

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.**
- **All communications, not just legal advice are privileged.**



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

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:**
 - **Attorney suspects wrongdoing by employee.**
 - **Attorney goes straight to federal law enforcement, without telling any agency officials.**
 - **Agency terminates *attorney* in response to report of wrongdoing.**
 - **Attorney files whistleblower case...**



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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