LEGAL MALPRACTICE

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By

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of the California Bar

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Chapters 1 through 11

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notice to file suit and informed her to seek other counsel immediately. She called the office, and one of the lawyers told her that she did not have a good case and that the delivery doctor was a nice guy. She did not pursue a medical malpractice action.

A year later, she sued the law firm. The court affirmed summary judgment for the lawyers, concluding that they acted reasonably where the identity of the physician was not known and had extended the plaintiff's time to sue that physician. The telephone conversation, explaining why they did not take the case, did not breach a duty to her or revive a duty to take the case. The court commented that the comments "were consistent with the position the letter had clearly taken, to decline to take the case."

§ 2:45 Documentation—Closing letters (end-of engagement letters)

When a matter has been completed, the client should be so informed by a written communication. This is sometimes inappropriately referred to as a "disengagement" letter, which is the term that used to describe the premature termination of a representation, a topic discussed below. A better description of such a communication is a closed-file letter, also known as an end-of-engagement letter. The letter also should confirm that the client is not seeking further advice or representation regarding the concluded matter.

The closing letter should restate the firm's file retention policy, including reminding the client how long the file will be stored, the process for obtaining and copy and whether the file will be stored electronically or hard copy.

A closing letter can prevent confusion about whether the law firm's representation has ended. This is important in at least two respects. One situation is if the law firm later seeks to represent another client adversely to the former client. That was illustrated by a 1997 Kansas Supreme Court decision which examined whether meetings in April, concerning advice about property transactions, extended the attorney-client relationship into May, when the law firm sought to defend an action for fire damage brought by the allegedly former clients.[1] The court found that relationship ended after the last transaction, because there was insufficient evidence of an ongoing relationship, such as a retainer or consultations, and because the prior transactions were discrete and complete. In discussing how to prevent such problems in the

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[Section 2:45]

[1]Barragree v. Tri–County Elec. Co-op., Inc., 263 Kan. 446, 950 P.2d 1351 (1997).

future, the court cited the Comment to Kansas' Model Rule of Professional Conduct 1.3 and offered some succinct advice: "A written communication is recommended."[2]

The failure to follow that procedure resulted in disqualification of a California law firm that sought to defend a copyright infringement action brought by the plaintiff.[3] The plaintiff contended that the law firm was still counsel of record on patent filings, and there was no letter terminating that representation to contradict that claim.

A second situation concerns the statute of limitations. A closing letter can provide important evidence that the representation ended. The failure to do so was illustrated by a 2010 California decision where a law firm settled a judgment against its real estate agent client by arranging for monthly payments on a reduced judgment.[4] Over two years later, well after the one-year period of the California statute of limitations, the client sued, contending that the law firm had represented conflicting interests by concurrently defending her and her brokerage. Although the trial court granted summary judgment, the appellate court reversed, noting an issue of fact because the lawyer "did not show the representation of Laclette [the client] had been fulfilled and that all agreed tasks for which Laclette retained Galindo [the lawyer] had been completed."[5] A closing letter could have provided that evidence.

Similarly, a New York action concerned a claim that the lawyer failed to file security interests on the property that the plaintiff acquired.[6] The lawyer sought summary judgment by showing that more than three years had passed since the closing date. The court held that there was an issue of fact because the filing could have occurred after closing, and the lawyer did not offer evidence to show that his representation had ended at the time of closing.

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[2]263 Kan. at 458, 950 P.2d at 1359. The court quoted extensively from the Comment to Kansas' Model Rule of Professional Conduct 1.3 which states, in pertinent part, that "If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so." 263 Kan. at 456-457, 950 P.2d at 1358.

[3]Mindscape, Inc. v. Media Depot, Inc., 973 F. Supp. 1130 (N.D. Cal. 1997).

[4]Laclette v. Galindo, 184 Cal. App. 4th 919, 109 Cal. Rptr. 3d 660 (2d Dist. 2010), as modified, (June 3, 2010).

