

IDENTIFYING THE CLIENT

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I. Introduction

In keeping with theme of this seminar, this paper will examine how a new port attorney deals with the problem of identifying the client within the port organization. This basic question confronts every port attorney at some point in his or her career. For a newly-hired attorney on a port authority's legal staff or one retained as outside counsel for a port, identifying the client is seldom an issue. When the question does arise, however, it is usually against the background of an internal conflict or dispute where tensions are running high. Being in that position requires some understanding of the perils attached to deciding where one's professional duties lie, especially since those decisions may affect the attorney's future working relationships, or even his or her job with the port.

Identifying the client is an area governed by the rules on attorney ethics. The legal profession's ethics framework revolves around the relationship of the attorney to the client so it is important to know to whom the attorney owes his ethical duties. Like most areas of the law, legal ethics is not prone to cut and dried answers. This paper will describe the framework and analysis for identifying the client in an organization by examining the relevant ethics rules. We will use the framework of the rules and case law to analyze the hypothetical attached to this paper to view how to reach a consistent result. The paper will make repeated references to in-house attorneys for the sake of consistency and brevity, but most of the issues are the same for outside counsel representing any organization, including port authorities.

The hypothetical raises an issue involving client confidentiality and the potential waiver of attorney-client communications. The paper will only touch on the ethical issues connected to confidential communications as that issue can (and has) filled multiple tomes of legal writing. We will use the confidentiality issue as a way of examining how to deal with deciding how to identify the client for purposes of determining the worthy recipient of the attorney's loyalty.

II. Working in or for an Organization—The Setting

An attorney working in-house at a port authority is not merely counsel to the port but an employee as well. This fact brings pressures that outside counsel does not face. Outside counsel who anger clients may be frozen out of future work for the clients, but they still have a place at a law firm and are free to pursue other clients. In-house counsel who displease their client can be punished by poor performance reviews and termination. In-house attorneys may also find themselves identifying with their clients' goals and objectives to a degree that can prevent the attorney from making unpopular legal pronouncements. This is especially true when the attorney wants to feel part of the "team" and contribute towards the success of a project or solving a problem. Giesel, "The Ethics or Employment Dilemma of In-House Counsel," 5 Georgetown Journal of Legal Ethics 535, 547 (1992). While it may be entirely understandable for in-house counsel to have such feelings, they become a liability when they impede the attorney's obligation to provide objective legal advice for the larger organization.

III. Ethics Rules

Each state has its own attorney conduct/ethics rules and those rules are the beginning point for client identification. About 2/3 of the states have adopted in whole or in part the American Bar Association's Model Rules of Professional Conduct ("MRPC").¹ The specific rule governing representation of an organization (as opposed to an individual) is in MRPC 1.13. The provision is reprinted in its entirety on Appendix A. A chart showing the differences between the MRPC version of Rule 1.13 and the versions adopted by the states is on Appendix B. The annotated version of the MRPC contains helpful commentary with citations.

The American Law Institute also publishes a Restatement on legal ethics. Section 96 ("Representing an Organization as Client") of the Restatement (Third) of the Law Governing Lawyers ("Restatement") is the Restatement's comparable section to MRPC 1.13. Section 97 ("Representing a Governmental Client") is also useful as it provides additional guidance specifically for government lawyers, which all port lawyers technically are. Sections 96 and 97 are attached as Appendix C. The Restatement is an exceptionally useful research tool on this and other ethics issues, containing thoughtful analysis with citations.

IV. The Organization and the Entity Rule

In the years before the MRPC, there were multiple theories regarding client identification when representing a governmental organization. One theory was that the lawyer ultimately represented the "public interest." This theory, while noble-sounding, offered little practical guidance to the lawyer, since it required the lawyer to make a pretentious judgment on what is or

¹ A complete listing of internet links to each state's ethic rules can be found on <http://www.abanet.org/cpr/links.html>

is not in the public's interest. William Josephson and Russell Pearce, "To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?," 29 Howard Law Journal 539, 561 (1986); Geoffrey P. Miller, "Government Lawyers' Ethics in a System of Checks and Balances," 54 Univ. of Chicago Law Review 1293, 1294-1295 (1987).² Another concept is the "group" theory, which holds that a lawyer representing an organization represents multiple clients within the same organization, thereby owing the same ethical duties to each of those clients. Geoffrey C. Hazard, Jr., W. William Hodes, John S. Dzienkowski, The Law of Lawyering (3rd ed.) (Aspen Law and Business: Gaithersburg, Md.), §17.2. This theory, while providing a clean rationale to spread the attorney's duties to potentially everyone within an organization, falls apart when the parties within the organization are in serious conflict. Id. at §17.3. An attorney cannot zealously represent competing parties for obvious conflict of interest reasons.

