

The Ethical Challenges of Representing Entities

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Common Challenges...

- ◆ **Decision-making authority**
- ◆ **Confidentiality**
- ◆ **Conflicting Interests**

Rule 1.12 “Organization as a Client”

- ◆ No prohibitions
- ◆ Recognizes complexities of representing entities
- ◆ Offers practical guidance
- ◆ Extensive comments

Rule 1.12(a)

- ◆ Who’s the boss?
 - Client = Organization, *as distinct from members*
 - Lawyer will report to, and take direction from, *duly authorized* constituents
 - Lawyer shall act in the *best interests of the organization*
 - Question *legitimacy* of constituent

Rule 1.12(b)

- ◆ **Lawyer must take remedial actions when:**
 - **Constituent has violated, or intends to violate, a legal obligation to entity (or violation which might be imputed to entity);**
 - **Violation is likely to substantially injure organization; AND**
 - **Is related to lawyer's scope of responsibility**

Rule 1.12(c)

- ◆ **The prescribed remedy?**
 - **Try to handle within the organization**
 - **Consider:**
 - **Severity of violation**
 - **Scope of lawyer's representation**
 - **Motive of Constituent**
 - **Policies with the organization**

Rule 1.12(c)

- ◆ **The prescribed remedy?**
 - **Determine if disclosure is mandatory**
 - **Ask for reconsideration of the matter**
 - **Advise client to get 2nd legal opinion**
 - **Refer matter to higher authority within the organization**

Rule 1.12(d)

- ◆ **When lawyer quits (or is fired)**
 - **Remedial obligations cease, provided that lawyer ends relationship properly (Rule 1.15)**
 - **Lawyer continues to be governed by confidentiality restrictions set forth in Rule 1.05**

Rule 1.12(e)

- ◆ **Imposes a duty...**
 - **When entity's interests are adverse to those of an individual constituent, lawyer *shall* explain the identity of the client, and that the lawyer may not represent the interests of the individual**

Decision Making Authority

- ◆ **Lawyer should be concerned “whether the constituent legitimately represents the interests of the organizational client.”**
 - **Rule 1.12, Comment 1**

Confidentiality

- ◆ **Rule 5.03, Rules of Evidence**
 - **Representative of a Client is:**
 - Person with authority to obtain legal services, or act on legal advice, on behalf of client; or
 - Anyone else who, for purpose of effectuating legal representation for the client, makes or receives a confidential communication

Confidentiality

- ◆ **Subject matter of privileged discussions is immaterial** (*Marathon Oil Co. v. Moye*)
- ◆ **All communications, not just legal advice are privileged** (*In re Carbo Ceramics, Inc.*)

Confidentiality

- ◆ **DRPC Rule 1.05**
- ◆ **Lawyer may reveal confidential info:**
 - **When necessary to prevent client from committing a criminal or fraudulent act**
 - **As necessary to rectify client crime or fraud in which lawyer's services were used**

Confidentiality

- ◆ **Scenario: "The friendly lawsuit"**
 - **City is sued by a friend of the mayor**
 - **You learn that the mayor is revealing damaging information to plaintiff**
 - **What do you do?**

Confidentiality

◆ **Scenario:**

- **City attorney compiles investigative report to advise city manager on potential liabilities facing the City. Conducts interviews, takes notes, drafts memo to city manager.**
- **Reporter requests all documents. Which should be released?**

Confidentiality

◆ **Scenario:**

- **City is involved in condemnation litigation. City Attorney discloses privileged information to the EDC, whom City Attorney also represents...**
- **Has the privileged been breached, making the information discoverable?**

Conflicting Interests

- ◆ **When entity's interests conflict with those of an individual constituent, lawyer should clarify role by:**
 - **Advising that entity is the client;**
 - **Clarifying that lawyer can't represent individual; and**
 - **Advising individual to get another lawyer**

Conflicting Interests

- ◆ **Scenario:**
 - **Ongoing investigation of police department**
 - **ACA routinely acts as legal adviser to officers, including warrants, use of force, etc.**
 - **During conversation, officer confides something to ACA**
 - **Later, officer tells different story under oath**

Conflicting Interests

- **Scenario:**
 - **City Attorney prosecutes ethics violations**
 - **May City Attorney undertake investigation of city council member?**
 - **Other variables?**

Governmental Clients

- ◆ **The tip of the day:**
 - **“When the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.”**



The End



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