[5]Laclette v. Galindo, 184 Cal.App. 4th at 929, 109 Cal.Rptr.3d at 666 (2010).

[6]Lytell v. Lorusso, 74 A.D.3d 905, 903 N.Y.S.2d 98 (2d Dep't 2010).

The closed-file letter should confirm whether the client is seeking further advice regarding the concluded matter. It should also confirm whether the client is expecting further advice on related matters. For example, a client whose tax matter has been concluded may expect to receive advice from the law firm in the future regarding new tax laws. Such an expectation can be a concern where documents prepared by a lawyer can be affected by the passage of time, such as wills or trusts.

On each matter, the law firm needs to decide whether it wants to be responsible for ongoing advice. On one hand, this may present a business opportunity to maintain ongoing relationships with clients. On the other hand, doing so may continue or create an ongoing attorney-client relationship. Thus, if the law firm decides to provide that advice, then it must carefully create a system to track matters that involve an agreement to provide future advice.[7] Of course, this can become complicated when lawyers die, retire, or move to other firms. Because the alternatives are numerous, the firm should establish a policy.

Closed-file letters also should discuss file retention, unless the engagement letter is clear, and no further consideration of it is necessary. In examining whether any further discussion is necessary, the law firm should evaluate whether the engagement letter clearly states how long the file will be retained.

§ 2:46 Documentation—Disengagement letters

A disengagement letter should be used when the law firm decides to withdraw, or is involuntarily terminated by the client or by court order before the completion of the matter. A disengagement letter should confirm the reason the relationship is ending. It also should discuss whether payment is due for fees and expenses. Other important topics that should be addressed are whether and under what conditions the firm will consult with successor counsel, and subject to jurisdictional variation,[1] provide access to work product that may have been generated, but for which payment has not been received. This is the subject of the next subsection.

In complex matters, the engagement agreement should describe the events of voluntary and involuntary withdrawal before completing a matter. Terminating a representation before its expected completion is not an easy topic to address in an engage-

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[7]Ongoing communications can form the basis for a continuing attorney-client relationship. *E.g.*, Oregon Ethics Opinion 2005-146 (2005).

[Section 2:46]

[1]For example, California Rule of Professional Conduct, 3-700, requires that the files be provided to the client, even if the lawyer is owed money.

ment agreement. In every engagement, however, there should be consideration of whether to address the subject.

The ABA Model Rule 1.16(d) states that a lawyer should take reasonable steps to prevent prejudice to a client when withdrawing. Thus, important deadlines and uncompleted activities should be noted. In that regard, it may be appropriate for the disengagement letter to include a closing status report.

Disengagement is important when a lawyer makes an error that may give rise to a malpractice claim and cannot be repaired by ongoing representation. That can create a personal interest conflict. Careful documentation of those facts is both required by the Model Rules, but also prevents claims from compounding. In a 1984 decision, *Mayo v. Engel*,[2] the Eleventh Circuit Court of Appeals affirmed a summary judgment in favor of a lawyer who was terminated by his client after undertaking trademark work. The lawyer had written a letter to the client outlining the services that had been provided and summarized their communications. The lawyer warned the client about the possibility of an error in the work that was undertaken and recommended that other counsel be retained. In ruling for the lawyer, the court discussed the importance of the warning.[3]

Another example is a 2000 Michigan decision, concerning a law firm that completed part of a personal injury case but refused to file a medical malpractice or workers' compensation claim based on a lack of merit.[4] The law firm completed part of the personal injury case, but refused to file a medical malpractice or workers' compensation claim based on a lack of merit. The disengagement letter did not warn the client about the workers' compensation statute of limitations. The firm prevailed, but the case probably would not have been filed if the disengagement letter had been more complete.

Similarly, when lawyers leave a firm and do not transfer ongoing work or clients to a new practice, a disengagement letter by the departing attorney is recommended. This can prevent clients from claiming that the departing lawyer had an obligation to provide services.[5]

§ 2:47 Documentation—Disengagement letters—Client documents

When the attorney-client relationship ends, the then-former

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[2]Mayo v. Engel, 733 F.2d 807 (11th Cir. 1984).

