Focus *Antitrust & Trade/Business Litigation*

Who's Your Client? The Business or the Executive?

BY BRITTA STANTON

You are sitting in a deposition with the CEO of a company. You have been together for the past 10 working hours, preparing her for her deposition. She is ready. You are ready. You have a good relationship with her, and she is in charge of a major client. You give her a nod and she is sworn in. Things are going exactly as you prepared her and you both relax. Opposing counsel asks if she is represented today and she says, "Yes, my lawyer is here," and nods her head in your direction. Opposing counsel notes on the record that she is referring to you. You say nothing.

Six months later, the CEO is fired and tries to bring a lawsuit against you for breach of fiduciary duty for things related to her deposition preparation.

Who was your client during the deposition? The CEO, the company, or both?

First, you did represent the company. That one is easy, right? You are the company's lawyer and the company was a party. But the thing that kept you from clarifying on the record that you were *only* the company's lawyer were privilege issues. You did not want to reveal what was discussed during the preparatory sessions. So, were those preparatory sessions and other communications with *the executive* privileged? Yes, they undoubtedly were. In *Upjohn Co. v. United States*, 449 U.S. 383 (1981) the Supreme Court held that the attorney-client privilege applies to communications by any level employee to corporate counsel—as long as the communications are to seek legal advice about a matter within the employee's scope of employment. *Upjohn* at 394-95.

Lesson one? Always provide employees with an *Upjohn* warning during your interviews or deposition preparation sessions with something like the following: "You know you are not a defendant [or plaintiff] in this case, the company is. So I represent the company, but I am not your lawyer, personally." During interviews where there are potential employee/company conflicts, you should also consider a written waiver and a warning to the employee that the information reported (and any attorney-client privilege) is within the company's control.

This should solve the problem, because your CEO will not testify that you are "her" lawyer in the first place. And you will know to clarify on the record that you are not her lawyer, but that you represent the company. You will feel confident doing this, knowing your preparation session is still privileged.

But what is done is done. So, **did you represent the CEO** personally during the preparation session because she said you did? You may have. An attorney-client relationship can arise with an organization's employees even without a formal agreement. In fact, an agreement to form an attorney-client relationship can be implied from the parties' conduct. *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App.--Corpus Christi 1991, writ den.).

Okay, am I safe? I stated "I represent Ms. CEO *for the limited purposes of this deposition*." You are probably safe. You probably did not represent the CEO. An attorney-client relationship may arise by implication if the lawyer knows a person reasonably expects him to provide legal services but does nothing to correct that misapprehension. *See Span Enters. v. Wood*, 274 S.W.3d 854, 857–58 (Tex.App.--Houston [1st Dist.] 2008, no pet.). You can argue you corrected the misapprehension when she said you are her lawyer by describing the limited purpose. A better practice is not to create an attorney client relationship with the CEO for a six hour deposition. There is no need for it, since your preparation session is already privileged.

How does this come up? And how does it get resolved? Hopefully, it does not arise. But if it does, it usually is not good for the lawyer. First, you may have to withdraw from representing everyone (including your corporate client) if there are multiple representations and a conflict develops. Unless you can get a client to consent and waive the conflict, you have to withdraw. If you do not, you could be disqualified under Texas Disciplinary Rule 1.09. Further, you could be subjected to attorney discipline under Disciplinary Rules 1.05-1.09. And, as in our scenario at the outset, there is a possible breach of fiduciary duty claim you might have to confront. Even if there are not actual damages, courts have held that fee-forfeiture can be an appropriate remedy in certain circumstances where withdrawal is required due to a conflict. *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999).

So what is the best future practice? When you are in doubt, be clear you do not represent the client. Give a good *Upjohn* warning. Put notes of making the warning in your prep or interview notes. It could help you during an *in camera* review in the future. Next? Get consent or an *Upjohn* waiver if you think a conflict is likely to arise. Finally, if a conflict has arisen and it is too late to take the steps mentioned above, withdraw from the case before consequences get more serious. **HN**

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