**2.8: Organizations as Clients**

*We live as we dream, alone. To crack the shell we mix with the others.*[[1]](#footnote-0)

*You pull down the future with the one you love (I see no evil).*[[2]](#footnote-1)

When an attorney represents an organization, the attorney’s client is typically the organization, and only the organization. An attorney may represent any kind of organization, irrespective of its form. Obviously, an attorney may represent an organization that is a legal entity, like a corporation or a limited liability company. But an attorney may also represent an organization that is not a legal entity, like a partnership or an unincorporated association. In all of these cases, the attorney may represent the organization without representing the constituents of the organization.

But an organization is a legal fiction that can act only through its agents. Accordingly, the attorney advises the organization by advising its agents, who make decisions on behalf of the organization. In other words, attorneys advise organizational clients by advising the people authorized to make binding decisions for the organization.

Of course, the agents of an organizational client may consult with each other before making decisions for the organization. They may individually ask the attorney for advice about how to act on behalf of the organizational client. They may ask the attorney to advise them collectively about the organizational client’s options. And they may ask the attorney for advice about the statements, decisions, and actions of other agents.

The attorney must provide legal advice to the agents of an organizational client, in their capacity as agents of that client. But the attorney must always remember that the client is the organization, not the organization’s agent. When the attorney advises an agent, the attorney must provide advice for the benefit of the organization, not the agent. And the attorney must ensure that the agents observe their duties to the organization.

Specifically, an attorney representing an organizational client must ensure that its agents act consistently with the interests of the organization, rather than their own interests. If an agent of an organizational client acts or refuses to act in a way that violates a legal obligation to the organization, then the attorney must act to protect the interests of the organization. The attorney should generally report the concern to the management of the organization. In some cases, the attorney may even report confidential information or withdraw from representation, if it is necessary to protect the interests of the organization.

| [**Model Rule 1.13: Organization as Client**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_13_organization_as_client/) |
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| 1. A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. 2. If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law. 3. Except as provided in paragraph (d), if    1. despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and    2. the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization. 4. Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law. 5. A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal. 6. In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing. 7. 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**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_7_conflict_of_interest_current_clients/). 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. |

| **Restatement (Third) of the Law Governing Lawyers § 96: Representing an Organization as Client** |
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| 1. When a lawyer is employed or retained to represent an organization:    1. the lawyer represents the interests of the organization as defined by its responsible agents acting pursuant to the organization's decision-making procedures; and    2. subject to Subsection (2), the lawyer must follow instructions in the representation. 2. If a lawyer representing an organization knows of circumstances indicating that a constituent of the organization has engaged in action or intends to act in a way that violates a legal obligation to the organization that will likely cause substantial injury to it, or that reasonably can be foreseen to be imputable to the organization and likely to result in substantial injury to it, the lawyer must proceed in what the lawyer reasonably believes to be the best interests of the organization. 3. In the circumstances described in Subsection (2), the lawyer may, in circumstances warranting such steps, ask the constituent to reconsider the matter, recommend that a second legal opinion be sought, and seek review by appropriate supervisory authority within the organization, including referring the matter to the highest authority that can act in behalf of the organization. |

| [***In the Matter of Silva*, 636 A.2d 316 (R.I. 1994)**](https://scholar.google.com/scholar_case?case=13362126445696104128) |
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| **Summary:** Attorney Daniel Silva represented both Medcon Mortgage Corporation and Suncoast Savings and Loan. Medcon was owned by Silva’s friend Edward Medeiros. Silva learned that Medeiros was illegally diverting funds and advised him to stop, but did not advise Suncoast, because Medeiros claimed attorney-client privilege. The Disciplinary Board found that Silva violated the rules of professional conduct, and the Supreme Court agreed, holding that Silva should have reported Medeiros’s fraud and withdrawn from representing Medcon and Suncoast. |

The respondent, Daniel J. Silva, appeared before this court on December 2, 1993, pursuant to an order to show cause why discipline should not be imposed. The Disciplinary Board conducted an evidentiary hearing and received legal memoranda from the respondent and disciplinary counsel. The board has filed with us its decision and a concurring opinion signed by three members of the board.

