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State Law & State Taxation Corner

Who Is (and Who Is Not) the Client?

By Thomas E. Rutledge*

In this my last column for the Journal of Passthrough Entities, it seems appropriate to return to a first principle of serving as an attorney, namely clear identification of who is the client. A reasoned determination of who is the client serves a number of important roles, most particularly the core question of whose interest the attorney is charged to assess, protect and advance. "Where you stand" (*i.e.*, whose interest you will advance) "depends on where you sit" (*i.e.*, to whom do you owe your loyalty).[1] From the opposing perspective, identifying who is the client necessarily identifies a different class, namely those who are not clients and whose interests the attorney is not bound to either protect or advance.

Problems arise when attorneys fail to carefully identify who is and is not the client. These failures result in litigation that at least anecdotally would appear is becoming more and more common. There is an adage that "the second worst thing that can happen to you is that you win a lawsuit."[2] This is particularly true in the context of a suit brought by one who believes he or she was the attorney's client. The attorney is now in the position of needing to defend him/herself. True, typically the attorney's insurer will retain counsel to provide a defense, but few and far between are the attorneys who will be comfortable turning over the action entirely to that counsel. Rather, the attorney charged with misconduct will want to be intimately involved in defending the action. There's certainly nothing wrong with that attitude, but it must be recognized that every hour the attorney is focused upon defending his or her own conduct, he/she is not performing services on behalf of a paying client. As such, the attorney may prevail in the action only with significant personal costs and, of course, there is always the possibility that the attorney will not prevail.

Many disputes in this area begin with the application of Model Rule of Professional Conduct 1.13(a), it providing, *inter alia*, that the attorney for an organization has as his or her client an organization, and does not by representation of an organization undertake to represent any of its constituents.[3] However, the attorney in representing the business organization must take instructions on its behalf from those same constituents. Meanwhile, even as attorneys should be particularly sensitive to the different offices an individual may have *vis-a-vis* a business entity,[4] non-attorneys may and often do have limited appreciation of

those distinctions, thinking of it simply as "their company" and the attorney as "their attorney."

In connection with the organization of a business venture, there are at least four options as to who is the client, namely:

- One of the owners;
- The venture itself;
- One owner and the venture; or
- More than one of the owners.[5]

If the decision is made to represent one and only one of the owners, then the attorney should do only that. If and when the owners meet, whether all or in a subset, the attorney needs to advise all of the other participants in the meeting as to who is his or her client. That identification of who is the client should be supplemented with a negative statement, namely that the attorney, in representing a particular owner, undertakes no representation of the other owners or the venture itself. In an optimal world, every participant would have his/her own independent legal counsel, and no participant could think that they are piggybacking on the guidance afforded another participant. In this situation, it is important that the attorney remains focused on the client and that there not be "mission creep." For example, assume the attorney represents one participant in the venture. All of the participants decide it should be organized as an LLC, and the one attorney prepares the articles of organization and a draft operating agreement. Absent clarity as to what role he or she does these tasks, he or she may be charged with having now undertaken representation of the LLC. The attorney for one of the participants in the to-be-formed LLC who agrees to prepare its organizational documents should in writing clarify to all of the other participants in the venture that those documents are being drafted exclusively at the request of the attorney's client and likewise for that client. Put another way, the attorney needs to disabuse in writing the other participants in the venture from any reasonable expectation that the attorney is representing the interests of the venture or of any of its participants other than the identified client.

Should the attorney be representing a subset of the members, not only are the obligations already described above binding upon the attorney, but he or she must as well fully advise the joint clients of the consequences of a joint representation, including the absence of any confidentiality amongst them as to disclosed information and the obligation of the attorney, in the event discord amongst them should arise, to withdraw from the representation, a withdrawal that likely will have negative consequences *vis-à-vis* their total expenses and upon transaction timelines.

