



## Committee on Professional Ethics

Opinion 868 (5/31/11)

**Topic:** Concurrent representation of corporation and sole shareholder, director and officer.

**Digest:** An attorney may concurrently represent a corporation and its sole shareholder, director and officer in prosecuting a property damage action on behalf of the corporation, and in defending against a third-party claim against the president of the corporation alleging that the claim is fraudulent.

**Rules:** 1.0(f), 1.7(a)(1), 1.13(d).

### FACTS

1. The inquirer is an attorney (“Attorney”) who represents a corporation (“Corporation”) in an action against a trucking company (“Trucker”). The President (“President”) of the Corporation is the sole shareholder, director and officer of Corporation. In the action against the Trucker, the Corporation alleges that the Trucker caused damages to the Corporation’s valuable goods (some fragile antique furniture) while the goods were in transit.

2. The insurance carrier for the Trucker conducted an investigation regarding the allegedly damaged goods and concluded that the Corporation’s claim for damages was fraudulent. (The carrier believes the antiques were already damaged before they were shipped.). The Trucker therefore interposed a third-party claim against the President of the Corporation personally and referred the matter to the District Attorney for possible criminal prosecution. The President of the Corporation has asked Attorney to continue representing the Corporation in its civil claim against the Trucker and, in addition, to represent him personally both as a third-party defendant in the civil action and as a criminal defendant in any criminal prosecution that may be lodged against him.

### QUESTION

3. Is there a conflict of interest between the Corporation and its President that would prohibit Attorney from representing both the President personally and the Corporation under these circumstances?

## OPINION

4. Rule 1.13, entitled, "Organization as Client," and Rule 1.7, entitled, "Conflict of Interest: Current Clients," of the Rules of Professional Conduct ("Rules") govern this inquiry. Rule 1.13(d) provides as follows:

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 concurrent 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.

5. Rule 1.13(d) therefore requires us to analyze Attorney's simultaneous representation of the Corporation and the President according to the provisions of Rule 1.7. Under Rule 1.7(a)(1), Attorney's simultaneous representation of the Corporation and its President creates a concurrent conflict of interest if a reasonable lawyer would conclude that such representation will involve the lawyer in representing "differing interests." The term "differing interests" is defined by Rule 1.0(f) to mean "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest."

6. In many situations, differing interests arise when an organization and one of its officers are accused of fraud, because the organization cannot properly defend against the fraud charges without investigating the conduct of the individual officer -- but the individual officer prefers not to be investigated. ROY SIMON, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 103 (2009 ed.). Here, however, inasmuch as the President is the sole shareholder, director and officer of Corporation, this principle has no practical application.

7. First, if the fraud allegations are proven and the civil action is determined in the Trucker's favor, the adverse financial consequence to the Corporation will pass through to the President as the sole owner of Corporation. The Corporation and the President therefore do not have "differing interests" in the matter. Rather, the President and the Corporation are united in interest in devising a successful strategy to prosecute the damages claim and to oppose the third-party fraud claim.

8. Second, engaging separate counsel for the President would likely be of significant benefit to the Trucker and prejudicial to both the Corporation and the President in the civil litigation. Lost would be the advantage of one attorney shaping a united defense strategy that would limit damaging disclosures. Separate counsel might also impede the obvious strategy that should be employed for the benefit of President, which would be to allow Corporation to accept responsibility in any civil settlement and in the disposition of any related criminal charges.

9. Our conclusion applies only to the particular facts presented, and would not necessarily hold if there were additional shareholders, officers or directors. We also

note that even where, as here, a corporation has a single owner and director, if the corporation is insolvent, differing interests may exist between the corporation and its creditors.<sup>1</sup>

## CONCLUSION

10. On the facts presented, an attorney may concurrently represent a corporation and its sole shareholder, director and officer in prosecuting a property damage action on behalf of the corporation and may simultaneously defend the shareholder/director/officer against a third-party fraud claim.

(30-10)

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<sup>1</sup> See, e.g., *RSL Commc'ns PLC v. Nesim Bildirici*, 649 F. Supp.2d 184, 202 (S.D.N.Y. 2009) (“[T]he duty that directors owe to the creditors of an insolvent corporation under New York law is defined primarily by the ‘trust fund doctrine.’ Specifically, ‘officers and directors of an insolvent corporation are said to hold the remaining corporate assets in trust for the benefit of its general creditors.’ As such, “directors of an insolvent corporation owe a fiduciary duty to preserve the assets of the corporation for the benefit of creditors.”) (internal citations omitted).