

## **“Now, Does Everyone Understand that I Don’t Represent You?”**

**by**

**Thomas F. Ascher, Assistant Director**

**Minnesota Office of Lawyers Professional Responsibility**

Reprinted from *Minnesota Lawyer* (December 5, 2005)

Many times, attorneys face issues regarding potential conflicts when assisting a group of individuals, not as individuals, but as a separate and distinct legal entity, such as a corporation. Such representation could raise issues under Rule 1.7 of the Minnesota Rules of Professional Conduct (MRPC), which deals with conflicts. A hypothetical situation might serve to illustrate the ethical considerations involved in a representation of this type. [Ftn 1](#)

Michael E., Bill G., Donald T., and Ted T. approach you, an attorney, about assisting them with forming a closely held corporation for purposes of affixing computer chips in squirrels to further facilitate world-domination plans. The entity will be called “Just Try to Stop Us, Inc.” and will be comprised of the four individuals, in equal shares with equal voting authority.

You are retained to prepare articles of incorporation, draft shareholder agreements and bylaws and conduct other “start up” services. You begin the process, and much of the drafting has been completed after a couple months, when, without much notice, Bill G. is discovered to have a soul and is precipitously ousted from the group. Bill G. is somewhat uneasy about leaving the fate of the world in the hands of the others, and very uneasy about losing money as a result of his ouster, so he retains another attorney to represent him in claims against the remaining members, and potentially against the not-yet-formed entity itself. This raises issues for you regarding your responsibilities to the corporate entity, the remaining individuals and the ousted individual.

Fortunately, when the four men approached you and asked if you would take on this representation, you phoned the Office of Lawyers Professional Responsibility and secured an advisory opinion. Because your inquiry was about your own prospective conduct, and because you made a full and accurate disclosure of the pertinent facts and background, you received helpful guidance. You were told to draft a retainer agreement clarifying precisely who your client is.

In this instance, you decided your client would be the prospective corporation itself, and your duties and responsibilities would flow to this entity. [Ftn 2](#) You clarified that you were not undertaking to represent any of the four as individuals, and that you did not, and could not, represent the individuals in any action, claim or dispute in opposition to the corporate entity itself. You were told to secure the signatures of each individual, for and on behalf of the corporate entity, on this retainer agreement before beginning the “start up” work. Because you took these steps, Bill G. was very clear that he could not rely on you for any assistance in his dispute with the corporation.

Other issues may arise, however. The three remaining members of the group approach you about representing them, individually, as defendants in Bill G.'s lawsuit. Depending on the specific claims Bill G. is asserting against each of the three remaining shareholders, you may be able to defend the individuals without violating MRPC 1.7.

You must first determine whether representing any of the three individuals would constitute a "concurrent conflict of interest" under Rule 1.7(a). Although the representation, on its face, would not be "directly adverse" to another client, as prohibited under 1.7(a)(1), the representation would still be considered a concurrent conflict of interest under 1.7(a)(2) if "there is a significant risk that the representation of one or more clients will be materially limited by [your] responsibilities to another client." In other words, will your responsibilities to the corporation, in the first instance, and each of the three individuals, in the next instance, "materially limit" your responsibilities to any one of the three individuals?

The answer to this question will most likely depend on what, precisely, Bill G. is alleging in his lawsuit. It is possible that the interests of the three remaining members could become adverse in the course of defending against Bill G.'s claims. If, for example, Bill G. has raised allegations of fraud, one or two of the remaining shareholders might have committed fraud, while the others had not. This could lead to conflicting interests among the individuals and/or the corporate entity itself in terms of defending against Bill G.'s lawsuit.

Even if you determine that Bill G.'s allegations raise a significant risk that the potential representation of one or more of the individuals would be materially limited by your responsibilities as owed to the corporation and/or the other individuals, you might still be allowed to take on the individual representation without violating the rules of professional conduct.

Subpart (b) of Rule 1.7 allows for a lawyer to undertake representation "Notwithstanding the existence of a concurrent conflict of interest" if certain conditions are met:

- The lawyer must reasonably believe that he or she will be able to competently and diligently represent each affected client;
- The representation cannot be prohibited by law;
- The representation will not involve asserting a claim by one client against another client in the same litigation or proceeding; and
- Each client gives informed consent, in writing.

Again, whether the attorney can undertake to represent one or more of the individuals in Bill G.'s lawsuit will depend on the specific claims and allegations raised. If, as supposed above, Bill G. has raised allegations of fraud against one or more of the remaining shareholders, the lawyer most likely would have to decline to represent that allegedly fraudulent shareholder. The other shareholders would want to assert

cross-claims against that other individual, and the representation would not be proper under Rule 1.7(b)(3) nor 1.7(b)(1) (most likely). Thus, even if the lawyer were to obtain each individual's written consent, the representation would still violate the rule.

It is possible, however, that the claims and allegations Bill G. raises in his lawsuit will not potentially pit one or more of the remaining shareholders against the other(s). In such a situation, the attorney could potentially take on the representation. Additionally, the lawyer should keep in mind that although the representation of the individuals may have been allowable under the MRPC initially, depending on how the lawsuit proceeds, and as more facts and evidence become known, the representation might later come to be prohibited under the rules. Should that occur, the attorney would then need to withdraw from the offending representation.[Ftn 3](#)

The key for the attorney is to clarify the representation at the point of inception to make sure that all individuals involved understand who the client is, and who it isn't. The attorney should review the ethical rules prior to the retention, and he should remain aware that as the representation moves forward, circumstances and developments could arise that require further analysis and possibly some additional action or changes.

---

<sup>1</sup> Other rules, including 1.6, 1.9 and 1.13, could also be implicated in such a situation.

<sup>2</sup> This is not to say that you could not undertake to represent one or more of the individuals, as individuals, instead of the pending corporate entity. This could be done, so long as the precise representation was made clear to all, and subject to the similar, but somewhat different, conflict issues that could arise under this scenario as opposed to the one to be discussed herein.

<sup>3</sup> The lawyer should, of course, follow MRPC 1.16 regarding terminating representation.