The approach of representing one of the participants in the venture and the venture itself, with it typically being the case that the member being represented is the source of its funding and to be its majority owner, is fraught with complications. First, there is the necessity of disclosure to the other members of who the attorney represents. This structure, in the view of the other participants, is necessarily going to give rise to perceptions of conflict. Assuming the attorney in the representation of the venture will be paid with company assets, every other member likely will assume that the LLC is in effect underwriting the legal cost of the majority member. Furthermore, in that it is anticipated that company assets will be utilized to pay the attorney's fee, underwriting certain of the otherwise incurred expenses of the represented member, that engagement may constitute a conflict of interest transaction requiring the disinterested approval of the other members of the LLC.[6]

Also, this constitutes a joint representation, and there needs to be consideration given to the eventuality that the majority member, a client of the attorney, and the venture itself, another client of the attorney, may come to be in opposition with one another. In that instance, the attorney will need to withdraw,[7] and it may be necessary that the attorney withdraw from both representations. Considering that eventuality, the attorney will need to advise his or her individual client that, in the event of a conflict between the individual and the venture, the company will not only have a claim upon the attorney's file with which to support its claim against that member, but the attorney likely cannot make a claim of confidentiality in that one of the jointly represented clients, the LLC, seeks the information.

The last option here considered is representation of only the venture. In that instance, it and it alone is the client, and all of the attorney's obligations of confidentiality and promotion/protection are to it. In this instance, the attorney is not representing any of the constituents of the venture, and none of them should be able to assert that the attorney as well represented them as an individual. However, as is reviewed below, often attorneys engage in activities and/or fail to express as to their role, opening the door to a multitude of allegations.

As suggested above, at least anecdotally, it seems that there has been a flurry of recent decisions involving claims by LLC constituents that an attorney has violated his or her obligations to that constituent even as the attorney has claimed "you are not my client." A review of a sample of these cases will identify common fact patterns that have led to these disputes.

Brafman v. Wilson Sonsoni

A recent decision from California considered and rejected the suggestion that an individual who had been a member of an LLC and then a shareholder in a successor converted corporation was, individually, a client of the firm retained to effect that conversion.[8]

Ori Brafman and Peter Sims started a business assisting business authors. In December of 2014, under the name "Silicon Guild," they retained an unnamed law firm to organize their venture as an LLC, jointly owned by each of them.

By mid-2015, they decided the company should be a C corporation in order that it could take in additional capital. Sims contacted Wilson Sonsoni ("WSGR") to assist in the incorporation process. In connection therewith, Sims, on behalf of Silicon Guild, signed an engagement letter with WSGR, it providing that WSGR had been "retained to advise Silicon Guild (the 'Company') with respect to formation and general corporate matters." That same engagement letter provided that the representation was of the company "and not any of its affiliates, owners, or agents, or any of the individuals associated with the Company." The engagement letter went on to provide that WSGR's representation of the company did not mean that it "represent[ed] any of the Company's parents, subsidiaries, employees, officers, directors, shareholders, or founders." After signing the engagement letter, Sims emailed a copy of it to Brafman. Shortly thereafter, WSGR realized that Silicon Guild LLC already existed, and that the process would involve the conversion of that LLC into a C corporation. Throughout WSGR communicated primarily with Sims. While that process was continuing, and even as the company was signing up customers, the relationship between Sims and Brafman deteriorated, and Sims was no longer willing to proceed as an equal owner in Silicon Guild. Working with WSGR, Sims drafted a proposal in which he would become the 90% owner of the corporation, Brafman would hold 5%, and two other individuals would split the remaining 5%.

Sims and Brafman agreed to mediate their dispute over the ownership of the company. While that mediation process was taking place, Sims retained WSGR to incorporate a new company, Parliament, it having the same purpose as Silicon Guild. To that end, Sims signed a new engagement letter with WSGR for the incorporation of Parliament.

WSGR asserted it did not know, and had no reason to know, that Parliament was intended to compete with Silicon Guild. WSGR did send an email to both Brafman and Sims setting forth its understanding that its relationship with Silicon Guild was ending, and that WSGR was going forward as counsel for Parliament. Brafman, having certainly by this point learned of Sims' efforts with respect to Parliament and WSGR's relationship thereto, "did not seek a temporary restraining order or injunction to stop Sims or WSGR's actions with respect to Parliament."