The "entity" theory is the prevailing rule guiding an attorney's representation of an organization. Section (a) of MRPC 1.13 states "A lawyer employed or retained by an organization represents the organization through its duly authorized constituents." The heart of the theory is that the attorney represents the organization as a whole and does not represent any single member within the organization, no matter how senior the member is. Hazard & Hodes, §17.3; Restatement, §96, Comment b. It is primarily when a fight breaks out among the senior leadership within the organization that this issue comes into sharper focus, especially when the leadership is giving conflicting directions to the organization's lawyer.

In Morin v. Tupin, 778 F.Supp. 711 (S.D.N.Y, 1991), limited partners sued the attorneys representing the partnership for malpractice. The court found that the attorneys represented the partnership, through the general partners, and not any specific constituent, including the limited partners. In Quintel v. Citibank, 589 F.Supp. 1235 (D.C.N.Y, 1984), in an action similar to Morin, the court, in language resembling MRPC 1.13, said that an attorney's allegiance is "to the entity that retained him rather than to any person connected with the entity." Id. at 1242.³

There is one further refinement on the entity theory that is worth noting. Although it is clear that an in-house attorney represents the entity rather than any given set of individuals, there used to be conflicting views as to whom the attorney could extend her duties. Prior to 1981, the

² Portions of the public interest theory persist in certain situations when the attorney confronts wrong-doing within the governmental organization. That issue will be described below.

³ The Quintel decision has been criticized in other jurisdictions, primarily for the fact that the dissenting decisions believed that the Quintel court erroneously applied the entity theory in limited partnerships. Those decisions believe that limited partners' rights to represent the interest of a partnership are as compelling as a general partners'. Roberts v. Heim, 123 F.R.D. 614, 624-625 (N.D. Cal., 1988); Pucci v. Santi, 711 F.Supp. 916, 927 (N.D. Ill. 1989); see also, In re Kinsey, 660 P.2d 660 (Ore., 1983). This difference of opinion ultimately does not affect the validity of the entity theory, but reflects a difference of opinion on the nature of limited partnerships and the relationship between the general and limited partners.

prevailing view was that the attorney's duties could only be applied to those within the so-called "control group" within an organization. The control group was considered to be senior employees who had significant decision-making authority. In Upjohn Co. v. U.S., 449 U.S. 383 (1981), the U.S. Supreme Court rejected the control group test as a means to determine the extent of attorney-client privilege. The Court held that the privilege (and by implication the status of client) could extend to any employee who had to speak to the entity's attorneys when the attorney was carrying out his or her work within the scope of legal work on behalf of the entity. Id. at 392. See Kerri R. Blumenauer, "Privileged or Not? How the Current Application of the Government Attorney-Client Privilege Leaves the Government Feeling Unprivileged," 75 Fordham Law Rev. 75, 81-82 (2006); Lory A. Barsdate, "Attorney-Client Privilege for the Government Entity," 97 Yale Law Journal 1725, 1732 (1988).

V. Conflict Within the Organization

Both the Model Rules and the Restatement call out special rules for attorneys representing governmental entities. Comment 9 to the MRPC acknowledges that identifying a governmental client can be difficult because of the independent functions of the many branches and the public interest that is being served. The MRPC applies the entity rule in government in different ways, depending on the situation. At different times, it is possible for the government lawyer to represent a particular agency, an entire branch (the executive, for example), or even the government entity as a whole. See also Ross Garber, "The Government Attorney-Client Privilege," in Ethical Standards in the Public Sector, 2d ed., Patricia Salkin, editor (ABA Section of State and Local Government Law; Chicago: 2008), p. 325. The Restatement echoes this concept, saying that all of the rules for representing a private organization apply to government representation, with some important distinctions described below. For a description of cases involving government client scenarios, see Annotated Model Rules of Professional Conduct (6th ed., 2007), pp. 207-208.

Perhaps the most significant distinction in representing a government body as a client is that the government lawyer is supposed to be more willing to question the conduct by officials since the public interest is at stake. This is a vestige of the outmoded "public interest" test that was one of the earlier theories on client identification when representing a government. The same criticisms leveled against that approach (that the lawyer is required to make his or her own judgment about what constitutes the public interest) applies here as well. In a similar vein, the Restatement adds that the government lawyer must proceed under §96(2)⁴ if a constituent client "violates a legal obligation that will likely cause substantial public or private injury" or that will likely result in substantial injury to the client. Restatement, §97(2). The distinction here is that under MRPC 1.13, the standard is substantial harm to the organization. The Restatement adds

⁴ "(2) If a lawyer representing an organization knows of circumstances indicating that a constituent of the organization has engaged in action or intends to act in a way that violates a legal obligation to the organization that will likely cause substantial injury to it, or that reasonably can be foreseen to be imputable to the organization and likely to result in substantial injury to it, the lawyer must proceed in what the lawyer reasonably believes to be the best interests of the organization."

the obligation to look beyond harm to the organization and review the conduct with regard to harm to the public or to private entities.