The board found that Silva violated several provisions of the Rules of Professional Conduct when he failed to report a diversion of mortgage funds by his long-time friend Edward Medeiros. Silva served as counsel to Medeiros’s mortgage company, Medcon Mortgage Corporation, and Suncoast Savings and Loan of Hollywood, Florida. In his capacity as closing attorney for Suncoast, Silva received wire transfers of mortgage proceeds in his client account. Upon receipt of the wire transfers from Suncoast, Silva simply turned the proceeds over to Medeiros and/or MEDCON for disbursement. In the fall of 1990 Silva learned that Medeiros had diverted funds from a closing funded by Suncoast in which Silva acted as closing attorney. The diverted funds were designated to pay off a preexisting mortgage on the property. Silva advised Medeiros that his conduct was criminal. Silva did not notify Suncoast of the diversion of funds, nor did he inform the title insurance company, which had issued a title policy that did not except the prior mortgage from coverage, that the prior mortgage had not been discharged. Silva testified that Medeiros forbade him to do so on the basis of Medeiros's assertion of the attorney/client privilege on behalf of both MEDCON and himself personally.

In December 1990 Silva received a wire transfer from Suncoast for another closing with MEDCON. Notwithstanding his knowledge of the previous diversion of funds by Medeiros, Silva did not disburse the funds in accordance with the terms listed on the closing sheet; instead, he turned the proceeds over to MEDCON. Silva kept $100 of the proceeds as his fee for serving as a conduit of the funds. Medeiros converted those funds to his own use, and was subsequently convicted and imprisoned. The respondent was never charged with committing a criminal act.

The respondent’s position before the board and this court is that he was prohibited from disclosing Medeiros’s defalcation by the provisions of Rule 1.6 of the Rules of Professional Conduct. Respondent also took the position that he had no obligation to protect Suncoast’s interests. We do not agree with either of his contentions.

On the basis of the record before us, we believe that Silva had an obligation to both MEDCON and Suncoast to ensure that the transactions in which he acted as attorney and/or agent were carried out with fair dealing and good faith. We further believe that Silva had an obligation to report Medeiros’s overt act of diverting the funds as soon as he learned of it. In addition Silva should have withdrawn from representing both MEDCON and Suncoast as soon as he discovered Medeiros’s fraud.

Although we consider Silva’s failure to act appropriately and to make the requisite disclosures serious breaches of his ethical obligation, we find no evidence that Silva’s actions were motivated by personal gain. Rather, he appears to have had a genuine belief that Medeiros’s assertion of the attorney/client privilege and the requirements of Rule 1.6 prohibited the disclosure we now say was required.

Silva did not appear to appreciate and understand to whom he owed the duty of confidentiality. It is apparent from this record, however, that he was counsel to the corporate entity MEDCON, and therefore, it was to MEDCON he owed the duty of confidentiality. Silva’s dealings with Medeiros did not establish the attorney/client relationship that would trigger the application of the prohibitions against disclosure encompassed in Rule 1.6. Therefore, Silva’s obligations to both Suncoast and MEDCON required him to disclose Medeiros’s overt criminal act of conversion of the funds.

This court concurs with the findings of the disciplinary board that Silva exercised very poor judgment and that he engaged in serious misconduct. We are constrained however to depart from the board's recommendation for sanction. We believe that Rule 1.6 has created a great deal of confusion among the members of the Rhode Island Bar. We therefore censure Silva for his failure to fulfill his ethical obligations to the parties to these transactions. The court’s issuance of this sanction rather than the three-month suspension of Silva’s license is due in part to the absence of any motive for personal gain and Silva’s ten years at the bar without a disciplinary complaint. The court’s position on the appropriate level of sanction, however, would be more severe were it not for the apparent confusion in the mind of this attorney concerning whom he represented and the silence of Rule 1.6 on that question.

| **CHECK YOUR KNOWLEDGE** |
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| 1. Medeiros owned Medcon. How could Silva have reported to Medcon? |
| 1. Could Silva have reasonably believed that he represented Medeiros? |
| 1. Did the court impose an appropriate punishment? |
| 1. Compare this case with [***Ferranti Intern. PLC v. Clark*, 767 F. Supp. 670 (E.D. Pa. 1991)**](https://scholar.google.com/scholar_case?case=4427546939148680262)(Section 2.1 Creating an Attorney-Client Relationship). Is it ever fair to assume that an attorney has created an attorney-client relationship with an individual in a company when he represents the company? |

