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The Conflicting Confidences of the City/County Attorney:
Navigating Client Confidentiality under ABA Model Rules of Professional Conduct 1.6, 1.11 & 1.13

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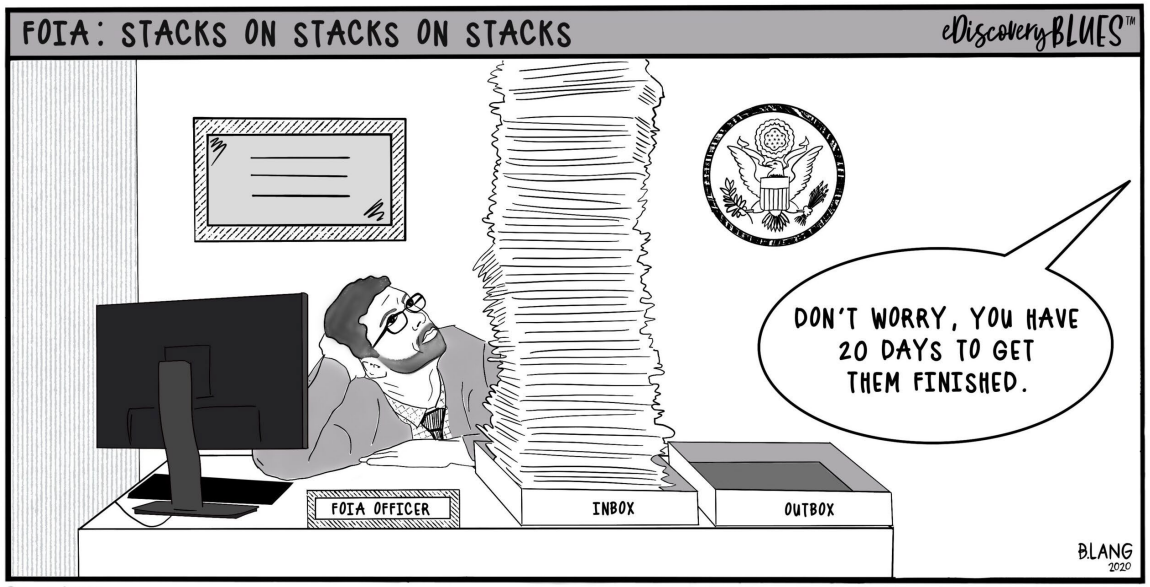
Client Confidences & Public Records



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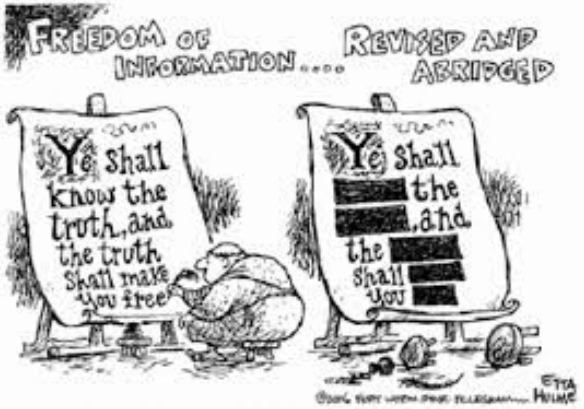

Rule 1.6: Confidentiality of Information

Client-Lawyer Relationship

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Rule 1.6: Confidentiality of Information

- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (6) to comply with other law or a court order; or
- (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

Rule 1.6: Confidentiality of Information

- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Professional Obligations & Sunshine Laws

Privilege vs. Confidentiality

- *Lawyer Disciplinary Bd. v. McGraw*, 194 W. Va. 788 (1995).
  - On January 1, 1989, the Berkeley County Council created the Berkeley County Solid Waste Authority (BCSWA). Since that time, BCSWA has methodically worked to implement a series of education, enforcement and solid waste collection programs. Components of those programs were implemented with the primary objective of following the integrated solid waste management hierarchy mandated by the West Virginia Solid Waste Management Act.





Professional Obligations & Sunshine Laws

Privilege vs. Confidentiality

- *Lawyer Disciplinary Bd. v. McGraw*, 194 W. Va. 788 (1995)
  - In essence, then, respondent argues that he did not breach his ethical duty of confidentiality because the information he disclosed to Ms. Hogbin had been previously revealed or "made public." We disagree. Clearly, respondent has confused the evidentiary attorney-client privilege with the ethical duty of attorney client confidentiality.
  - Under the facts of this case, it is arguable that the information disclosed to Ms. Hogbin was not protected by the evidentiary attorney-client privilege. *See State v. Burton*, supra; *United States v. (Under Seal),* 748 F.2d 871 (4th Cir. 1984). *See also Marano v. Holland,* supra; *United States v. Jones*, supra. In that this issue is not presently before this Court, we decline to address it.
  - However, by disclosing to Ms. Hogbin client information communicated at the meeting, respondent has breached his ethical duty of confidentiality. In so doing, he has violated Rule 1.6(a) of the Rules of Professional Conduct.

