

# Government Lawyer Ethics: Client - Constituent Communications

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# When officials or employees speak to public about pending legal issues

- A defendant about a pending municipal court case
- A defendant about why law involved in his/her pending case should be changed
- A former defendant about how to "avoid prosecution" in the future (other than simply complying with the law)
- A person who files or plans to file a claim for damages against City
- A party in pending or completed litigation
- A person to whom they reveal attorney-client confidential information



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Mr. Cohen, an attorney, received a monthly retainer, not from the campaign and having nothing to do with the campaign, from which he entered into, through reimbursement, a private contract between two parties, known as a non-disclosure agreement, or NDA. These agreements are.....

3:46 AM - 3 May 2018

15,972 Retweets 70,322 Likes



21K

16K

70K



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...very common among celebrities and people of wealth. In this case it is in full force and effect and will be used in Arbitration for damages against Ms. Clifford (Daniels). The agreement was used to stop the false and extortionist accusations made by her about an affair,.....

3:54 AM - 3 May 2018

16,634 Retweets 75,333 Likes



20K

17K

75K



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...despite already having signed a detailed letter admitting that there was no affair. Prior to its violation by Ms. Clifford and her attorney, this was a private agreement. Money from the campaign, or campaign contributions, played no roll in this transaction.

4:00 AM - 3 May 2018

17,479 Retweets 82,936 Likes



47K 17K 83K



# When officials or employees speak to public about pending legal issues

- How to handle situations ethically?
- What if elected official has some control over office (even if indirectly, as at budget time)?
- What if elected official in position to take adverse action if they disagree with lawyer?
- One part ethics
- Two parts proactive management and training of nonlawyers

# Relevant RPCs – Review and Discussion

- Rule 1.2 – Allocation of Authority
- Rule 1.4 – Communication
- Rule 1.7 – Conflict of Interest: Current Clients
- Rule 1.13 – Organization as client
- Rule 2.1 – Advisor
- Rule 5.3 – Responsibilities regarding non-lawyer assistance
- Discussion in groups –best practices



# Organization as Client

First question in entity representation = who is client?

Rule of Professional Conduct 1.13 adopts “entity approach”

- Lawyer for organization represents organization acting through duly authorized constituents
- “Constituents” = positions equivalent to officers, directors, employees and shareholders
- “Duly authorized constituents” – who can lawfully act on behalf of entity?

# Entity approach and Government Lawyers

## Rule 1.13 Comments:

- Applies to lawyers for governmental organizations
- “Defining precisely identity of client and prescribing resulting obligations of government lawyers may be difficult”
- Government lawyer may have authority to question conduct of government officials more extensively than private lawyer
- In public context, may have different balance between maintaining confidentiality and assuring that wrongful acts are prevented or rectified

# Entity approach and Government Lawyers

Identifying the government lawyer's client

- Always represents the office
- Represents officials *only when acting in official capacity*

Montana (and most states)

- Follows Rule 1.13 “organization as client” approach
- Lawyer employed by state agency represents agency as a whole, not individual members – Mt. Advisory Op. 940202

# Rule 1.2 - Allocation Of Authority Between Client And Lawyer

- Shall abide by client's decisions concerning objectives of representation
- Shall consult with client as to means by which objectives are to be pursued, as required by Rule 1.4
- May take such action on behalf of client as is impliedly authorized to carry out representation
- Lawyer shall not counsel client to engage, or assist a client, in conduct that lawyer knows is criminal or fraudulent

# Rule 1.4: Communications

Lawyer shall:

- Consult with client about any limitation on lawyer's conduct when lawyer knows client expects assistance not permitted by Rules or other law
- Explain a matter to extent reasonably necessary to permit client to make informed decisions regarding the representation

# Rule 1.7

## Conflict Of Interest

A concurrent conflict of interest exists if:

- *Significant* risk representation will be *materially limited* by lawyer's responsibilities to another client, a former client or a third person or *by a personal interest of the lawyers*
- Loyalty and independent judgment are essential elements in lawyer's relationship to client

# Rule 1.7

## Conflict Of Interest

Conflict of interest exists if:

- significant risk that lawyer's ability to consider, recommend or carry out an appropriate course of action
- materially limited by lawyer's other responsibilities or interests

Critical question:

- Will difference in interests materially interfere with lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of client?

# Rule 1.13

## Organization As Client

Explaining the relationship:

- In dealing with constituents, lawyer shall explain the identity of client when lawyer knows or reasonably should know that organization's interests are adverse to those of constituents



# Rule 1.13

## Organization As Client

Protecting the client's interests:

- When lawyer knows person associated with organization is acting, or intends to act, in manner that is:
  - a violation of a legal obligation to organization
  - a violation of law that reasonably may be imputed to organization
  - likely to result in substantial injury to organization
- Lawyer shall proceed as reasonably necessary in best interest of organization

# Rule 1.13 Organization As Client

In determining how to proceed, lawyer shall consider:

- Seriousness of violation and consequences
- Scope and nature of lawyer's representation
- Responsibility in organization
- Apparent motivation of person involved
- Policies of organization concerning the matter

Measures taken must be designed to minimize

- disruption to organization
- risk of revealing information to persons outside organization

# Rule 1.13

## Organization As Client

Measures might include:

- asking for reconsideration
- advising that separate legal opinion be sought
- referring matter to higher authority

If, despite lawyer's efforts, organization insists upon action that is:

- clearly a violation of law and
- likely to result in substantial injury to organization

Lawyer may resign (in Montana)

# Rule 2.1

## Advisor

- Lawyer shall exercise independent professional judgment and render candid advice
- Lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant

# Rule 2.1

## Advisor

### Comments:

- In general, a lawyer is not expected to give advice until asked
- However, when lawyer knows client proposes a course of action that is likely to result in substantial adverse legal consequences, lawyer's duty under Rule 1.4 may require lawyer to offer advice
- Lawyer ordinarily has no duty to initiate investigation of client's affairs or to give advice that the client has indicated is unwanted, but lawyer may initiate advice when doing so appears to be in client's interest

# Rule 5.3

## Responsibilities Regarding Non-lawyer Assistance

### Duty to train

- Lawyer with managerial authority shall make reasonable efforts to ensure office has measures giving reasonable assurance that non-lawyer conduct is compatible with lawyer's professional obligations

### Duty to supervise

- Lawyer with direct supervisory authority over non-lawyer shall make reasonable efforts to ensure conduct is compatible with lawyer's professional obligations

# Training Best Practices

In groups, identify:

1. Topics non-lawyer training should cover
2. Methods, frequency and assessment of training
3. Lawyer's course of action if constituent, once trained and advised, proceeds

# Re-Group

## Topics?

- City, not individuals, is client
- Lawyer's role and responsibilities
- Public lawyer's obligation to client
- Situations that create a conflict of interest
- Professional independence of lawyer and indirect control
- Attorney Client Privilege – what it is, who has it, why it matters, and how it is lost
- Balancing constituent care and feeding with City's legal interests



# Re-Group

Methods, frequency & assessment?

- Language and materials accessible to layperson
- Upon hiring/assumption of office, and at regular intervals
- Written guidance with specific examples

If all your good efforts fail . . . ?

- Document advice given
- Identify any conflict
- Seek outside opinion
- Damage control/protect Client interests
- Withdraw?

# Final Assignment

In lay language, explain:

- Entity theory, your relationship to constituents, and obligations to client
- Ideal ground rules for public officials' communications with public

**THANK YOU!**