**Representing a Corporation**

| [***Brennan v. Ruffner*, 640 So. 2d 143 (Fla. 1994)**](https://scholar.google.com/scholar_case?case=8513950254166668236) |
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| **Summary:** In 1976, Dr. Brennan and Dr. Martell formed a professional association. Attorney Charles Ruffner prepared the shareholders agreement. When Dr. Mirmelli joined the association in 1982, Ruffner revised the agreement, which provided for the involuntary termination of any shareholder by majority vote. All of the shareholders agreed. In 1989, Martell and Mirmelli voted to terminate Brennan. Among other things, Brennan filed a malpractice action against Ruffner. The trial court granted summary judgment to Ruffner, and the appellate court affirmed, holding that Ruffner represented the corporation, not Brennan. |

We affirm a final summary judgment entered in favor of a lawyer and against a disgruntled minority shareholder of a closely held corporation. We find that an attorney/client relationship did not exist between the individual shareholder and the attorney representing the corporation. Consequently, there is no basis for a legal malpractice action. We further reject the other theories of liability asserted by appellant.

In 1976, appellant, Robert J. Brennan, M.D., along with a Dr. Martell, employed appellee, Charles L. Ruffner, Esq., to incorporate their medical practice as a professional association. In connection with the incorporation, the lawyer prepared a shareholder’s agreement. In 1982, a third doctor, Dr. Mirmelli, joined the corporation, and each doctor became a one-third shareholder in the new firm. The lawyer, who was corporate counsel since 1976, was requested to draft a new shareholder's agreement. After approximately 8 months of negotiation, the shareholders executed a new shareholder's agreement. The new agreement included a provision for the involuntary termination of any shareholder by a majority vote of the two other shareholders. It is undisputed that Dr. Brennan was aware of this provision at the time he signed the documents and that he signed the agreement upon reassurances from Dr. Mirmelli that he would not join with Dr. Martell in using the provision against Dr. Brennan.

However, despite the assurances, in 1989 Dr. Martell and Dr. Mirmelli involuntarily terminated Dr. Brennan as a shareholder and employee of the corporation. Dr. Brennan instituted a lawsuit against Dr. Martell and Dr. Mirmelli claiming breach of contract and fraud in the inducement. The verified complaint in that lawsuit specifically alleged that Dr. Brennan was *not* represented by counsel in the negotiation of the shareholder's agreement. That lawsuit was settled. Dr. Brennan then filed this suit for legal malpractice, breach of contract, breach of fiduciary duty and breach of contract as a third party beneficiary. In contradiction to the sworn allegations of the first lawsuit, Dr. Brennan alleged in this complaint that the lawyer represented him individually, as well as the corporation, in the preparation and drafting of the agreement. The lawyer denied undertaking the representation of Dr. Brennan individually.

In a legal malpractice action, a plaintiff must prove three elements: the attorney's employment, the attorney's neglect of a reasonable duty and that such negligence resulted in and was the proximate cause of loss to the plaintiff. Florida courts have uniformly limited attorney's liability for negligence in the performance of their professional duties to clients with whom they share privity of contract.

The material undisputed facts in this case support a legal conclusion that there was no privity of contract between Dr. Brennan and the corporation’s lawyer. It is undisputed that the lawyer was representing the corporation. The issue raised by Dr. Brennan's complaint was whether the lawyer was also representing him individually. While Dr. Brennan made the initial contact with the lawyer, there is no evidence in the record to create a credible issue of fact that the lawyer ever represented Dr. Brennan individually. Dr. Brennan's sworn complaint against the other doctors, which preceded the legal malpractice action against the lawyer, states he was unrepresented by counsel in the negotiation of the shareholder's agreement.

Dr. Brennan argues that a separate duty to him as a shareholder arose by virtue of the lawyer's representation of the closely held corporation. Although never squarely decided in this state, we hold that where an attorney represents a closely held corporation, the attorney is not in privity with and therefore owes no separate duty of diligence and care to an individual shareholder absent special circumstances or an agreement to also represent the shareholder individually. While there is no specific ethical prohibition in Florida against dual representation of the corporation and the shareholder if the attorney is convinced that a conflict does not exist, an attorney representing a corporation does not become the attorney for the individual stockholders merely because the attorney's actions on behalf of the corporation may also benefit the stockholders. The duty of an attorney for the corporation is first and foremost to the corporation, even though legal advice rendered to the corporation may affect the shareholders. Cases in other jurisdictions have similarly held.