At the culmination of the mediation, Brafman sold his interest in Silicon Guild to Sims, and Sims, Silicon Guild, Parliament and Brafman, entered into comprehensive releases. Two months after that settlement, Brafman filed his initial complaint against WSGR, which a year and a half later was followed by an amended complaint alleging seven causes of action against WSGR. Each of these claims was premised, *inter alia*, upon the notion that Brafman was a client of WSGR. WSGR then moved for summary judgment and, after oral argument, the trial court granted the requested summary judgment on the basis that WSGR owed no duty to Brafman. This appeal followed.

Affirming the summary judgment and a determination that WSGR owed no fiduciary or similar obligations to Brafman, the court began by reviewing the necessary elements for the attorney-client relationship to arise, including that the client's belief that they were being represented is of itself "not sufficient to create such a relationship, as that belief must have been reasonably induced by representations or conduct by the attorney."[9] In this respect, the court looked to the engagement letter, which "limited the scope of representation to formation and corporate matters and expressly disclaim representation of any person or entity other than the company Silicon Guild." In addition, "WSGR did not perform any other work for Brafman or have any interaction with Brafman that would have led him to reasonably believe WSGR represented him personally in any capacity." The court as well rejected Brafman's efforts to recharacterize Silicon Guild LLC as a partnership and to then apply the elements of an attorney-client relationship arising from a partnership circumstance, finding that even under that paradigm, Brafman failed to demonstrate that an attorney-client relationship would have arisen.

Turning to the assertion that the engagement letter with WSGR was invalid on the basis that the intended corporation did not exist, and after noting that Silicon Guild LLC, while perhaps inartfully described, was in existence, the court recited that a contract with a nonexistent party is simply void. The invalidity of that engagement letter between the firm and the not yet existing business entity would not have the consequence of creating an attorney-client relationship between WSGR and Brafman. Even then:

> Moreover, public policy favors allowing attorneys to represent only the entity being incorporated, to avoid potential conflicts that could arise with continued representation of the newly-incorporated company and its founders after incorporation.[10]

Next, the court dismissed, on the basis of derivative action standing, Brafman's allegations that WSGR's actions caused him injury. Finding there to be no standing, the court determined that, even if the allegations were true, the injury was to Silicon Guild, LLC. As such, Brafman had no individual injury, and having not satisfied the requirements for bringing a derivative action, he lacked standing to proceed.

Some additional thoughts. This case is yet another that may be categorized under the heading "no good deed goes unpunished." WSGR, while perhaps without as firm a grasp of the facts (organizing a new versus converting an existing entity) as would have been desired, at least got a signed engagement letter specifying who was its client and what it was engaged to do. That letter was provided to Brafman, the plaintiff in this action. It was that written engagement letter that provided the bulk of the successful defense of this action. Still, it is unfortunate that the firm, through an appeal, had to defend the allegation of an attorney-client relationship that was in direct opposition to that written agreement.

Green v. Blake

In a recent decision from Kansas, the court considered but rejected the suggestion that the attorney for an LLC was as well an attorney for each of its members.[11]

Green, Blake and Leonard were all members in an LLC organized in Oregon, 63rd St., Enterprises, LLC. Green filed suit against the Blake and Leonard asserting claims including fraudulent misrepresentation with respect to his having joined the LLC as a member. Green, in bringing that suit, utilized the services of Laner, an attorney who it was asserted had previously advised Blake and Leonard with respect to the LLC. On that basis, they sought his disqualification from the matter.

The court rejected that suggestion. Rather, it found that to the extent Laner had been involved with the LLC, it had been as counsel to the LLC and not the individual members. In addition, they could not bring forth evidence of particularized communications and representation with respect to the LLC. Falling back on the Kansas adoption of Rule 1.13 and the principle that the attorney for the organization is not as well the attorney for the constituent members, the motion to disqualify Laner as plaintiff's counsel was denied.