[3]733 F.2d at 811 n. 5.

[4]Colbert v. Conybeare Law Office, 239 Mich. App. 608, 609 N.W.2d 208 (2000).

[5]*E.g.*, Barragree v. Tri-County Elec. Co-op., Inc., 263 Kan. 446, 950 P.2d 1351 (1997); Wilbourn v. Stennett, Wilkinson & Ward, 687 So. 2d 1205, 1209 (Miss. 1996).

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Peter S. Davis, as Receiver of DenSco Investment Corporation, an Arizona corporation, Plaintiff, v. Clark Hill PLC, a Michigan limited liability company; David G. Beauchamp and Jane Doe Beauchamp, husband and wife, Defendants.	No. CV2017-013832 **FIRST SUPPLEMENTAL ARIZONA RULE OF EVIDENCE 807(b) NOTICE** (Assigned to the Honorable Daniel Martin)

Pursuant to Arizona Rule of Evidence 807(b), Plaintiff gives notice that it intends to offer the following particular statements or absence of statements, among others:

I. Denny Chittick's corporate journal

1. On May 9, 2013, Chittick wrote: "the big deal was meeting with Dave. We met for nearly 2 hours going over the memorandum. Because of the size I've become there could be some additional issues to worry about." [RECEIVER_000016.]

2. On June 17, 2013, Chittick wrote: "I am going back and forth with David about how to circumvent this 50 million issue on size." [RECEIVER_000020.]

3. The journal does not contain any other entries in 2013 reflecting that Beauchamp advised Chittick that the Private Offering Memorandum ("POM") must be updated.

4. On January 6, 2014, Chittick wrote: "The whole day surrounded meeting with these three guys that represent about 40 loans that want me to subordinate to theirs to give us time to work it out. I didn't commit to anything, I forwarded it all to David . . . ." [RECEIVER_000044.]

5. On January 7, 2014, Chittick wrote: "I emailed David a long explanation of what has gone on. I didn't hear from him." [RECEIVER_000044.]

6. On January 9, 2014, Chittick wrote: "[Menaged] and I met with David. He never read my email. We spent two hours. . . . He's going to contact the lawyer tomorrow and let us know." [RECEIVER_000045.] This entry does not reflect that Beauchamp advised Chittick that (a) DenSco was not permitted to take new money without full disclosure to the investor lending the money, (b) DenSco was not permitted to roll over existing investments without full disclosure to the investor rolling over the money, or (c) DenSco needed to update its POM and make full disclosure to all its investors.

7. On January 10, 2014, Chittick wrote: "at 5pm Dave called, said they would give us time to clean it up. I talked to [Menaged]; he is going to try to bring in money. I can raise money according to Dave." [RECEIVER_000045.]

8. On January 14, 2014, Chittick wrote: "I deposited . . . $150k from Jolene Page, 40k from Carol Wellman. I talked to Marv[;] he's going to do 400k." [RECEIVER_000045.]

9. On January 15, 2014, Chittick wrote: "I've got 300k in from the miller's." [RECEIVER_000046.]

10. On January 21, 2014, Chittick wrote: "We have a new idea. I payoff all the loans for [one group of lenders]. Then the overage I put on [another group's] loans, then [Menaged] will pay off [that group's] loans and he sells the house[;] I get

my money back and everyone is paid. We went over this on the phone for a hour[,] a ½ dozen emails. I emailed and call[e]d David, he approved." [RECEIVER_000046.]

11. On January 21, 2014, Chittick wrote: "I raise[d] a million more from Bunger. I might get a few hundred k from Kirk." [RECEIVER_000046.]

12. On January 22, 2014, Chittick wrote: "Steve wired in $500k more." [RECEIVER_000047.]

13. On January 27, 2014, Chittick wrote: "I'm trying to raise some more money so that I can payoff more of these damn loans from [the Lienholders identified in the January 6, 2014 demand letter]." [RECEIVER_000047.]

