

## Once again: Identify your client

by

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Reprinted from *Minnesota Lawyer* (February 4, 2013)

There have been many articles like this one and in legal ethics treatises exhorting lawyers to carefully identify who is their client (and, almost as important, who is not) at the outset of a representation. Failure to do this can bring a variety of consequences: conflicts of interest, disqualification, civil liability, fee disputes, ethics complaints, etc.

A sampling of articles from the director's office, all of which can be found at the LPRB website ([lprb.mncourts.gov](http://lprb.mncourts.gov)), includes such topics as distinguishing between representing a probate estate and representing the personal representative (Sept. 7, 2009, *Minnesota Lawyer*), probating a will that the lawyer drafted and a dispute arising among previously friendly beneficiaries (April 6, 2009, *Minnesota Lawyer*), assisting with the "start-up" of a corporation involving several persons (Dec. 5, 2005, *Minnesota Lawyer*), when parents hire and pay for a child's criminal defense lawyer (February 2005, *Bench & Bar*), and when a client's son or daughter asks you to revise the client's will (September 2003, *Bench & Bar*).

In addition to identifying your own client, sometimes the issue can be, "Who is opposing counsel's client?" For example, when the opponent is an organization, the question may arise as to which person(s) connected to the organization may be contacted directly without first obtaining the consent of opposing counsel (or a court order or other authorization by law). This issue presented itself recently in the following disciplinary case:

Lawyer (L) represented a local corporation (A) in a contract dispute with another local corporation (B). Several years after the contract was formed, B was acquired by a larger corporation (C). Sometime later, C became a wholly-owned subsidiary of a large national corporation (D).

After B/C was acquired by D, a managerial employee of B (who had knowledge of the disputed contract with A) transferred into an executive position with D in another state. Years later, D sued A on the disputed contract.

Without notifying D's counsel, L located and contacted the key employee in order to gain information about the contract and help A win the lawsuit. D's counsel

complained that the ex parte contact violated Rule 4.2, Minnesota Rules of Professional Conduct, which provides that “a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”

Comment [7] to Rule 4.2, MRPC, clarifies that, in the case of a represented organization, the rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. “Constituent” is defined in Comment [1] to Rule 1.13, MRPC, as “[o]fficers, directors, employees, and shareholders . . . of the corporate organizational client.”

The term “corporate organizational client” is not defined, however, in the MRPC or elsewhere, according to research by the Director’s Office. How broad is the term, exactly? Does it include affiliates of the organization? Divisions? Subsidiaries? A parent company such as D?

If the key employee were still employed by B or even C (in whose name the lawsuit was brought), he or she would seem to fit within the definition of “constituent” and be “off-limits” to L. Conversely, if the key employee had left the company altogether and was a former employee, the consent of A’s counsel would not be required for L to communicate with the key employee. Did the acquisition of B/C by D change the key employee’s status?

In a larger issue, might an acquisition of a represented organization by a much larger organization potentially expand the universe of “constituents of the organization” — and persons “off-limits” to opposing parties — unreasonably? The answer is often unclear, and the issue was not resolved in the disciplinary investigation described above. L was not publicly disciplined.

Arguably, L’s ex parte contact with the key employee was prohibited by Rule 4.2, MRPC. That would depend on who opposing counsel’s client was and was not. A lawyer facing a situation similar to that faced by L may wish to “play it safe” and make the contact through A’s counsel and avoid a possible ethics complaint.

As this example shows, identifying your own client or recognizing who is opposing counsel’s client is not always easy, but it is always important.