# Model Rule 1.13 and the Municipal Organization as the Client

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KANSAS CITY
Law Department

# City Attorney: A Noble Profession

Government lawyers must navigate across a sea of conflicting loyalties, ambiguous objectives, and ethical pressures. But as they do so, they include themselves among the ranks of many of the noblest public servants this nation has ever known.

*-Randy Lee*



# City Attorney: Something Else

The image of lawyers as backward-looking, ass-covering, wordsmithing, risk-averse, non-value generating, fine-distinction-drawing deal killers, who spend most of their time trying to separate the pepper from the fly poop, and the rest of the time saying "no you can't do that" to their clients, probably has some empirical basis.



*- Jeff Lipshaw*

# Identification of the Client

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

*Model Rule 1.13(a)*

# Identification of the Client

Precisely defining the identify of the client and prescribing the resulting obligations may be more difficult in the government context.

*Model Rule 1.13 Comment 9*

# Identification of the Client

No universal definition of the client

of a governmental lawyer is possible.

*Restatement 3rd of Law Governing Lawyers*

# Identification of the Client

"An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents."

*Model Rule 1.13(a) Comment 1*

# Identification of the Client

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

*Model Rule 1.13(a)*

- Mayor
- City Council
- City  Manager
- Appointed Officials
- Boards and Commissions
- Department Directors

Even when the city attorney can identify the duly authorized constituent, the duty remains to the organization. Model Rule 1.13 is not intended to limit the scope of that authority.

# Duty to the Organization

*Every attorney owes a duty to the client which includes the general requirements of competence, diligence, timeliness, communication and the like.*

"[w]hen 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."

*Model Rule 1.13 Comment 3*

# When a city attorney knows…

"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…

*Model Rule 1.13(b)*

"…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."

*Model Rule 1.13(b) continued*

Knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

*Model Rule 1.13 Comment 3*

*Model Rule 1.0 (f)*

# Seek an appropriate balance

*Model Rule 1.13 Comment 4*

"… [A] 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."

*Remember, the city is conducting public business.*

# So how does it really happen?

*A Constituent…*

- Refuses to do or avoid doing something unlawful
- Recklessly disregards the potential for risk and liability
- Refuses to make needed decisions
- Makes decisions beyond the scope

# So how does it really happen?

## City Attorney Advice

- That's illegal.
- Your division is going to violate the law.
- If your department does this the city is on the hook for big dollars.
- To the boss:  Make 'em stop!

## Constituent Response

- It's done that way.
- It's his call.
- You'll have to defend us.
- Your talking to me about this because…?

# You’re talking to me about this because…?

…because you’re the top of this

bureaucratic food chain.

# Who is the Client and What is the attorney's Obligation?

*Ask…*

- Is this legal advice related to the representation or business/personal advice?
- Who can make the decision?

# SCENARIO 1: Who directs the settlement of a claim?

A department director might say “I pay your salary. I pay the claims. I’ll tell you when to settle and when not to settle.” Not so quick. What department budget picks up the tab for an attorney is not determinative of who makes the decision. The question is, what does the client (organization) want from the lawyer, not what does the representative of the client want from the lawyer. What is the lawyer’s role?

# Do a structural analysis.

- What authority?
- What duties?
- City attorney decisions?
- Relationship to other departments?

# Structural Analysis

KCMO CODE

- City Attorney
  - up to $25,000
- Risk Management
  - $25,000-$50,000
- City Council
  - over $50,000

MISSOURI STATUTE

- Prosecute and defend all actions to which the city is a part
- Generally perform all legal services required
- Silent on settlement authority

*Note that this does not apply to a Charter City like KCMO –further obscuring the answer.*

# SCENARIO 2: Was attorney client privilege invoked?

During the discovery phase for an employee suit, an organizational attorney was brought in for advice. Non-party employee witnesses who investigated the underlying matter were present. Later, during deposition, they were instructed not to answer questions if the only basis for the answers is to recall the conversations that occurred in front of the attorney. Privilege was challenged

(1) does the presence of the attorney make the entire conversation privileged (2) did the presence of non-party witnesses effectively waive any potential privilege?

