enough to say that Rule 1.13(a) is a good starting point for solving problems of client identity, but it is not an ending point. Tackling the thorny questions of client identity will often require significant legal and factual research. Sometimes, unfortunately, a lawyer will not know the answer to a client identity problem until the court rules on a motion to disqualify.

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