

## 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 with 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 2<sup>nd</sup> 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. Moyer*)
- ◆ **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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