VI. A Brief Overview on Confidentiality

Although the focus of this paper is not on confidential attorney-client communications and how waiver can be viewed, we will briefly examine the issue here prior to examining the hypothetical as the perils of such waiver are relevant to the attorney's review of the risks to the Port.

The attorney-client privilege can be invoked when the following four elements are met:

- (1) there is a communication
- (2) made between privileged persons
- (3) in confidence
- (4) for the purpose of obtaining or providing legal assistance for the client.

Restatement, §68.

The privilege can be waived by an organization and a key question is by whom. The general view is that since the privilege belongs to the corporate entity, only the appropriate controlling person or body can authorize intentional waiver of the privilege. Edna Selan Epstein, The Attorney Client Privilege and the Work Product Doctrine, 5th ed. (ABA Section of Litigation, Chicago: 2007), p. 28; American International Specialty Lines Insurance Co. v. NWI-Inc., 240 F.R.D. 401, 406 (N.D. Ill., 2007); Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 348 (1986). If a member of the governing board accidentally or purposefully goes against the will of the board, the board member may succeed in waiving the privilege with respect to the specific communication that he or she reveals, but that does not act as a general waiver of the privilege for all other relevant privileged communications.

Interfaith Housing Delaware v. Town of Georgetown, 841 F.Supp. 1393 (D.Del., 1994) describes this situation. A nonprofit housing group sought a city permit from Georgetown for a new housing development. The group sued the city over what it considered arbitrary conditions to the permit as a means of blocking the project. During the course of the litigation, they deposed a member of the city council. During the deposition, the council member explained that the reason the council voted for the conditions was on the advice of the city attorney. The attorney for the city failed to register an objection to the answer and the plaintiffs alleged that this constituted a waiver of the privilege. The federal district court ruled that there was a waiver with respect to the subject matter of the answer the council member gave, but that there was no general waiver. The court found that the council member was not the president or otherwise authorized to speak on behalf of the council. The court used the same analysis that would be applied to issues of apparent authority. If a reasonable person could expect that a particular government official (such as a mayor) had the authority to speak on behalf of the larger group,

then it would be possible to argue that there was a generalized waiver since that person might have the authority to waive the privilege. In this case, the court found that the particular member was not a public representative for the council as a whole and did not have the apparent authority to waive the privilege. *Id.* at 1399.

VII. Conflict Within the Port—Examining the Hypothetical

A. Commissioners make the request.

In the hypothetical, the highest authority at the Port is a 7 member Commission. Five of the Commissioners are elected by the voters of the county where the Port is located and two are appointed by the governor of the state. The Executive Director is hired by the Commission and she is the bridge between the staff and the Commission. In the hypothetical, the Commission is riven with dissent with 3 Commissioners opposed to the other 4. The block of 3 Commissioners demand that the General Counsel follow a particular order that comes from the three of them and not the Commission as a whole. Moreover, the Executive Director has countermanded the order.

The General Counsel's narrow legal resolution to this particular fact pattern is probably achieved without resorting to the ethics rules. The general rule is that no elected body can take action except in the manner required by law. McQuillan, *Municipal Corporations*, §13.07. That generally means the Commission would have to conduct a vote in open session directing the General Counsel to take a specific action. The three members of the Commission are, in this case, speaking on their own behalf and not on behalf of the Commission, since the Commission has not voted to take action in this regard. The General Counsel can furthermore point to the structural limitation on the Commission's authority. All staff actions are technically directed by the Executive Director, as the Commission only has specific authority to hire and fire the Executive Director, and not individual staff members below her.⁵

This requirement for official action means that it does not matter if 4 or more of the Commissioners (a majority) have made the request of the General Counsel. The request is not official unless the Commission has taken action in open session.

B. Executive Director makes the request.

The issue becomes much more complicated if the roles are reversed. What if the Executive Director had ordered the General Counsel to turn over the memo to the newspaper and the General Counsel believes such disclosure would be harmful to the Port? What if the Commissioners had given a sense in the Executive Session that the memo should not be made public but had not taken a vote? The shield that the Commission can only speak via a vote does

⁵ There is obviously a great deal of political sensitivity attached to this kind of dilemma and this kind of dispute would typically be mediated between the Executive Director and the Commissioners. These answers are only from the point of view of the lawyer's ethical duty.

not seem to allow the attorney to disobey an order from his direct supervisor. It is in this situation that the ethics rules provide some guidance.