14. On January 28, 2014, Chittick wrote: "I'm taking in 750k from an old borrower out of Utah, then john Schreiber called and wants to give me $400k or so." [RECEIVER_000048.]

15. On January 29, 2014, Chittick wrote: "Kirk sent me 600k more too. I'll be getting 400k or in from the guys in UT." [RECEIVER_000048.]

16. On January 30, 2014, Chittick wrote: "I had 400k come in from Ryan in UT. I've got funds to kno[ck] off some more [double-encumbered loans] next week." [RECEIVER_000048.]

17. The journal does not contain any entries in 2014 reflecting that Chittick was making the requisite disclosures to investors.

18. On February 7, 2014, Chittick wrote: "I was on the phone with David and [Menaged] off and on trying to find middle ground in this crap to make this agreement final. Now [D]avid is telling me I have to tell my investors." [RECEIVER_000049.]

19. On February 20, 2014, Chittick wrote: "[Beauchamp and Goulder] were no better in person then they were in email. David lost his temper more than once. We went back and forth for 3 hours. We broke up and came together, finally we are down to one point about the release. The lawyers are trying to word it to make each other happy." [RECEIVER_000051.]

20. On February 20, 2014, Chittick wrote: "I told David the dollars today, he about shit a brick. I explained to him how I got there and how far we have come and how much better we are today then in November. Though I'm not sure he understands that. My balance sheet isn't looking much better, but it will start to swing in the right direction in the next 30 days. I'm more concerned about telling my investors and their reaction to the problem. I have to tell them and hope they stick with me. If I get a run on the bank I'm in deep shit. I won't be able to fund new deals, I won't be able to payoff investors and won't be able to support [Menaged]. The whole thing crators." [RECEIVER_000051.]

21. On February 21, 2014, Chittick wrote: "I talked to Dave, he found out what we already suspected, there is no way we can give what [Menaged] wants. I'm not sure where this will lead us. We talked about telling my investors; we are going to put that off as long as possible so that we can improve the situation as much as possible. We've got another 15 more that are closing next few weeks. We could be close to under a 100 problem loans within a month. I just have to keep telling myself I'm doing the right thing to fix it, no matter [how] much an[]xiety I have over this issue." [RECEIVER_000051.]

22. On February 26, 2014, Chittick wrote: "We've decided it's better to sell these properties as quickly as possible, take the losses and move on. [Menaged] will sign a promissory note, it frees up from paying interest, I take a big hit, . . . and we move on. It will take me 2 years to get back to profitability I'm guessing. This may allow me not to do what David wants me to do, I don't know. I never got to talk to him. But what we are doing isn't going to work fast enough and we'll have a big hill to climb in the end. I'm just so sick over this I can't function." [RECEIVER_000052.]

23. On February 27, 2014, Chittick wrote: "I talked to [Menaged] again, he agreed to everything this morning on how to work this out. I talked to David, he's

thinks its fine. So we are done. . . . [N]ow we just need to get this signed and start working towards selling these houses." [RECEIVER_000052.]

24. On March 3, 2014, Chittick wrote: "David called me telling of ad lib info to scare me about dealing with [Menaged]. I can't control what others are saying in the lawyer community. I have to get this done so that I have something in writing and do the best deal that I can do." [RECEIVER_000053.]

25. On March 11, 2014, Chittick wrote: "David changed and said now I have to tell my investors. [Menaged] and I are going to try to fix this mess in 30 days and that way it will be a minor issue." [RECEIVER_000054.]

26. On March 20, 2014, Chittick wrote: "[Menaged] finally agreed to [the] agreement. That's done, I have to do some numbers to fill in the blanks, but otherwise it's ready to be signed. I have no idea if it will ever be used, but David assured me I'm in a good position." [RECEIVER_000055.]

27. On April 16, 2014, Chittick wrote: "[M]enaged signed the agreement. Now I hope we never have to look at it again. I'll send it up to David and then he and I can start on the memorandum." [RECEIVER_000059.]