Rule 1.13: Organization as Client

Client-Lawyer Relationship

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

- ABA Comment:
  - [9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules.
  - Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole.

Rule 1.13: Organization as Client

Client-Lawyer Relationship

- (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.

Rule 1.13: Organization as Client

- ABA Comment:
  - Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, 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.

Rule 1.13: Organization as Client

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

- (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

- (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.

Public Duty vs. Professional Obligations

Attorney-Client & Criminal Investigations/Litigation

- *In Re: Grand Jury Subpoena,* 886 F.2d 135 (6th Cir. 1989)
  - The City of Detroit, Detroit City Council and James H. Bradley, Detroit City Clerk, appeal the district court's denial of a motion to quash a federal grand jury subpoena *duces tecum*. The district court denied the motion to quash and ordered the City to produce the minutes of four closed sessions of the City Council on the ground that the attorney-client privilege was inapplicable to the minutes because the City Council was not the client of Detroit corporation counsel or outside counsel retained by corporation counsel. Because this factual finding by the district court was clearly erroneous, the judgment of the district court is vacated, and this case is remanded for further proceedings
- *In Re: A Witness before the Special Grand Jury 2000-2*, 288 F.3d 289 (7th Cir. 2002).
  - The central question on this appeal is whether a state government lawyer may refuse, on the basis of the attorney-client privilege, to disclose communications with a state officeholder when faced with a grand jury subpoena. The district court found that in the context of a federal criminal investigation, no such government attorney client privilege existed. We agree with this determination, and therefore affirm.
- *State ex rel Thomas v. Schneider*, 212 Ariz. 292 (2006)
  - The grand jury issued the indictments after hearing the testimony of several witnesses, including [City Attorney] Flaaen. The trial court determined that Flaaen improperly disclosed communications protected by the attorney-client privilege and remanded the matter to the grand jury.... The State brought this special action, arguing that the attorney-client privilege does not protect Flaaen's communications with the real-parties-in interest. Because the State has no adequate remedy on appeal, we accept jurisdiction. However, because the trial court was correct, we deny the relief requested by the State.

Rule 1.13: Organization as Client

- (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 reasonably believes that he or she has been discharged 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 assure 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.

Rule 1.13: Organization as Client

- (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.

Public Duty vs. Professional Obligations

Who is the Client?

- *Restat 3d of the Law Governing Lawyers* § 74 - The Privilege for a Governmental Client:
  - Unless applicable law otherwise provides, the attorney-client privilege extends to a communication of a governmental organization as stated in § 73 and of an individual employee or other agent of a governmental organization as a client with respect to his or her personal interest.
  - A narrower privilege for governmental clients may be warranted by particular statutory formulations. Open meeting and open-files statutes reflect a public policy against secrecy in many areas of governmental activity. Moreover, unlike persons in private life, a public agency or employee has no autonomous right of confidentiality in communications relating to governmental business

Public Duty vs. Professional Obligations

Attorney-Client & Civil Litigation – Who is the Client?

- *Pritchard v. County of Erie (In Re County of Erie)*, 473 F.3d 413 (2nd Cir. 2007)
  - Access to legal advice by officials responsible for formulating, implementing and monitoring governmental policy is fundamental to "promot[ing] broader public interests in the observance of law and administration of justice," Upjohn, 449 U.S. at 389. At least in civil litigation between a government agency and private litigants, the government's claim to the protections of the attorney-client privilege is on a par with the claim of an individual or a corporate entity.
- *Ross v. City of Memphis*, 423 F.3d 596 (6th Cir. 2005)
  - …the real dispute is between the City of Memphis (the "City") and its former police director, Walter Crews, who has also been sued in his individual capacity. The City asserts the attorney-client privilege as to the content of conversations between Crews, while he was police director, and various attorneys employed by the City. However, in the present lawsuit, Crews has raised the advice of counsel as the basis of his qualified immunity defense. Thus, we are asked to determine whether Crews's invocation of the advice of counsel impliedly waives the attorney-client privilege held by the City. To answer this question, we must first decide whether a municipality can hold the attorney-client privilege. Holding that a municipality can maintain the privilege and that Crews's litigation choices cannot waive the City's privilege, we reverse the district court….

Considerations…

- Attorney-Client Privilege considerations may differ from the obligations of attorney confidences.
  - Waiver of the privilege does not necessarily constitute a waiver of confidentiality.
- Know who your client is – make sure the city employees with whom you interact also know who the client is.
- The duties of the office you serve may come into conflict with your professional obligations – seek guidance from your state disciplinary counsel/board.

Maybe I'll just go into private practice…



Rule 1.11: Special Conflicts of Interest for Former & Current Government Officers & Employees

Client-Lawyer Relationship

- (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

- (2) shall not:
- (ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

- (e) As used in this Rule, the term "matter" includes:
- (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
- (2) any other matter covered by the conflict of interest rules of the appropriate government agency.



Thank you – any questions?

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