Subparagraph (b) of MRPC 1.13 states:

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 refused 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.

It is important to remember that this provision is not an invitation for a port lawyer to start second guessing decisions made by superiors. Comment (b) to MRPC 1.13 states “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.” See also Jeffrey Rosenthal, “Who is the Client of the Government Lawyer?,” in Ethical Standards in the Public Sector, p. 28.

This provision and Restatement §96(2) require that the attorney make some difficult assessments when a constituent is crossing the line of legality. The first issue is that the attorney must (1) either know or have reasonable certainty that a constituent is engaging in acts that will either be illegal and imputable to the organization or violates a legal obligation to the organization and (2) such action will result in substantial injury to the organization. Comment 4 to MRPC 1.13 describes some of the factors that the lawyer could consider:

- 1) the seriousness of the violation;
- 2) the consequences;
- 3) the position of the person committing the act within the organization;
- 4) the motivation involved;
- 5) the policies of the organization that may be relevant; and
- 6) other “relevant” considerations.

These factors require a great deal of careful consideration by the lawyer, especially as there seems to be a degree of subjectivity or conjecture to these factors. There is also no weighting of these criteria, which adds to the difficulty of the review.

The lawyer in this situation is charged with acting in the best interests of the organization. The Restatement offers some additional insight into this vague blandishment. The interests of the organization are those that are “normally defined by appropriate managers of the organization in the exercise of the business and managerial judgment that would be exercised by a person of ordinary prudence in a similar position. The lawyer’s duty of care is that of an ordinary prudent lawyer in such a position.” Restatement §96, comment f. The lawyer’s assessment of the situation can take into account factors such as the credibility and intentions of the parties involved, based on prior dealings or other information available to the lawyer. Id.

In analyzing the injury that could occur to the organization, the lawyer must examine the “degree and imminence of threatened financial, reputational, and other harms to the organization; the probable results of litigation that might ensue against the organization or for which it would be financially responsible; the costs of taking measures within the organization to prevent or correct the harm; the likely efficaciousness of measures that might be taken; and similar considerations.” Id.

In the hypothetical, with the situation where the Executive Director wants to release the privileged memo, here is the process the attorney would have to go through:

- 1) Is there a violation of the law in releasing the memo? Answer: Clearly no. The attorney-client privilege would be lost, but such waiver is not a criminal offense.
- 2) What are the consequences of releasing the memo? Answer: It depends on what is in the memo and whether the Port will be more vulnerable in a legal dispute if the memo is released for its opponents to review.
- 3) The fact that the Executive Director is ordering the release should give the attorney some pause. Unless the Commission ordered the memo not to be released, the ED is certainly within her authority to release the memo and waive the privilege.⁶
- 4) Motivation of the decision maker: If the Executive Director is making a business judgment, the decision would normally be hard to second guess from the attorney’s point of view. The only way the attorney could overcome this is if it is clear that no reasonable Executive Director in similar circumstances would act in this fashion. Only in that case could the attorney challenge the Executive Director’s decision.

⁶ This notion could be challenged on the grounds that the Commission, as the highest authority within the Port, is the only constituent who has the ability to waive the privilege. If that argument can be made, then it perhaps gives the attorney further evidence of wrongdoing. See Nancy Leong, “The Attorney Client Privilege in the Public Sector: A Survey of Government Attorneys”, 20 Georgetown Journal of Legal Ethics 163, 180 (2007).

5) What are the Port's policies in this regard? Since the facts are silent on this issue, we cannot speculate. In the larger picture, it might be instructive to the attorney to determine if the party ordering the suspect action is somehow violating any law, regulation, or internal by-laws that deal with fiduciary obligations to the organization as a whole.

What if the release of the memo would have truly serious and damaging impacts on the Port? What if, despite spirited protest from the attorney, the Executive Director still insists on releasing the memo and there does not appear to be any rational business decision involved? What if in fact the Executive Director's decision is clearly a crass attempt to save her job at the Port's expense? In this instance, the General Counsel should consider reporting this conduct to the Commission, pursuant to MRPC 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.

In this case, the General Counsel should consider reporting the situation to the Commission as the Commission is the highest authority within the port entity. This action is naturally fraught with danger for the General Counsel since this act will appear to the Executive Director as a betrayal and will damage his relationship with his boss. Going down this path undoubtedly requires a great deal of courage and certainty as to the degree of danger to the Port. The lodestone guiding the attorney's conduct is that the actions must be carried out with the "best interests" of the organization in mind.