Furtado v. Oberg

A decision rendered earlier this year in Rhode Island addressed and rejected the assertion by a member of an LLC that the LLC's attorney represented his individual interest. Still, while the attorney did ultimately prevail, there is much she could have done in order to if not entirely avoid the dispute at least expedite its resolution.[12]

J. Furtado and Karin Dreier joined forces in 2008 to open a gym under the name Total Fitness LLC. Dreier invested her capital contribution in the company and as well made a loan to Furtado what would be his contribution, that amount to be paid back pursuant to an amortization schedule. While there was some dispute as to whether Furtado actually received that amortization schedule, "[T]here is no dispute that Mr. Furtado knew about Ms. Dreier's expectation that he would invest $25,000 but did not pay the money back."[13]

Oberg, the defendant in this action, was a "long-term friend" of Dreier and had been her attorney for many years. Based on that relationship, Dreier contacted Oberg "to provide legal services in forming [Total Fitness LLC]."[14] Dreier told Furtado that Oberg would be representing the interest of the members in the LLC. Oberg did not prepare or provide a written engagement letter, never explained to Furtado that a conflict of interest could arise amongst the various members, and never requested any sort of advance waiver.

Oberg drafted the operating agreement for the LLC, it providing that each of the members was obligated to execute and deliver an amended and restated operating agreement (the "Amended Agreement") within four days, and that in the absence of execution delivery of the Amended Agreement that member would cease to be a member of the LLC. Curiously, the opinion does not explain why this was an amended and restated operating agreement, manifesting that there was a prior agreement. It is also at this point in the opinion that we are first introduced to a Mr. Powell, the apparent third member of the LLC. Regardless, Dreier and Powell signed that Amended Agreement. Notwithstanding an extension and various outreach efforts to him, Furtado never signed the Amended Agreement, even after Oberg explained to him the consequences of not doing so.

Even as these issues were arising in connection with execution and delivery of the Amended Agreement, Furtado consulted Oberg "about an unrelated legal complaint" on which Oberg agreed to assist him (the "Farino Matter").

That engagement led to three separate meetings. Again, there was no engagement letter. Ultimately the matter was settled, and Oberg did not charge Furtado for any fees.

In 2012, four years after the deadline for executing and delivering the Amended Agreement, Furtado sought from Dreier copies of the LLCs financial statements. She refused on the basis that he was not a member. Furtado sued Dreier in 2013, seeking a declaration that he was an owner of the LLC; that dispute was resolved in a private settlement. In turn, Furtado brought this malpractice action against Oberg and her firm.

The court began its analysis by noting that the attorney-client relationship arises out of contract. While, in this instance, there was no written engagement letter, Furtado argued for the existence of an implied attorney-client relationship based upon Furtado's belief that Oberg represented him as an owner of the Total Fitness LLC. With respect to such an implied relationship, the court noted that the standard is more than a "subjective, unspoken belief that the person with whom he is dealing space … has become *his* lawyer," and that an objective reasonable standard applies.[15]

After reviewing a variety of factors to be considered, the court determined that "the undisputed facts do not support an implied attorney-client relationship."[16] Factually, the court found:

1. Attorney Oberg had represented Ms. Dreier individually for 20 years on many legal matters; Mr. Furtado and Attorney Oberg had no relationship before the formation of the LLC.
2. Mr. Furtado never asked Ms. Oberg to represent him; Attorney Oberg never agreed to represent Mr. Furtado.
3. Attorney Oberg never told Mr. Furtado she represented him.
4. Darrow Everett opened a "sub-file" for the LLC matter under Mr. Dreier's personal file at the law firm.
5. There are no correspondence or telephone calls solely between Attorney Oberg and Mr. Furtado.
6. Attorney Oberg never gave individualized legal advice to Mr. Furtado.
7. Attorney Oberg never billed Mr. Furtado, and Mr. Furtado never paid Attorney Oberg anything.
8. When a dispute arose about the LLC, Mr. Furtado identified Attorney Oberg as Ms. Dreier's attorney and he retained another attorney as his attorney, not Attorney Oberg.[17]

From there it was found:

