

Representing the Company and its Constituents

by Steven W. Sufilas and Alison C. Lorenzo

When representing an organization, substantial and meaningful contact with its officers, employees or other constituents is essential to effective legal representation of the client. However, attorneys must tread carefully. Today, the constituent might be the source of vital information as a representative of the client. Tomorrow, that same constituent might be adverse to the client in a lawsuit. The lawyer has the responsibility of preempting the formation of an attorney-client relationship with the constituent at the start, where such a relationship is not intended.¹

The baseline rule is well-known. New Jersey's Rules of Professional Conduct (RPC) prohibit "a lawyer who has represented a client in a matter [from] thereafter represent[ing] another client in the same or substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing."² This seemingly straightforward rule becomes complicated when a corporate client seeks representation by the lawyer against a former employee, who may claim to have been a client of the lawyer as well. However, RPC 1.13(a) points toward an answer, by providing that an attorney "retained to represent an organization represents the organization,"³ and *not* its employees. But, under RPC 1.13(d), an attorney in dealing with the organization's employees is under an affirmative duty to "explain the identity of the client when the lawyer believes that such explanation is necessary to avoid misunderstanding on [the part of the employee]."⁴

Recently, in an employment case, the Appellate Division of the superior court of New Jersey had an opportunity to address this issue of whether a former executive was a former client of the corporation's law firm, and to further define the scope of the attorney-client relationship.

Casey v. University of Medicine and Dentistry of New Jersey

*Casey v. University of Medicine and Dentistry of New Jersey*⁵

arose out of the termination of the former executive director of materials management at University Medicine and Dentistry of New Jersey (UMDNJ). Ellen Casey filed suit, alleging that her discharge was due to her voicing objection to UMDNJ's alleged improper spending practices, violating the Conscientious Employee Protection Act.⁶ When UMDNJ retained a law firm to defend against Casey's claims, she sought to disqualify the firm by arguing that the firm had formerly represented her.

In her capacity as executive director, Casey had previously been involved in a State Commission of Investigation (SCI) inquiry at UMDNJ. The organization retained the law firm in June 2005 to represent its interests in the SCI investigation. The law firm corresponded with the SCI to schedule the appearances of the UMDNJ employees for interviews, including Casey. Prior to her testimony, Casey met with two firm lawyers to review her testimony. They had no further communications before or after that meeting.⁷ Based on these interactions, Casey objected to the law firm's representation of UMDNJ in the subsequent whistleblower suit, demanding that the firm withdraw.

At the same time that the SCI investigation was underway, the law firm also represented UMDNJ in connection with an unrelated federal investigation. In that capacity, one of its lawyers wrote to an assistant U.S. attorney, stating that the law firm also "represent[s] the University and its employees. Each employee you have selected to appear before the grand jury is told that we represent the University and that any privilege that envelops the conversation is held by the University."⁸ Casey was not involved in this second investigation, and did

not claim that she was aware of this letter.

Based on these facts, the trial judge entered an order disqualifying the law firm from representing UMDNJ in Casey's lawsuit, placing significant emphasis on the letter from the firm to the assistant U.S. attorney, which it found to be the "clincher."⁹ The trial judge's decision suggested that the credibility of the lawyers' statements to Casey (namely, that they represented UMDNJ alone) "was wholly undermined" by the letters to the assistant U.S. attorney.¹⁰

However, the Appellate Division found that the trial judge was too hasty, and that although typically reserved for only the rarest of occasions,¹¹ an evidentiary hearing was necessary. Unlike the trial judge, the Appellate Division found that the letters supported the law firm's position that Casey had been advised that UMDNJ, and not Casey, was the client. Accordingly, the court remanded the matter for a hearing to determine whether Casey was indeed a former client of the law firm.¹²

Formation of the Attorney-Client Relationship by Implication

Typically, the attorney-client relationship is the result of an express, consensual understanding, "one which is founded upon the lawyer affirmatively accepting a professional responsibility."¹³ However, legal representation and its attendant duties may arise by implication, where, even though "it is not articulated, there [is] conduct on the part of the parties to the purported attorney-client relationship that gives rise to that inference."¹⁴

In the context of a corporate representation, one could easily see how representation by implication can arise. An employee or management official meets with the employer's lawyer, viewing him or her as a trusted advisor, and shares confidences. This scenario forms the rule: "[a]n attorney-client relationship may be found by implication based

upon conduct when: (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services."¹⁵

More commonly, the failure of the attorney to manifest a lack of consent to the representation can result in the creation of an attorney-client relationship. Indeed, in *Casey*, the Appellate Division noted that notwithstanding the plaintiff's assertions to the contrary, if the lawyer had expressly denied acceptance of any professional obligation to Casey, no attorney-client relationship could have been created.¹⁶ Thus, counsel to corporations always should initially advise, and thereafter remind, the employees with whom they interact that their professional duties of loyalty and confidentiality belong to the organization alone.