C. Five Commissioners are appointed by the Governor

Assume that the Executive Director wants to release the memo and that the consequences of that release will be very detrimental to the Port. What if 5 instead of only 2 Commissioner are appointed by the state Governor? How might that change the analysis? Once again, the General Counsel would have the ethical duty to report up the chain of command within the Port to the Commission. If the Commission, upon hearing the report decides to do nothing out of indifference, neglect, or even corrupt motives, the General Counsel has another difficult decision to make. Depending upon the laws governing the Port, the fact that 5 Commissioners are appointed by the Governor suggests that the Governor of the state might be considered an even higher authority. This does require a close examination of the legal relationship of the Port to the State. Even if the Port were an agency of the state, in most cases the highest authority would be considered the Commission. In the unusual situation where all levels within the Port are blind to potential malfeasance, the Governor or whoever is directly over the Port Commission would be the next in line for reporting. See Rosenthal, "Who is the Client of the Government Lawyer?," p. 24.

There is a final step that the General Counsel can take. Once the attorney has reported the potential wrong-doing to the highest possible authority and if the offending activity is still

occurring, the attorney has the ability to go outside the organization to make a disclosure. Section (c) of MRPC 1.13 provides:

(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 1.6⁷ permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

⁷ ***Client-Lawyer Relationship***
Rule 1.6 Confidentiality Of Information

(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).

(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; or

(6) to comply with other law or a court order.

Take note that this option can be taken regardless of the duty of confidentiality that attorneys have under MRPC 1.6. Hazard and Hodes, §17.2.

VIII. Conclusion

Identifying the client appears to be a simple task for an in-house port attorney, but the issue becomes very complex when there are competing factions within the port at the senior management levels. Port attorneys must consult the specific ethical rules governing the states where they practice for guidance. As the hypothetical illustrates, internal power struggles can have the attorney caught in the middle of a deadly cross-fire and wondering who is authorized to give the orders. All lawyers are obligated to follow the applicable ethical rules in their states, but no one should be under any illusion that it is an easy or logical path.

APPENDIX A

American Bar Association Model Rules of Professional Responsibility

Rule 1.13 Organization As 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

(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.

(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.

(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.

APPENDIX B

Copyright © 2008 American Bar Association. All rights reserved. Nothing contained in these charts is to be considered the rendering of legal advice. The charts are intended for educational and informational purposes only. Information regarding variations from the ABA Model Rules should not be construed as representing policy of the American Bar Association. The charts are current as of the date shown on each. A jurisdiction may have amended its rules or proposals since the time its chart was created.

	<p style="text-align: center;">Rule 1.13 January 7, 2008</p> <p>Variations from ABA Model Rule are noted. Based on reports of state committees reviewing recent changes to the Model Rules. For information on individual state committee reports, see http://www.abanet.org/cpr/jclr/home.html.</p> <p>Of states that have reviewed their professional conduct rules since 2002: 21 states have rule same or similar to MR (AZ, AR, CO, CT, ID, IN, IA, LA, MA, NE, NV, NH, NC, ND, OK, OR, RI, SC, UT, WA, WI) 15 states did not adopt 2003 Task Force on Corporate Responsibility changes (DE, DC, FL, KS, MD, MN, MS, MO, MT, NJ, OH, PA, SD, VA, WY) Four states have proposed rule same or similar to Model Rules (AK, IL, KY, VT) Three states have proposed rules that do not adopt 2003 Task Force on Corporate Responsibility changes (ME, MI, NY)</p>
<p>AK Proposed</p>	<p>(b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in conduct or intends to engage in conduct (whether act or omission) related to the representation that violates a legal obligation to the organization, or that constitutes a violation of law that might reasonably be imputed to the organization, and that this conduct is likely to result in substantial injury to the organization, then the lawyer shall take the steps reasonably necessary to protect the best interest of the organization.</p> <p>In determining how to proceed, the lawyer shall give due consideration to: (1) the seriousness of the violation and its consequences, (2) the scope and nature of the lawyer's representation, (3) the person's responsibility within the organization and the person's apparent motivation, (4) the policies of the organization concerning such matters, and (5) any other relevant considerations. Any measures taken by the lawyer shall be designed to minimize disruption of the organization and the risk of revealing client confidences and secrets to persons outside the organization. Such measures may include among others:</p> <p>(1) asking for reconsideration of the matter; (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and</p>