28. On July 2, 2014, Chittick wrote: "We are making progress, just to[o] damn slow, but I'm sure much quicker than David expected us to do." [RECEIVER_000069.]

29. On July 25, 2014, Chittick wrote: "My time is running out on updating my private placement memorandum and notifying my investors." [RECEIVER_000072.]

30. On July 31, 2014, Chittick wrote: "It's all going in the right direction, just not sure if it's going fast enough. As long as David doesn't bug me, I feel like we are doing the right thing." [RECEIVER_000073.]

31. The journal does not contain any entries in 2014 reflecting that (a) Chittick refused to provide the necessary information to complete the POM, (b) Chittick refused to approve the description in the POM of the workout or the

double lien issue, (c) Chittick told Beauchamp that he was not ready to make any kind of disclosure to his investors, or (d) Beauchamp terminated his representation of DenSco.

32. On March 13, 2015, Chittick wrote: "I got an email from Dave my attorney wanting to meet. He gave me a year to straighten stuff out. We'll see what pressure I'm under to report now." [RECEIVER_000101.]

33. On March 24, 2015, Chittick wrote: "I had lunch with Dave Beauchamp. I was nervous he was going to put a lot of pressure on me. However, he was thrilled to know where we were at and I told him by April 15th, we'll be down to 16 properties with seconds on them, and by the end of June we hope to have all the retail houses sold by then and darn near be done with it. I'm going to slow down the whole memorandum process too. Give us as much time as possible to get things in better order." [RECEIVER_000102.]

34. On June 18, 2015, Chittick wrote: "[Menaged] tried to enlarge the wholesale number saying, well I'm paying down the workout, I can use that for the wholesale. I'm not letting him. That number needs to start dropping! I have to get his number falling, or it's going to be hell with Dave." [RECEIVER_000112.]

II. Denny Chittick's pre-suicide letter to his sister Shawna Heuer ("Iggy")

1. In the letter, Chittick wrote: "Dave my attorney even allowed us to do the wholesaling. . . . [H]e let me get the workout signed[,] not tell the investors[,] and try to fix the problem. That was a huge mistake. . . . Dave did a workout agreement with [Menaged], we were executing to it and making headway, yet Dave never made me tell the investors." [DIC0009482–83.]

2. In the letter, Chittick wrote: "I talked Dave my attorney in to allowing me to continue without notifying my investors. Shame on him. He shouldn't have allowed me. He even told me once I was doing the right thing." [DIC0009484.]

3. In the letter, Chittick wrote: "Dave my lawyer, negotiated the work out agreement and endorsed the plan. Then when [Menaged] said hey, let me buy some

foreclosures, flip them, wholesale them, etc. so I can make money. All the other lenders wouldn't lend to him. I needed him to make money now more than ever before, we went to Dave, and he gave some constraints on how we were to operate. I followed them. I have all the documentation. I received copies of checks made out to trustees, receipts from the trustee's. I had all my docs signed. I recorded my mortgage, I had evidence of insurance, and I did everything." [DIC0009485.]

III. Denny Chittick's pre-suicide letter to "Investors"

1. In the letter, Chittick wrote: "In January [2014], a group of five of the other lenders met me in my office. They had loans on about 60 of the houses. They said unless they were paid off in full, they would take this to court. . . . Yes, by this time I'm talking with my lawyer David Beauchamp . . . . He's aware of all that I know. He agreed it would be the worst situation to sue each other and try to figure it out." [DIC0009464.]

2. In the letter, Chittick wrote: "[Menaged] and I worked for months on an agreement that was pounded out between our lawyers. It was a work out agreement with outline of what we were doing and how it was to happen. Why I didn't let all of you know what was going on at any point? It was pure fear. . . . I have 100 investors. I had no idea what everyone would do or want to do or how many would just sue, justifiably. I also feared that there would be a classic run on the bank. . . . I truly believe we had a plan that would allow me to continue to operate, my investors would receive their interest and redemptions as a normal course of business, and the rest of my portfolio was performing. Dave blessed this course of action. We signed this workout agreement and began executing it." [DIC0009464.]

