



J. ANTHONY MCLAIN

Corporation and Individual Directors

QUESTION:

I am general counsel for a closely held corporation. Fifty percent of the stock in this corporation is owned by Husband and Wife A and B. The other fifty percent is owned by Husband and Wife C and D.

The corporation was initially established with three directors, A, C and D. A was also the corporation president, D was the vice president and C was the secretary-treasurer. Additionally, A and C are salaried employees of the corporation.

The relationship between A and C is now completely deteriorated and they are incompatible. The corporate directors have regular monthly meetings at which I am called upon by C and D to provide certain services for said corporation. Additionally, I represent C and D in certain business transactions which are not in any way related to the corporation or its business.

Further, C has asked me to prepare a buy-sell agreement with a covenant not to compete for the consideration of the stockholders. I have now completed this work.

A has obtained counsel of his own choosing. A refuses to sign the buy-sell agreement because it contains a covenant not to compete insofar as the insurance business is concerned for a limited period of time and a limited geographical area.

In a recent meeting of the directors, A implied that I had a conflict in representing the corporation and both C and D. I question A's contention, as I am representing the corporation at the request of the majority of the board of directors of the corporation, and I am representing C and D on other business dealings, e.g., the sale of a shopping center to the children of C and D. I believe A is concerned because he has employed an attorney of his own, whom I assume he is paying or intends to pay out of his own private funds.

OPINIONS OF THE GENERAL COUNSEL Continued from page 455

Please provide an opinion as to whether it would be ethical for me to represent a corporation, at the request and direction of the majority of the board of directors of said corporation, and also to represent the directors of the corporation in their private dealings not related to the corporation.

ANSWER:

There would be no ethical impropriety in your representing the corporation at the request and direction of a majority of the board of directors (C and D) and at the same time representing certain of the directors (C and D) in their private matters unrelated to the corporation, namely, the sale of a shopping center to the children of C and D.

DISCUSSION:

Rule 1.13(a), *Alabama Rules of Professional Conduct*, states as follows:

Rule 1.13 Organization As Client

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

The Comment to Rule 1.13 states that while communication of a constituent of an organizational client with the organization's lawyer is protected by Rule 1.6, this does not mean that constituents of an organization client are clients of the lawyer. Pursuant to these rule provisions and interpretations, your identified clients in your representation are the corporation, as a legal entity, and two individual directors of that corporation, in separate, unrelated matters.

Rule 1.7(b), *Ala. R. Prof. C.*, states as follows:

Rule 1.7 Conflict of Interest:

General Rule

- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and

- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

The Comment to Rule 1.7 recognizes that the propriety of concurrent representation can depend on the nature of the litigation and the representation. In your fact situation, you point out that your representation of the corporation requires your participation in regularly monthly meetings of the board of directors.

The Disciplinary Commission had previously considered this scenario, under the prior *Code of Professional Responsibility*. Therein, the Commission quoted Ethical Consideration 5-18 as follows:

Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that different interests are not present.

As such, the Disciplinary Commission is of the opinion that, based upon the representations in your ethical inquiry that the matters are not in any way related, then you may ethically represent the directors and stockholders C and D, in their individual capacity in a matter which is apparently completely unconnected with any of the affairs of the corporation and which would not interfere with the exercise of your independent professional judgment on behalf of the corporation.

Further, consistent with the mandates of Rule 1.13, you can represent the corporate entity only at the request and instructions of a majority of the board of directors, which request and instructions have been obtained in the instant case.

[This opinion hereby modifies and supersedes previously issued opinion RO-81-518]. ▲▼▲