	<p>(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law. 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, unless the lawyer reasonably believes that this is not necessary or is Not in the best interest of the organization.</p> <p>(c)(1): replaces “address in a timely and appropriate manner an” with “timely and appropriately rectify a threatened or ongoing”</p> <p>Last paragraph of (c): replaces “information relating to the representation” with “client confidences and secrets” and “permits such” with “would permit the”</p> <p>(d): replaces “shall not apply with respect to information” with “does not apply to client confidences and secrets”</p> <p>(e): adds “circumstances of the” before “lawyer’s discharge”</p> <p>Adds (h) “Constituents” denotes officers, directors, employees and shareholders of a corporate client. "Other constituents" denotes the positions equivalent to officers, directors, employees, and shareholders held by persons acting for an organizational client that is not a corporation.</p>
AZ Effective 12/1/04	Same as MR
AR Effective 5/1/05	Same as MR
CO Effective 1/1/08	Same as MR
CT Effective 1/1/07	Same as MR
DE Effective 7/1/03	<p>(b) and (c): same as former MR</p> <p>Does not have MR (d) and (e)</p> <p>(d) and (e): same as MR (f) and (g)</p>
DC Effective 2/1/07	<p>(b): deletes “to the organization” after “legal obligation”</p> <p>Does not have MR (c) – (e)</p> <p>(c): same as MR (f) but replaces “are adverse” with “may be adverse”</p> <p>(d): same as MR (g)</p>

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<p>FL Effective 5/22/06</p>	<p>(a): adds “Representation of Organization” to beginning (b): same as former MR but adds “Violations by Officers or Employees of Organization” to beginning (c): same as former MR but adds “Resignation as Counsel for Organization” to beginning Does not have MR (d) and (e) (d): same as MR (f) but adds “Identification of Client” to beginning (e): same as MR (g) but adds “Representing Directors, Officers, Employees, Members, Shareholders, or Other Constituents of Organization” to beginning</p>
<p>ID Effective 7/1/04</p>	<p>Same as MR</p>
<p>IL Proposed</p>	<p>(b): adds “crime, fraud or other” before “violation of law” (c)(1): replaces “violation of law” with “crime or fraud” (c)(2): replaces “violation” with “crime or fraud” (d): adds “crime, fraud or other” before both instances of “violation of law”</p>
<p>IN Effective 1/1/05</p>	<p>Same as MR</p>
<p>IA Effective 7/1/05</p>	<p>Same as MR</p>
<p>KS Effective 7/1/07</p>	<p>(b): same as former MR (c): same as former MR but replaces “may resign in accordance with” with “shall follow” Does not have MR (d) and (e) (d): same as former MR (e): same as MR (g)</p>
<p>KY Proposed</p>	<p>Same as MR</p>
<p>LA Effective 3/1/04</p>	<p>Same as MR</p>
<p>ME Proposed</p>	<p>(b): same as former MR but replaces “information relating to the representation” with “confidences and secrets” (b)(1): same as former MR but deletes “asking” (b)(2) and (3): same as former MR</p>

	<p>(c)(1): deletes “or fails to address in a timely and appropriate manner an”</p> <p>(c)(2): replaces the lawyer reasonably believes that the violation is reasonably certain” with “likely”</p> <p>Remainder of (c): replaces “then the lawyer may reveal information relation to the representation whether or not Rule 1.6 permits such disclosure, but only if and” with “the lawyer may resign in accordance with Rule 1.16 and make such disclosures as are consistent with Rule 1.6, Rule 3.3, Rule 4.1 and Rule 8.3, but only”</p> <p>Does not have MR (e)</p> <p>(e): same as MR (f) but adds “as the organization” after “client” and replaces “are adverse” with “may be adverse”</p> <p>(f): same as MR (g)</p> <p>Adds (g) A lawyer who acts contrary to this Rule but in conformity with promulgated federal law shall not be subject to discipline under this Rule, regardless whether such federal law is validly promulgated.</p>
MD Effective 7/1/05	<p>(c) When the organization's highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is reasonably certain to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by Rule 1.6 only if the lawyer reasonably believes that:</p> <p>(1) the highest authority in the organization has acted to further the personal or financial interests of members of the authority which are in conflict with the interests of the organization; and</p> <p>(2) revealing the information is necessary in the best interest of the organization.</p> <p>Does not have MR (d) and (e)</p> <p>(d) and (e): same as MR (f) and (g)</p>
MA Effective 1/1/08	<p>Same as MR</p>
MI Proposed	<p>(a): replaces “acting through its duly authorized” with “as distinct from its directors, officers, employees, members, shareholders, or other”</p> <p>(b): same as former MR</p> <p>(c): same as former MR but adds “of a legal obligation to the organization or” before “of law” and adds to end “and may disclose information either:</p> <p>(1) when permitted by Rule 1.6, or</p> <p>(2) when the lawyer reasonably believes that:</p> <p>(i) the highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and</p> <p>(ii) revealing the information is necessary in the best interests of the organization.”</p> <p>Does not have MR (d) and (e)</p>