> In the face of these undisputed facts and in support his position that he had an implied attorney-client relationship with Attorney Oberg, Mr. Furtado argues that he spoke with Attorney Oberg about what type of entity to form, equal ownership of the entity she was forming, personal liability issues as a member of a limited liability company, and management and governance of the LLC as it began to operate; that Defendants represented him in the Farina matter in the days after the LLC was formed, essentially making them "his lawyers") and that Mr. Furtado and Ms. Dreier approached Ms. Oberg together at least a year later concerning problems they were having with Mr. Powell. None of the factors Mr. Furtado cites, alone or together, are enough to sustain an implied attorney-client relationship.[18]

With respect to the Farino Matter on which Furtado consulted Oberg, the court noted that the consultation with respect to an unrelated matter it was just that, an unrelated matter, that did not give rise to attorney-client relationship with respect to the Total Fitness LLC. With respect to a dispute between Furtado and Dreier against Powell, as Oberg never gave Furtado any "personal or individualized legal advice during [the] dispute," no attorney-client relationship.

Some additional thoughts. In this instance, Oberg and her firm prevailed, and were awarded summary judgment after what appears to be in excess of three years of litigation. While, in the context of litigation, that might constitute success, that characterization ignores the time, expense and general irritation attendant to receiving and answering a complaint, engaging in the necessary discovery, and crafting a motion for summary judgment.

With some better planning, Oberg could have objectively determined (at least as of that point in time) who was the client. Picking only a single client, in this instance presumably Dreier, would have avoided allegations of divided loyalties in connection with her work. The non-client could have been made aware of the terms of the engagement letter at least as far as the identification of who was (and was not) the client. A "I am not your lawyer" letter would have added clarity and countered Furtado's assertion of a reasonable belief that Oberg represented his interests. If a non-client is to be represented with respect to a unrelated matter, the limited scope of that representation needs to be made clear even as there is a carve out for the existing engagement. Oberg could have specified that she would represent Furtado with respect to the separate Farino Matter while maintaining her right to represent Dreier, and presumably the LLC *vis-à-vis* (and in opposition to) Furtado.

Baker v. Wilmer Cutler Pickering Hale and Dorr LLP

The decision of the Massachusetts Court of Appeals in *Baker v. Wilmer Cutler Pickering Hale and Dorr LLP*[19] is a particularly troubling decision. In this instance, the majority members retained Wilmer Cutler to represent the LLC "to assist the majority in merging the company with and into a newly created Delaware limited liability company, all for the purpose of eliminating significant protections afforded minority members under the Massachusetts company's operating agreement." In response, the minority members asserted the firm had breached fiduciary duties owed to them, as well as aided and abetted the tortious conduct of the majority members. While the claims were dismissed by the trial court, they were reinstated by the Court of Appeals, a decision premised upon Massachusetts's rule that counsel for a closely held corporation may owe a fiduciary duty to the individual shareholders thereof.[20] Exporting this rule to limited liability companies and identifying that determination as a question of fact, it was held that the complaint pled a plausible cause of action.[21]

Speaking for myself, this decision is entirely untenable as any attorney consulted by a member of the LLC, particular the majority members, with respect to utilizing the terms of an existing operating agreement and/or the controlling LLC act against the alleged interest of a minority member could find themselves charged with a breach of fiduciary duty. One must wonder how a company and its majority owners could utilize a provision for judicial expulsion of a member were this the rule.[22] For example, were this the general rule, the New York decision *Shapiro v. Ettenson*[23] would be entirely different; the attorney for the two members who effected the squeeze out of the third[24] could be alleged to have violated a fiduciary duty to that third member. While the *Baker v. Wilmer Cutler* decision was subsequently restricted to circumstances in which the "limited liability company is governed by an operating agreement that provides significant protections to minority members," with the lawyer for the LLC then having a fiduciary duty "not to undermine the minority member's contractual rights"[25] that trial court ruling cannot modify the holding of the Massachusetts Court of Appeals.

Circumstances such as that outlined in the *Baker v. Wilmer Cutler* decision are especially troubling in that they impose upon the attorney for an entity an obligation to represent and protect the interests of any owners of the entity, including and especially those persons who the attorney could not reasonably have contemplated was entitled to any level of representation.