3. In the letter, Chittick wrote: "Going back to December of 2013, . . . [Menaged] knew he had to make money to help cover the deficit [that] would be created by the double encumbered properties and shortage that would be created at the time of disposition. He wanted time to still fund him buying properties at auction and flipping them, wholesaling them, etc. I talked to Dave about this in January [2014]

and he was in agreement with it as long as I received copies of checks and receipts showing that I was paying the trustee. . . . We agreed to the operation and allowed him to still buy things." [DIC0009465.]

4. In the letter, Chittick wrote: "Now I know that you would think, why the hell would I lend more money to guy that just put me in this situation? [Menaged] came to me and said he was going to do everything he could to make this right. He could at anytime just throw up his hands and walked away, filed BK and left me with a massive mess. He didn't. He helped negotiate with the other lenders. He sat with his attorney and mine and signed a very one sided agreement in my favor to work this out. I had UCC's on his furniture business and a life insurance policy. In fact his attorney advised him not to sign it. No one else was going to lend him money and I needed him to make money so that I could be paid back because of what and how we were operating, Dave blessed it . . . ." [DIC0009465.]

5. In the letter, Chittick wrote: "I know I made wrong decisions. I did consult my lawyer for the first year on each step of the way." [DIC0009468.]

RESPECTFULLY SUBMITTED this 13th day of July 2018.

OSBORN MALEDON, P.A.

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STATE BAR OF ARIZONA

Rules of Professional Conduct

1. Client-Lawyer Relationship | Related Opinions

ER 1.2. Scope of Representation and Allocation of Authority between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by ER 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See ER 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by ER 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other

law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See ER 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See ER 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to ER 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to have diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to ER 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See ER 1.1.

[8] Although paragraph (c) does not require that the client's informed consent to a limited representation be in writing, a specification of the scope of representation will normally be a necessary part of the lawyer's written communication of the rate or basis of the lawyer's fee as required by ER 1.5(b). See ER 1.0(e) for the definition of "informed consent".

[9] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., ERs 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[10] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[11] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See ER 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. In extreme cases, a lawyer may be required to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. See ER 4.1.

[12] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[13] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[14] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See ER 1.4(a)(5).

STATE BAR OF ARIZONA

Rules of Professional Conduct

1. Client-Lawyer Relationship | Related Opinions

ER 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 or required by paragraphs (b), (c) or (d), or ER 3.3(a)(3).

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

(c) A lawyer may reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime.

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

(1) 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;

(2) to 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;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) 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

(5) to comply with other law or a final order of a court or tribunal of competent jurisdiction directing the lawyer to disclose such information.

(6) to prevent reasonably certain death or substantial bodily harm.

(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.

(e) 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.

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See ER 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, ER 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and ERs 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See ER 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The public is better protected if full and open communication by the client is encouraged than if it is inhibited. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality also applies in such situations where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or, to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[6] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Disclosure Adverse to Client

[7] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b) recognizes the overriding value of life and physical integrity, and requires the lawyer to make a disclosure in order to prevent homicide or serious bodily injury that the lawyer reasonably believes is intended by a client. In addition, under paragraph (c), the lawyer has discretion to make a disclosure of the client's intention to commit a crime and the information necessary to prevent it. It is very difficult for a lawyer to "know" when such unlawful purposes will actually be carried out, for the client may have a change of mind.

[8] Paragraph (c) permits the lawyer to reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime. Paragraph (c) does not require the lawyer to reveal the intention of a client to commit wrongful conduct, but the lawyer may not counsel or assist a client in conduct the lawyer knows is criminal or fraudulent. See ER 1.2(d); see also ER 1.16 with respect to the lawyer's obligation or right to withdraw from the representation from the client in such circumstances. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct, in connection with this Rule, the lawyer may make inquiry within the organization as indicated in ER 1.13(b).