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	(d) and (e): same as MR (f) and (g)
MN Effective 10/1/05	(c): same as former MR but adds “or fails to address in a timely and appropriate manner an” before “action,” deletes “and is likely to result in substantial injury to the organization” and adds to end “and may disclose information in conformance with Rule 1.6” Does not have MR (d) (d) – (f): same as MR (e) – (g)
MS Effective 11/3/05	Same as former MR
MO Effective 7/1/07	(b) and (c): same as former MR Does not have MR (d) and (e) (d) and (e): same as MR (f) and (g)
MT Effective 4/1/04	(b) and (c): same as former MR Does not have MR (d) and (e) (d) and (e): same as MR (f) and (g)
NE Effective 9/1/05	Same as MR
NV Effective 5/1/06	(d): replaces “representation of” with “retention by” (f): replaces language after “identity of the client” with “to the constituent and reasonably attempt to ensure that the constituent realizes that the lawyer’s client is the organization rather than the constituent. In cases of multiple representation such as discussed in paragraph (g), the lawyer shall take reasonable steps to ensure that the constituent understands the fact of multiple representation.”
NH Effective 1/1/08	Same as MR
NJ Effective 1/1/04	(a): replaces “by” with “to represent” and “acting through its duly authorized constituents” with “as distinct from its directors, officers, employees, members, shareholders or other constituents. For the purposes of RPC 4.2 and 4.3, however, the organization's lawyer shall be deemed to represent not only the organizational entity but also the members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the

	<p>matter whether or not in litigation, provided, however, that "significant involvement" requires involvement greater, and other than, the supplying of factual information or data respecting the matter. Former agents and employees who were members of the litigation control group shall presumptively be deemed to be represented in the matter by the organization's lawyer but may at any time disavow said representation."</p> <p>(b): same as former MR</p> <p>(c) When the organization's highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by RPC 1.6 only if the lawyer reasonably believes that:</p> <p>(1) the highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and</p> <p>(2) revealing the information is necessary in the best interest of the organization.</p> <p>Does not have MR (d) and (e)</p> <p>(d): same as MR (f) but replaces language after "when the lawyer" with "believes that such explanation is necessary to avoid misunderstanding on their part"</p> <p>(e): same as MR (g)</p> <p>Adds (f) For purposes of this rule "organization" includes any corporation, partnership, association, joint stock company, union, trust, pension fund, unincorporated association, proprietorship or other business entity, state or local government or political subdivision thereof, or non-profit organization.</p>
<p>NY Proposed</p>	<p>(a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.</p> <p>(b): adds "(i)" before "is a violation" and replaces "that" before "is likely" with "(ii)"</p> <p>(c): same as former MR</p> <p>Does not have MR (d) – (f)</p> <p>(d): same as MR (g)</p>
<p>NC Effective 3/2/06</p>	<p>(c): has former MR but adds "reveal such information outside the organization to the extent permitted by Rule 1.6 and may" after "the lawyer may"</p> <p>(e): replaces "either of these paragraphs" with "these Rules"</p>
<p>ND Effective 8/1/06</p>	<p>(d): replaces "constituent" with "consultant"</p> <p>(f): replaces "knows or reasonably should know" with "reasonably believes," adds "or are likely to become" before "adverse"</p> <p>(g): replaces "official" with "constituent," deletes "or by the shareholders"</p>

<p>OH Effective 2/1/07</p>	<p>(a): deletes “duly authorized,” adds “A lawyer employed or retained by an organization owes allegiance to the organization and not to any constituent or other person connected with the organization. The constituents of an organization include its owners and its duly authorized officers, directors, trustees, and employees.” to end (b) If a lawyer for an organization knows or reasonably should know that its constituent's action, intended action, or refusal to act (1) violates a legal obligation to the organization, or (2) is 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 necessary in the best interest of the organization. When it is necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer shall refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. (c) The discretion or duty of a lawyer for an organization to reveal information relating to the representation outside the organization is governed by Rule 1.6 (b) and (c). Does not have MR (d) and (e) (d): same as MR (f) (e): same as MR (g) but adds “written” after “If the organization’s”</p>
<p>OK Effective 1/1/08</p>	<p>Same as MR</p>
<p>OR Effective 1/1/05 and amended 12/1/06</p>	<p>(g): replaces “shall” with “may only”</p>
<p>PA Effective 1/1/05</p>	<p>(b): same as former MR (c): same as former MR Does not have MR (d) and (e) (d): same as MR (f) (e): same as MR (g)</p>
<p>RI Effective 4/15/07</p>	<p>Same as MR</p>
<p>SC Effective 10/1/05</p>	<p>Same as MR</p>
<p>SD Effective 1/1/04</p>	<p>(b): same as former MR (c): same as former MR Does not have MR (d) and (e) (d): same as MR (f)</p>