We reject the notion that the lawyer in this case could be held liable to one of the minority shareholders for a breach of fiduciary duty. In any closely held corporation, there will be an inherent conflict between the potential rights of the minority shareholder and the rights of the corporation in a shareholder’s agreement concerning termination. At the time this agreement was drafted, any one of the three shareholders could have ended up becoming the minority shareholder. While Dr. Brennan claimed in the complaint that the lawyer had a duty to advise him of a conflict of interest and never advised him of a potential conflict, the facts in the record do not support that contention. Dr. Brennan testified in deposition that he simply did not recall any conversations. However, the accountant for the corporation specifically remembered a conversation where the lawyer told the doctors collectively that he represented only the corporation in the drafting of the shareholder agreement. Absent some evidence that the corporation's lawyer conspired or acted with the two shareholders to insert provisions that would work to the detriment of the third shareholder; that the corporation’s lawyer concealed his representation of another individual shareholder; or that the attorney agreed to the dual representation, there is no breach of fiduciary duty established in this case.

Finally, even assuming arguendo that a duty existed based on an attorney/client relationship, a third party beneficiary theory or a breach of fiduciary relationship, we simply do not find any factual dispute concerning the issue of proximate cause. It is undisputed that Dr. Brennan was aware of the provisions in the agreement and chose to take his chances upon being reassured by Dr. Mirmelli that he would never use the provisions against Dr. Brennan.

| **CHECK YOUR KNOWLEDGE** |
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| 1. Why did the court hold that Ruffner represented the corporation, rather than Brennan? What if Brennan were a majority shareholder of the corporation? |
| 1. Did Ruffner provide Brennan with legal advice? If so, did Ruffner provide negligent legal advice? |
| 1. Did Ruffner represent any of the doctors? |
| 1. Did Ruffner represent anyone? |

**Representing a Partnership**

| [***Mursau Corp. v. Florida Penn Oil & Gas, Inc.*, 638 F. Supp. 259 (W.D. Pa. 1986)**](https://scholar.google.com/scholar_case?case=6108130372307919650) |
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| Summary: Thomas Murray, President and owner of Mursau Corporation, purchased a limited partnership in Florida-Penn Oil and Gas, Inc, with the assistance of Goldberg & Snodgrass (“G&S”). Mursau filed a breach of fiduciary duty action against G&S alleging this duty had arisen out of an attorney-client relationship between Murray and G&S. The district court granted summary judgment to G&S, because it found no attorney-client relationship existed. |

Presently before us are Motions for Summary Judgment filed on behalf of each Defendant. Having held oral argument and having reviewed the affidavits, depositions, briefs and other exhibits filed, we find no genuine issue as to any material fact. Consequently, we will grant these motions.

*Facts*

Plaintiff, Mursau Corporation, through its President and majority stockholder, Thomas H. Murray, Esquire, purchased a limited partnership interest in Defendant Florida-Penn Oil & Gas, Inc.’s 1981-102 Drilling Program. Defendant Christian E. Carlsen is the President of Fla-Penn and Defendant David Graham is a stockholder of Fla-Penn. Defendant Goldberg & Snodgrass, a law firm in which individual Defendants Lee H. Goldberg and Stewart R. Snodgrass are partners, was retained by Fla-Penn to structure the 102 program and prepare a tax opinion letter with regard to that program.

Mursau’s acquisition of the limited partnership interest in the 102 program came about as a result of Murray contacting Goldberg in early October, 1981. Murray was interested in the 102 program as a tax shelter for Mursau. Since Mursau’s fiscal year ended on October 31, Murray wanted to close the deal on or before October 30, in order to secure tax advantages for Mursau in 1981.

At his initial meeting with G&S, Murray was given a copy of a Private Placement Memorandum for an earlier Fla-Penn oil and gas partnership, the 101 program. He was told that the PPM for the 102 program would be materially similar but that the costs would be reduced proportionally according to the lesser number of wells to be drilled under the 102 program. The 101 program drilled 10 wells; the 102 program would drill only 4. Murray reviewed the PPM for the 101 program with independent counsel, then signed a commitment letter for the 102 program.