# SCENARIO 2: Was attorney client privilege invoked?

The court found that "[w]hen the client is an organization, such as a corporation or, as in this case, a township, questions arise as to which employees of the organization are considered "clients" for purposes of the privilege. The answer to that question is that it depends upon the circumstances."

Since the purpose of the discussion was to help the attorney ascertain relevant facts, attorney client privilege extended to the conversation.

Note that the privilege extends only to the conversation, not to the underlying facts.

*Dzierbicki v. Twp. of Oscoda (2009)*

# Lessons from Case Law

- Government attorneys are held to a higher, or at least a different standard.
- Failure to act can be the basis for discipline.
- Going to far when taking action can be the basis for discipline.
- Allowing personal feelings to get in the way of the duty to the organization can be problematic for a city attorney.

# In re Schuessler, 578 S.W.3d 762 (Mo. 2019)

- The attorney *knew* of a criminal act and potential civil rights violation
- The attorney *knew* the suspect was falsely charged to cover up the assault.
- The attorney failed to report the misconduct and protect the client.

*Troubled by the repeated dishonesty and finding that government attorneys are held to a higher standard given the nature of their work to protect the public, it was not a surprise when the court discipline included an indefinite suspension with no leave to file for 3 years.*

# *Crandon v. State*, 897 P.2d 92 (Kan. 1995)

- Potential wrongdoing within a government agency.
- Role of lawyer as part of the team.
- Role of lawyer is to advise, not to prosecute, the government client and its representatives.

*Ms. Crandon's First Amendment, pre-Garcetti, gave her no claim to damages claimed as a result of her termination. As an attorney, Ms. Crandon had an obligation to her client, the Office of the State Bank Commissioner. By taking her investigation outside her office she failed in her obligations.*

*The Kansas Supreme Court succinctly observed: "The attorney's duty is to advise and counsel, not prosecute her client." The attorneys working for government have a different relationship than other employees. Because of that difference an attorney's conduct is measured by a different standard. It is not so much that the standard is "higher" but that it is different.*

# In re Harding, 223 P.3d 303 (Kan. 2010)

- Small town politics
- Bar complaints and aftermatch
- Personal destruction

*We are concerned about the harm done, the respondent's disclosure of confidential information, and the damage caused to the reputations of some of the city officials. We may not ignore respondent's angry and selfish response. A minority of the court would impose a greater discipline.*

# Great.  So…Who's the Client?

- The People
- The Mayor and Council
- Department Directors and Agency Heads
- The Public Interest
- The Municipal Corporation

# The Client Problem

The client problem is that a city attorney works for all of the city's elected officials but represents none of them.

*- Brigham Smith*

# Clarifying the Lawyer's Role

*Model Rule 1.13(f)*

"…[A] lawyer shall explain the identify of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing."

*Model Rule 1.13 Comment 10*

In some circumstances, the lawyer should advice the constituent to consider retaining independent representation.

The constituent should be helped to understand that discussions with the lawyer may not be privileged.

# Why Does It Matter?

- Confidential Information
- Conflicts of Interest
- Waivers
- Attorney Work Product
- Who controls litigation

It has been suggested that since “Who’s the boss?” is a different question from “Who’s the client?” that the determination can follow, again, a structural analysis of the government and the issue being confronted. The practical ramifications are navigated every day. Who wants to explain to an elected official that yes, she is your boss, but no, she is not your client. But knowing the client determines the entire character of the City Attorney’s work.

*-Brigham Smith, Who’s the Boss: Deciding Who Your Client Is When You’re a City Attorney, 11 T.M. COOLEY J. PRAC. & CLINICAL L. 1, 16 (2009).*

# Questions?

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