Heightened Inquiry When the Corporate Constituent is an Attorney

Casey begs the question of whether the analysis should be heightened when the corporate employee is also an attorney. As noted above, if a lawyer fails to correct an employee's impression that he or she represents the employee as well as the corporation, an attorney-client relationship may result *if* the employee *reasonably relies* on the lawyer to provide legal advice. At least one court has suggested that the reasonable reliance inquiry takes on heightened scrutiny when the employee is also an attorney, charged with an awareness of ethical rules and obligations.¹⁷

In *Ferranti Int'l PLC v. Clark*,¹⁸ cited by the *Casey* court, the United States District Court for the Eastern District of Pennsylvania found "unconvincing" a former employee's assertion that an attorney-client relationship had arisen

by implication through personal comments and observations.

William Clark, the former vice president and general counsel for Ferranti, had retained the law firm of Hogan & Hartson to represent the company in connection with a government investigation.¹⁹ Despite repeated statements by the outside attorneys to employees of Ferranti that they represented the company, and that employees could and should seek separate counsel, Clark claimed the firm should be disqualified in a subsequent lawsuit between him and the company because it owed him a professional duty. Due to the repeated warnings by the lawyers, and Clark's status as an attorney, the court denied the motion for disqualification.²⁰

Having [retained the law firm] and formed such associations, [Clark] may understandably resent and find objectionable the turn of events in which he is now being sued not only by the same law firm but also on behalf of the client that he brought to that firm. However, these personal and business considerations do not necessitate disqualification on legal-ethical grounds.

This is not a case in which a layperson might have perceived or reasonably misperceived that his corporate employer's attorney was also representing him. *As a general counsel, defendant must have keenly appreciated the distinction between the corporation and its employees as well as the employees' need for separate counsel.*²¹

Substantially Related Matters

The *Casey* court declined to address the second component of RPC 1.9(a), namely whether the present matter involving the former employee and the prior representation of the organization are substantially related. Rather, the court decided to wait until the issue of former representation was resolved after a hearing, before addressing the second

element of the analysis in light of the Supreme Court of New Jersey's recent ruling in *City of Atlantic City v. Trupos*.²²

In 2004, New Jersey's RPCs were amended, eliminating the "appearance of impropriety" standard previously applied in the "substantially related" analysis.²³ *Trupos* is the first reported decision to address head-on the substantially related matter inquiry under the new test.

In *Trupos*, hundreds of Atlantic City taxpayers retained a law firm, which formerly had represented the municipality with respect to real estate tax appeals, to appeal the 2009 real estate tax assessments imposed on them by the municipality.²⁴ The city moved for disqualification, which the tax court granted. "[W]ithout the benefit of any record proof," the tax court surmised that the prior representation, which involved discussions of litigation and settlement strategies, must have resulted in knowledge on the part of the law firm that "even if not consciously used," provided an improper advantage in the subsequent representation.²⁵

On review, the Supreme Court first addressed the legal standard to be applied in light of the amendments to the RPC. After engaging in a review of neighboring jurisdictions' laws, the Court adopted a test that strikes a balance between the competing interests, "weighing the need to maintain the highest standards of the profession against a client's right to freely choose his counsel."²⁶

[Thus] for purposes of RPC 1.9, matters are deemed to be "substantially related" if (1) the lawyer for whom disqualification is sought received confidential information from the former client that can be used against that client in the subsequent representation of parties adverse to the former client, or (2) facts relevant to the prior representation are both relevant and material to the subsequent representation. We

adopt that standard because it protects otherwise privileged communications, see RPC 1.6(a) (proscribing revelation of "information relating to representation of a client"), while also requiring a fact-sensitive analysis to ensure that the congruity of facts, and not merely similar legal theories, governs whether an attorney ethically may act adverse to a former client.²⁷