Some Thoughts on Best Practices

It is certainly open to debate as to what can be done to protect attorneys in a *Wilmer Cutler* situation. Certainly, the Court of Appeals found it important that the attorneys were working in secret with the majority members against the interest of the minority. Could the operating agreement have contained a provision, that "no obligations, fiduciary or otherwise, shall be owed to or arise for the benefit of any minority members in the Company should the majority members, on their own behalf or on behalf of the Company, retain legal counsel"? Certainly it could, but would that go far enough? Could the operating agreement go on to provide that there exists no obligation of disclosure that either counsel has been hired or the nature of the engagement? Certainly, but will a court find that disclosure to be sufficiently specific to constitute *a priori* waiver of the obligation to not work against the interest of the minority members? In response to that question, is it necessary that the operating agreement specify not only the above, but expressly provide that "the majority members, working through legal counsel representing the company, have the right and capacity to investigate and implement mechanisms by which any and all protections of the minority interest set forth in this operating agreement may be altered or set aside?" While such language may be sufficiently specific to set aside the risk posed by the *Baker v. Wilmer Cutler* circumstances, it is doubtful that operating agreements will go to that extreme.

Returning to the more typical situation, there is a great deal that attorneys can do in order to reduce the risk of a claim that they have breached their duties to an individual participant in a venture. First, irrespective of who is the client in the venture, there should be a written engagement letter specifying exactly who that is. If the entity, either alone or with some subset of the members, is the client, the attorney should be sure that the terms of the engagement are approved in the manner required under the controlling law and perhaps the operating agreement so that there is no question that the approval of the engagement was not tainted by a conflict of interest. At the same time, with respect to all other constituents in the venture, the attorney could send an "I am not your lawyer" letter. Irrespective of what standard is applied as to the creation of the attorney-client relationship,[26] it is almost inconceivable that any person will be able to credibly make an argument that they had a subjectively reasonable belief that they were a client of the attorney when the attorney has expressly advised them that they are not agreeing to be the person's

attorney. In those jurisdictions that utilize a mutuality of consent test for the formation of the attorney-client relationship, an express rejection of the creation of such agreement negates its existence. Conversely, in those jurisdictions that use the more forgiving test of the *Restatement* wherein consideration is given to the attorney's actions to negate the subjective belief of the potential client, again, the affirmative rejection of the relationship negates any expectations.

But that does not complete the task. Relationships between attorneys and clients are ongoing. From time to time it may be necessary for the attorney to reaffirm who is and is not the client. For example, if new participants join a venture, whether as equity owners or members of management, it behooves the attorney for the venture to confirm to those persons that he or she is the attorney for the LLC and has undertaken no attorney-client relationship with any of the constituents.

The attorney should be aware as well that his or her conduct, as well as the conduct of others in the law firm, may present challenges. For that reason, additional representations that may involve "mission creep" should be carefully scrutinized before they are undertaken. For example, assuming the LLC is the firm's client, issues may arise in the future if a member of the firm is engaged to advise an individual member. Assume a member of the LLC, not yet a firm client, engages a member of the estate planning department. In the course of that representation, the estate planning attorney is going to need to review the operating agreement and advise the individual member as to certain of his or her rights thereunder, undoubtedly including those relating to assignability and the impact on assignment of any rights to participate in management. Now, within the same firm, there is at least one attorney charged to protect the interest of the LLC while another attorney is looking at the rights of a member *vis-à-vis* the LLC. The opportunity for conflict is clear.

It is virtually impossible to immunize oneself from claims of legal malpractice. That said, careful attention to identifying when one is and is not in an attorney-client relationship, confirmed from time to time in writing so there can never be a question as to what was communicated, will go a long way to protecting one's reputational bond and as well avoid the time and expense of defending what are ultimately unsupportable allegations.[27]

ENDNOTES

* The author is as well an adjunct professor at the University of Kentucky College of Law and was formerly the Gordon Davidson Fellow at the University of Louisville School of Law. A frequent commentator on the law of business organizations, he is an elected member of the American Law Institute. In 2018, he joined RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES as a co-author in place of the late Professor Larry Ribstein.

1 *See also* Rufus E. Miles, Jr., *The Origin and Meeting of Miles' Law*, 38 PUBLIC ADMINISTRATION REVIEW 339 (Sept.–Oct. 1978).

