

ETHICS FOR THE PUBLIC SECTOR ATTORNEY

WHO IS MY CLIENT? (And who cares?)

A. Why do we care?

1. An attorney owes certain ethical duties to “the client”.
 - a. Rule 1.1 – represent client completely
 - b. Rule 1.2 – abide by the clients decisions
 - c. Rule 1.3 – be diligent and prompt in representing the client
 - d. Rule 1.4 – keep client informed
 - e. Rule 1.6 – maintain client confidence
 - f. Rule 1.7 – avoid conflicts of interest between two clients
 - g. Rule 1.8 – client conflicts: specific rules
 - h. Rule 1.9 – avoid conflicts of interest between current and former clients
 - i. Rule 1.10 – imputed disqualification
 - j. Rule 1.11 – successive government and private practice
 - k. Rule 1.13 – organization as a client
 - l. Rule 1.16 – terminating client representation
 - m. Rule 2.1 – rendering advice to a client
 - n. Rule 2.2 – acting as an intermediary between clients
 - o. Rule 3.8 – special duties as a prosecutor
2. Who are we going to get in trouble with? – the Bar, the client, the due process attack.

B. Who is the public sectors attorney’s client? – see Rule 1.13; UCA 17-18a Part 8

1. Rule 1.13
2. Utah Code: 17-18a-801 & 802
3. Commission v. Short, 989 P.2d 899 (Utah 1999)

C. Most likely complaints about public sector civil attorney conduct

1. Loyalty to the client
2. The attorney’s conflicts of interest
3. Maintaining client confidences

D. The Due Process Attack

1. Ethics rule violation as a violation of due process
2. V-1 Oil v. Department of Environmental Quality, 939 P.2d 1192 (Utah 1997)

Rule 1.13. Organization as a Client.

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if,

(c)(1) despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(c)(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who has been discharged and reasonably believes the discharge was because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to ensure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

(h) A lawyer elected, appointed, retained or employed to represent a governmental entity shall be considered for the purpose of this rule as representing an organization. The government lawyer's client is the governmental entity except as the representation or duties are otherwise required by

law. The responsibilities of the lawyer in paragraphs (b) and (c) may be modified by the duties required by law for the government lawyer.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules, 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6 (b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict or limit the provisions of Rule 1.6(b)(1) – (6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances, Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A discharged lawyer who reasonably believes the discharge was because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to ensure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Clarifying the Lawyer's Role

[9] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to ensure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[10] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of the case.

Dual Representation

[11] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[12] Under some circumstances, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[13] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Government Agency

[13a] Utah Rule 1.13, unlike the ABA Model Rule, contains paragraph (h), which deals with the relationship between government lawyers and the government entities they represent. A government lawyer following these legal duties in good faith will not be considered in violation of the ethical standards of this Rule. The duties defined in this Rule apply to government lawyers and lawyers in military service, except to the extent the responsibilities of the government lawyers are otherwise controlled by the duties imposed upon them by law. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. For example, the government lawyer's client is generally the governmental entity itself, but the relationship between the government lawyer or lawyer in military service and the client may be further defined by statute, regulation, ordinance or other law. This Rule does not limit that authority. In addition, a lawyer for the government may have a legal duty to question the conduct of government officials and perform additional remedial or corrective actions including investigation and prosecution. The lawyer may also have an obligation to divulge information to persons outside the government to respond to illegal or improper conduct of the organizational client or its constituents. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and ensuring that the wrongful act is prevented or rectified, where public business is involved. The obligation of the government lawyer may require representation of the public interest as that duty is specified by law.

[13b] When the client is a governmental legislative body (such as the Utah Legislature, a city council, or a county council or commission), a lawyer representing that legislative body may concurrently represent the interests of the majority and minority leadership, members and members-elect, committee members, and staff to the legislative body. In representing the legislative body and the various interests therein, the lawyer is considered to be representing one client and the rules related to conflict of interest and required consent to conflicts do not apply.

17-18a-801. Public prosecutor's ethical duties.

An attorney exercising public prosecutor duties under this chapter:

- (1) is a lawyer representing an organization as a client under the Rules of Professional Conduct, Rule 1.13;
- (2) represents the state as an organizational client;
- (3) is considered the representative of the state; and
- (4) is empowered to make commitments for and decisions on behalf of the state.

17-18a-802. Representation by civil counsel -- County is client.

(1) (a) An attorney acting as civil counsel under this chapter represents an organization as a client in accordance with Rules of Professional Conduct, Rule 1.13.

(b) The county is the client organization described in Subsection (1)(a).

(2) The attorney:

(a) does not represent a county commission, county agency, county board, county council, county officer, or county employee;

(b) counsels with the county regarding civil matters; and

(c) receives direction from the county through the county elected officers in accordance with the officers' duties and powers in accordance with law.

(3) Notwithstanding Subsection (2)(a), the attorney may represent an employee named as a party in litigation:

(a) with the approval of the county executive; and

(b) if permitted by law and the Rules of Professional Conduct.

Warnings to Employees

It is imperative that at the outset of every interview, the lawyer give employees certain admonitions. Although a debate exists about the exact scope of these warnings, at a minimum warnings prior to the interview should include:

- A short, concise statement of the purpose and nature of the interview should be made. Generally, the interview is conducted to assist management in responding to the particular pending or anticipated litigation matter, and to provide legal advice.
- The lawyers present are representing the company, not any past, present, or future employees.
- Management believes that the interviews are being conducted subject to the company's lawyer-client communication privilege and lawyer work product doctrine.
- Management might voluntarily or intentionally elect to disclose anything said during the interview to others in the company or to third parties in its own best interest, but pending this decision, the communications are intended to be privileged.
- The employee should not discuss the interview with anyone, including fellow employees, because disclosure could inhibit the company's ability to assert the aforementioned privileges, and may taint the fact-finding investigation.
- The employee should tell the *truth*.

These warnings are given at the outset of the interview to apprise employees of their rights and to preserve the privileges of the corporation. Of course, during the interview, company counsel must be careful to determine whether any statements made by the employee indicate that the employee could be the subject of criminal charges. If, during the course of the interview or investigation, it appears reasonably possible that criminal allegations against the individual may result, company counsel should consider advising the employee to retain private counsel.

Although the company wants to obtain the full cooperation of its employees, the company may also want to ensure employees that its goal is investigation, not prosecution. The company may offer to assist an employee in selecting counsel and, under some circumstances, may want to wait until counsel is selected before continuing with the interview. On the other hand, the company may have an immediate need to punish wrongdoers to convince the government that those responsible for the illegal activity are no longer employed. The company should consider its approach to this issue at the beginning of its investigation to reduce the risk of disparate treatment of similarly situated employees.

HYPOTHETICAL QUESTION

You have just been invited to a meeting with the Board of County Commissioners and the County's Personnel Manager; you learn that a serious complaint of sexual harassment has been lodged against the County Assessor by one of his employees and the County Commission wants to know what to do next. You suggest that the charges need to be investigated to determine if the victim's claims have merit and if some kind of action is necessary against the Assessor. The County Commission asks whether it would be better for your office or for them to conduct such an investigation.