As applied to the *Trupos* facts, the Court found that the law firm's prior representation of the municipality in 2005, which was limited to tax appeals involving casinos and large commercial properties, was sufficiently distinct from the 2009 appeals challenging assessments on residential taxpayers. "[O]ther than the purely superficial similarity that all of the work involved tax appeals," there were no common facts or confidential information at a risk of disclosure in the subsequent representation.²⁸ The Court thus held that the matters were not substantially related, and vacated the order of disqualification.²⁹

Key Points

In order to avoid disqualification based on implied representation, practitioners should keep the following firmly in mind:

Three Major Principles

- An organization is an independent entity with a legal existence separate from the organization's constituents.
- A lawyer employed or retained by an organization represents the organization, which acts through its duly authorized constituents.
- Representation of the organization, standing alone, is not equivalent to representation of its constituents.

The Lawyer's Duty to Make Clear the Identity of the Client

- **Explain.** In dealing with an organization's constituents, a lawyer must

carefully explain the identity of the client (*i.e.*, the organization) and *not* the constituent. This is especially so when the lawyer knows or reasonably should know that the organization's interests are or could potentially become adverse in the future to those of the constituents with whom the lawyer is dealing.³⁰

- **Advise.** Specifically, the lawyer should advise any constituent, whose interests the lawyer finds could potentially be or become adverse to those of the organization that:
 - 1) the lawyer cannot and will not represent the constituent; he or she represents the organization; and there is a conflict or potential conflict of interest;
 - 2) the constituent may wish to obtain independent representation.
- **Be Careful.** Care must be taken to ensure that the constituent understands that, when there is the potential for a current or future conflict of interest (which always exists in the areas of employment law), the lawyer for the organization does not and cannot provide legal representation for that constituent, and that the lawyer cannot allow the constituent to come to reasonably believe that he or she has become a client of the lawyer. ☪

Endnotes

1. *Schiffli Embroidery Workers Pension Fund v. Ryan, Beck & Co.*, No. 91-5433, 1994 WL 62124, *4-5 (D.N.J. Feb. 23, 1994).
2. RPC 1.9(a).
3. RPC 1.13(a).
4. RPC 1.13(d).
5. *Casey v. University of Medicine and Dentistry of New Jersey*, 2010 N.J. Super. Unpub. LEXIS 1866 (Aug. 3, 2010).
6. *Id.* at *2 (citing Conscientious Employee Protection Act, N.J.S.A. 34:19-1 *et seq.*).
7. *Id.* at *5.

8. *Id.* at *7.
9. *Id.* at *9.
10. *Id.* at *14.
11. *Id.* at *10 (“A motion to disqualify should ordinarily be decided on the affidavits and documentary evidence submitted, and an evidentiary hearing should be held only when the court cannot without confidence decide the issue on the basis of the information contained in those papers.”) (Internal citations omitted).
12. *Id.* at *14. Contrary to the trial court, and without further discussion, the Appellate Division reasoned that “Timpone’s letter does not reflect any ambivalence or inconsistency relevant to the question of import here, which is the identity of the party who enjoined MDMC’s loyalty and held the privilege of confidentiality.” *Id.*
13. *Id.* at *11 (quoting *In re Palmieri*, 76 N.J. 51, 58-59 (1978)).
14. *Ibid.*
15. *Id.* at *11-12 (citing *Herbert v. Haytavian*, 292 N.J. Super. 426, 436-37 (App. Div. 1996)).
16. *Id.* at *13.
17. Interestingly, the Appellate Division opined that, despite her credentials as a lawyer, it seriously questioned whether Casey understood the principles of RPC 1.13. *Id.* at 13.
18. *Ferranti Int’l PLC v. Clark*, 767 F. Supp. 670, 671-72 (E.D. Pa. 1991).
19. *Id.* at 671.
20. *Id.* at 672.
21. *Id.* at 671-72.
22. *City of Atlantic City v. Trupos*, 201 N.J. 447 (2010).
23. RPC 1.7(c)(2) (repealed).
24. *Trupos*, 210 N.J. at 456.
25. *Id.* at 456 (quoting *City of Atlantic City v. Trupos*, 25 N.J. Tax 108, 117 (2009)).
26. *Id.* at 462 (quoting *Dewey v. R.J. Reynolds Tobacco Co.*, 109 N.J. 201, 218 (1988)).
27. *Trupos*, 210 N.J. at 467.
28. *Id.* at 469.
29. *Id.* at 470.
30. RPC 1.13(d).

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