

In House Counsel – The Importance of Understanding Conflicts of Interest and Related Breach of Fiduciary Duty Claims

- I. Threshold Issue – Importance of Identifying the Client
 - a. Not always obvious – can be made more difficult by close working relationship among officers and directors
 - b. Identify the entity’s owners, officers, directors for outside counsel at the outset
 - c. What inter-relationships exist among these individuals? What are their respective roles (e.g. managers, promoters, finance, etc.)
 - d. Importance of communication from outset – “I am not counsel for individual officers, directors, or shareholders”
 - e. Better to set the relational scope, frequently and in writing, rather than have it imposed on you later
 - f. Ounce of prevention
 - g. Taking a leadership approach
 - h. URPC 1.13 – Organization as a Client
 - i. If there’s one rule you need to know...
 - ii. Identifying potential harm to the organization
 - iii. Reporting potential harm
 - iv. Override of Rule 1.6 of the URPC
(Confidentiality of Information)
 - i. Unique problem of closely held, informally managed organizations
- II. Benefits and Limitations of Conflict Waivers under URPC 1.7
 - a. General rule – extreme caution and scrutiny before inviting or accepting a conflict waiver
 - b. Best case scenario – no actual conflict, unlikely potential conflict, simply alerting client as soon as potential conflict becomes known
 - c. Advance waivers definition: waiver granted before conflict arises and generally before precise parameters are known
 - d. Distinguishing between general and specific waivers
 - e. Distinguishing between sophisticated and unsophisticated clients
 - f. Why these distinctions may not ultimately matter
- III. Investigating Claims by Employees
 - a. Warning employees they are not represented and as to lack of confidentiality
 - b. Nonengagement letter with appropriate disclaimers
 - c. Make clear who you represent, i.e. the entity
- IV. Successor Entities
 - a. Determine what your obligation may be to the successor
 - b. Does successor entity have current or former client status
 - c. Attorney-client privilege issues
 - d. Succession of duty of loyalty
 - e. Sale of assets or transfer of entity’s business operations, rights and liabilities?

- V. Avoiding Entanglement in Litigation
- a. Best way to avoid: “I’m not a – fill in the blank, e.g. litigator” (avoid dabbling)
 - b. Second best: “I let you know at the outset that I can’t take sides”
 - c. Remember 1.13(f) (In dealing with an organization’s constituents, lawyer shall explain identity of client when knows organization’s interests are adverse to the constituent(s))
 - d. Maintain careful records regarding your involvement and advice – you will likely be a key witness (and hopefully only that)

Resources:

Utah Rules of Professional Conduct
Restatement of the Law Third: The Law Governing Lawyers
Hotlines maintained by various legal malpractice carriers
Ethics Opinions issued by the Ethics and Discipline Committee
Other experienced practitioners

BY: MICHAEL SKOLNICK