On October 29, 1981, Murray received a copy of the PPM for the 102 program which was in fact materially similar to the PPM for the 101 program. At the closing on October 30, 1981, Murray refused to tender a check on behalf of Mursau unless he was granted check-signing authority for the partnership, a demand clearly in conflict with the limited partnership agreement already signed by Murray. Murray wanted that authority so that, after closing, he could dispute the payment of certain costs provided for in the PPM, including a finder's commission to the group securing the limited partners participation. As indicated by his notes comparing the costs under the 101 and 102 program, Murray was fully aware of the $49,600 finder's commission prior to the time set for closing.

Although Murray initially walked out of the closing because of the refusal of Fla-Penn to acquiesce in his demands, he returned after a conversation with Snodgrass outside on the sidewalk. Fla-Penn never acceded to Murray’s demands. After the closing, Fla-Penn paid G&S $20,000 for legal fees and $49,600 as a finder’s commission. Murray became aware of these payments sometime in December of 1981.

In the complaint, Murray essentially alleges breach of fiduciary duty arising out of an attorney-client relationship between Mursau and G&S and Goldberg and Snodgrass individually.

The Defendants maintain that the 102 PPM as well as the 101 PPM, on which the 102 was modeled, disclose all material information. Both PPMs disclose the payment of legal fees to G&S and the finder's commission; both disclose the potential conflict of interest of G&S as counsel for the partnership and the general partner. Both advise prospective limited partners to consult independent counsel.

In order to recover for a breach of fiduciary duty by an attorney, the plaintiff has a threshold burden of showing existence of an attorney-client relationship. The intent to create an attorney-client relation can be implied from the conduct of the parties where no express relationship exists.

Although the relationship of attorney and client may be implied from the conduct of the parties, such conduct must evidence an offer or request by the client for legal services and an acceptance of the offer by the attorney. It is clear that an attorney client relationship exists only with the consent of both parties.

As noted above, G&S’s representation of the partnership and general partner was disclosed to Plaintiff, and Plaintiff was advised to obtain independent counsel. Murray admits that he did retain legal counsel who, on behalf of Mursau, met with G&S about the 102 plan. Murray received a bill and remitted payment to his independent counsel for legal services.

In contrast, Plaintiff paid no fees to G&S. As stated in the 102 PPM, the partnership paid G&S for adapting the 101 PPM for use in the 102 plan and for preparing the tax opinion letter to accompany the 102 PPM. The legal fees paid to G&S by the partnership did not include any amount for services rendered to the Plaintiff. Plaintiff concedes that the only legal advice he received from G&S concerned the tax aspects of the 102 plan. We conclude that the legal advice on the tax consequences of the 102 plan was a service provided to and paid for by the partnership as part of its efforts to secure a limited partner for its venture.

Since we see no evidence from which we can imply an offer or request for services by Plaintiff, nor an acceptance of any such request by G&S, we must conclude that no attorney-client relationship was formed between Mursau, the limited partnership, and G&S. G&S did have an attorney-client relationship with the partnership and probably the general partner who organized the venture. Although Mursau indirectly benefited by receiving the services G&S performed on behalf of the partnership to enable the partnership to attract a limited partner, it never requested, nor did it receive, other legal advice or services from G&S.

Even were we to find evidence from which an attorney-client relationship between G&S and Mursau could be inferred, as discussed above, we see no facts indicating any fraud or other breach tending to violate such a relationship.

Viewing the facts presented in a light most favorable to Mursau, the nonmoving party, we believe Defendants have met their burden of showing the absence of any genuine issue of material fact and are entitled to summary judgment.

| **CHECK YOUR KNOWLEDGE** |
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| 1. Did Mursau have any attorney-client relationship with G&S? |
| 1. Should it matter whether Mursau paid G&S for legal services? |
| 1. Why did the court conclude that Mursau had no attorney-client relationship with G&S in relation to this matter? |

1. Gang of Four, *We Live as We Dream, Alone*, Songs of the Free (1984). [↑](#footnote-ref-0)
2. Television, *See No Evil*, Marquee Moon (1977). [↑](#footnote-ref-1)