



## Florida Appellate Court Allows Attorney to Represent Majority Shareholder But Not Corporation

Recently, an appellate court in Florida ruled that despite a conflict that prevented an attorney from representing both the corporation and the majority shareholder in defending derivative and direct claims against the majority shareholder, the same attorney would not be prevented from defending only the majority shareholder. *Campelloni v. Cragan*, Fla. Ct. App. 5th Dist., No. 5D05-1042, Sept. 16, 2005. The court relied on the Florida versions of Rules 1.13 and 1.7. The court acknowledged that Rule 1.13 addresses the issue of dual representation of an organization and a corporate constituent and allows dual representation subject to the provisions of Rule 1.7. Rule 1.7 addresses conflicts with current clients. Rule 1.9 describes duties to former clients. Rule 1.13 covers the multifaceted factual permutations when an organization is the client (or should be the client) as opposed to the constituents of the organization.

The case involved the breakup of three corporations, each of which had only two shareholders. Campelloni and Cragan were shareholders owning 51% and 49% respectively of all the entities. The litigation involved both direct claims and derivative claims in which Cragan made multiple allegations against Campelloni. The trial court disqualified the same attorney from representation of both Campelloni and the corporations. The appellate court reversed.

The appellate court found that the interest of Campelloni and the interest of the corporate entities were not aligned under any construction of the facts alleged. The court also noted that Cragan and Campelloni are the only ones within the entities who could consent to the dual representation, but Cragan did not consent to representation of the entities by the attorney for Campelloni.

Campelloni's attorney, through his dual representation, had access to information regarding the entities, and the trial court determined that Campelloni would have an unfair advantage in the derivative suit if he could use that information against Cragan. That is the basis on which the trial court disqualified Campelloni's attorney from representing either Campelloni or the corporation. The appellate court affirmed the disqualification of Campelloni's attorney for purposes of representing the corporate entities and upheld the trial court's ruling that Campelloni cannot consent on behalf of the corporate entities to the representation by his attorney of the entities. The trial court relied on *Forrest v. Baeza*, 58 Cal. App. 4th 65, 76 (Cal. App. 1997).

The court found that Rule 1.9(a), however, did not support a finding that the prior representation of the corporation by Campelloni's attorney should prevent that same attorney from representing Campelloni in the same case. The court ruled that the implied basis for the complete removal of Campelloni's attorney from the litigation was the trial court's finding that the attorney had access to financial and other information that would give Campelloni an unfair advantage in a derivative action, but the appellate court found that a new attorney would be privy to the same information that Campelloni's current attorney would have in light of Campelloni having access to that confidential information about the corporation in any event.

A key issue in a Rule 1.9 analysis is whether the two client matters are substantially related and whether confidential data was obtained by the lawyer in a prior representation that could be used against a former client. Compare, R. Donoghue, *Conflicts of Interest: Concurrent Representation*, 1 Geo. J. Legal Ethics 319, 320 (1998) (party who seeks disqualification under Rule 1.7 need not show any adverse effect from conflict). See generally, *Unanue v. Unanue*, 2004 WL 602096 (Del. Ch.) (director could use long-time corporation attorney to defend him against effort to remove that director by shareholders and other directors -- also, the court regarded as an important part of its reasoning that it did not find any prejudice to the integrity of the proceedings as a result of the alleged conflict). See also, *Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc.*, 142 F. Supp. 2d 579 (D.Del. 2001) (two offices of large firm were adverse to the same client but were not disqualified under Rule 1.7).

In sum, the ethical rules that apply to representation of shareholders, directors and their entities require a fact-intensive analysis to determine the existence of a conflict, and the starting point is to clarify the identity of any current and prior clients as well as what data was acquired by the attorney that could be used against those clients. When representing an entity, in order to minimize conflict issues, one would be well-advised to clarify at the outset of the representation, in writing, whether the client is the entity or one of its constituents. ♦

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