2 I learned this adage from my friend and co-author Bob Keatinge.

3 *See* MODEL RULES OF PROFESSIONAL CONDUCT 1.13(a) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.").

4 For example, the same person may be a shareholder, a director and an officer in a corporation, the same person may be both a member and a manager in an LLC, and the same person may be both the managing general partner and a limited partner in a limited partnership.

5 *See also* Robert R. Keatinge, *The Implications of Fiduciary Relationships and Representing Limited Liability Companies and Other Unincorporated Associations and Their Partners or Members*, XXV STETSON L. REV. 389 (1995).

6 *See also* MODEL RULES OF PROFESSIONAL CONDUCT 1.13(g) ("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 dual 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.").

7 *See, e.g.*, Matthew 6:24; Gospel of Thomas Saying 47.

8 *Brafman v. Wilson Sonsoni Goodrich & Rosati P.C.*, No. A153595, 2019 WL 2267049 (Cal. Ct. App. May 28, 2019), *reh'g denied* (June 26, 2019), *review denied* (Aug. 21, 2019).

9 Citing *Fox v. Pollack*, 181 Cal.App.3d 954, 959 (1986).

10 2019 WL 2267049, *5.

11 *Green v. Blake*, __ F.Supp.3d __, 2019 WL 3776009 (D. Kan. Aug. 12, 2019).

12 *Furtado v. Oberg*, C.A. No. 15-312-JJM-LDA, 2019 WL 430893 (D. R.I. Feb. 4, 2019). This decision has been appealed to the First Circuit Court of Appeals. As of this publication the briefs have been filed but there has been no oral argument.

13 2019 WL 430893, *1.

14 *Id.*

15 With respect to these principles, the court cited *Sheinkopf v. Stone*, CA-1, 927 F2d 1259, 1265 (1991).

16 2019 WL 430893, *3.

17 *Id.* (citations omitted).

18 *Id.*, *4.

19 91 Mass. App. Ct. 835, 81 N.E.3d 782 (2017).

20 *See Schaeffer v. Cohen, Rosenthal, Price, Mirkin, Jennings & Berg, P.C.*, 541 N.E.2d 997 (1989).

21 For another dispute on a similar theme, *see Aranki v. Goldman & Associates*, 34 A.D.3d 510 (2006), wherein claims for aiding and abetting breach of fiduciary duty and malpractice were reinstated against counsel to an LLC based upon allegations it "colluded" with the majority members to squeeze them out.

22 Of course, it is "above my pay grade" to reverse a decision of the Massachusetts Court of Appeals or of any tribunal.

23 2015 N.Y. Slip Op. 31670(u) (Aug. 16, 2016).

24 A detailed analysis of this decision, prepared by Peter Mahler and posted on his (highly recommended) blog, *New York Business Divorce*, is available at *Can LLC Agreement Be Enforced Against Member Who Doesn't Sign It? www.nybusinessdivorce.com/2015/09/articles/llcs/can-llc-agreement-be-enforced-against-member-who-doesnt-sign-it/*.

25 *See All Tech Networking LLC v. Pryor*, 35 Mass. L. Rptr 491, 2019 WL 2234614, *5 (Super. Ct. Mass. Suffolk Cty. Apr. 25, 2019).

26 *See* RESTATEMENT (3rd) OF THE LAW GOVERNING LAWYERS § 14 and particularly Comment *b* thereof; *H-D Transport v. Pogue*, 374 P.3d 591 (Idaho 2016) (comparing various tests for the creation of the attorney-client relationship).

[27] First, I need to thank my friend and law partner A.J. Singleton for his helpful comments on this column and the many hours we have spent discussing and debating various points of legal ethics, particularly as they relate to business organizations. Second, I need to thank my friend and co-author Robert ("Bob") R. Keatinge, who likewise has greatly educated me as to the relationship of business entity law and legal ethics. Third and last, I must thank Father Reginald Whitt, O.P., who (no doubt to his great frustration) taught me legal ethics at the University of Kentucky College of Law. I am indebted to each of you.