	(e): same as MR (g)
<p>UT Effective 11/1/05</p>	<p>(e): replaces “reasonably believes that he or she has been discharged” with “has been discharged and reasonably believes the discharge was” Adds (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.</p>
<p>VT Proposed</p>	<p>(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 reasonably certain to result in harm that would require a disclosure of information relating to the representation under Rule 1.6(b), or 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. In determining how to proceed, 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, unless the lawyer reasonably believes that</p> <p>(1) a disclosure required by Rule 1.6(b) is necessary to prevent harm pursuant to that rule before a referral can be made or acted upon;</p> <p>(2) a referral is otherwise not feasible in the circumstances, considering the best interests of the organization; or</p> <p>(3) a referral is not necessary in the best interests of the organization.</p> <p>(c) Except as provided in paragraph (d), if, 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 reasonably certain to result in harm that would require a disclosure of information relating to the representation under Rule 1.6(b) or is clearly a violation of law and is likely to result in substantial injury to the organization, and</p> <p>(1) the lawyer reasonably believes that the action or refusal to act is reasonably certain to result in harm that would require a disclosure under Rule 1.6(b), then the lawyer must reveal the information, but only if and to the extent the lawyer reasonably believes necessary to prevent the harm; or</p> <p>(2) the lawyer reasonably believes that the action or refusal to act is a violation of law that 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 requires or permits such disclosure, but only if and to the extent the lawyer</p>

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	reasonably believes necessary to prevent substantial injury to the organization. (d): adds “Except for disclosures required by Rule 1.6(b)” to beginning
VA Effective 1/1/04	Same as former MR
WA Effective 9/1/06	Adds (h) For purposes of this Rule, when a lawyer who is not a public officer or employee represents a discrete governmental agency or unit that is part of a broader governmental entity, the lawyer's client is the particular governmental agency or unit represented, and not the broader governmental entity of which the agency or unit is a part, unless: (1) otherwise provided in a written agreement between the lawyer and the governmental agency or unit; or (2) the broader governmental entity gives the lawyer timely written notice to the contrary, in which case the client shall be designated by such entity. Notice under this subsection shall be given by the person designated by law as the chief legal officer of the broader governmental entity, or in the absence of such designation, by the chief executive officer of the entity.
WI Effective 7/1/07	Adds (h) Notwithstanding other provisions of this Rule, a lawyer shall comply with the disclosure requirements of SCR 20:1.6(b).
WY Effective 7/1/06	Same as former MR

APPENDIX C

Restatement (Third) of The Law Governing Lawyers

§ 96. Representing An Organization As Client

(1) When a lawyer is employed or retained to represent an organization:

(a) the lawyer represents the interests of the organization as defined by its responsible agents acting pursuant to the organization's decision-making procedures; and

(b) subject to Subsection (2), the lawyer must follow instructions in the representation, as stated in [§ 21\(2\)](#), given by persons authorized so to act on behalf of the organization.

(2) If a lawyer representing an organization knows of circumstances indicating that a constituent of the organization has engaged in action or intends to act in a way that violates a legal obligation to the organization that will likely cause substantial injury to it, or that reasonably can be foreseen to be imputable to the organization and likely to result in substantial injury to it, the lawyer must proceed in what the lawyer reasonably believes to be the best interests of the organization.

(3) In the circumstances described in Subsection (2), the lawyer may, in circumstances warranting such steps, ask the constituent to reconsider the matter, recommend that a second legal opinion be sought, and seek review by appropriate supervisory authority within the organization, including referring the matter to the highest authority that can act in behalf of the organization.

§ 97. Representing A Governmental Client

A lawyer representing a governmental client must proceed in the representation as stated in [§ 96](#), except that the lawyer:

(1) possesses such rights and responsibilities as may be defined by law to make decisions on behalf of the governmental client that are within the authority of a client under [§§ 22](#) and [21\(2\)](#);

(2) except as otherwise provided by law, must proceed as stated in [§§ 96\(2\)](#) and [96\(3\)](#) with respect to an act of a constituent of the governmental client that violates a legal obligation that will likely cause substantial public or private injury or that reasonably can be foreseen to be imputable to and thus likely result in substantial injury to the client;

(3) if a prosecutor or similar lawyer determining whether to file criminal proceedings or take other steps in such proceedings, must do so only when based on probable cause and the lawyer's belief, formed after due investigation, that there are good factual and legal grounds to support the step taken; and

(4) must observe other applicable restrictions imposed by law on those similarly functioning for the governmental client.