[9] The range of situations where disclosure is permitted by paragraph (d)(1) of the Rule is both broader and narrower than those encompassed by paragraph (c). Paragraph (c) permits disclosure only of a client's intent to commit a future crime, but is not limited to instances where the client seeks to use the lawyer's services in doing so. Paragraph (d)(1), on the other hand, applies to both crimes and frauds on the part of the client, and applies to both on-going conduct as well as that contemplated for the future. The instances in which paragraph (d)(1) would permit disclosure, however, are limited to those where the lawyer's services are or were involved, and where the resulting injury is to the financial interests or property of others. In addition to this Rule, a lawyer has a duty under ER 3.3 not to use false evidence.

[10] Paragraph (d)(2) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (d)(2) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[11] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (d)(3) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[12] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other

proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (d)(4) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[13] A lawyer entitled to a fee is permitted by paragraph (d)(4) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[14] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes ER 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by ER 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (d)(5) permits the lawyer to make such disclosures as are necessary to comply with the law.

[15] Paragraph (d)(5) also permits compliance with a court order requiring a lawyer to disclose information relating to a client's representation. If a lawyer is called as a witness to give testimony concerning a client or is otherwise ordered to reveal information relating to the client's representation, however, the lawyer must, absent informed consent of the client to do otherwise and except for permissive disclosure under paragraphs (c) or (d), assert on behalf of the client all nonfrivolous claims that the information sought is protected against disclosure by this Rule, the attorney-client privilege, the work product doctrine, or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal. See ER 1.4. Unless review is sought, however, paragraph (d)(5) permits the lawyer to comply with the court's order.

[16] In situations not covered by the mandatory disclosure requirements of paragraph (b), paragraph (d)(6) permits discretionary disclosure when the lawyer reasonably believes disclosure is necessary to prevent reasonably certain death or substantial bodily harm.

[17] Paragraph (d)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See ER 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only when there is a reasonable possibility that a new relationship might be established. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these ERs.

[18] Any information disclosed pursuant to paragraph (d)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (d)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (d)(7). Paragraph (d)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[19] Paragraph (d) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[20] Paragrach (d) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (d)(1) through (d)(5). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (d) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by this Rule. See ERs1.2(d), 4.1(b), 8.1 and 8.3. ER 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See ER 3.3(b).

Withdrawal

[21] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in ER 1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in ER 1.6. Neither this Rule nor ER 1.8(b) nor ER 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Acting Competently to Preserve Confidentiality

[22] Paragraph (e) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See ERs 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (e) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this ER or may give informed consent to forgo security measures that would otherwise be required by this ER. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law,

such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these ERs. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see ER 5.3, Comments [3]–[4].

[23] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this ER or may give informed consent to the use of a means of communication that would otherwise be prohibited by this ER. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these ERs.

Former Client

[24] The duty of confidentiality continues after the client-lawyer relationship has terminated. See ER 1.9(c)(2). See ER 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

STATE BAR OF ARIZONA

Rules of Professional Conduct

1. Client-Lawyer Relationship | Related Opinions

ER 1.16. Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer shall comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering documents and property to which the client is entitled and refunding any advance payment of a fee that has not been earned. Upon the client's request, the lawyer shall provide the client with all of the client's documents, and all documents reflecting work performed for the client. The lawyer may retain documents reflecting work performed for the client to the extent permitted by other law only if retaining them would not prejudice the client's rights.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See ERs 1.2(c) and 6.5. See also ER 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also ER 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under ERs 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in ER 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is

not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

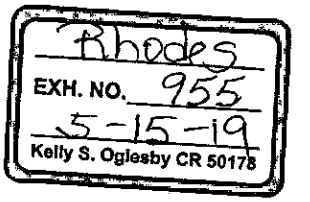
[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client Upon Withdrawal

[9] Ordinarily, the documents to which the client is entitled, at the close of the representation, include (without limitation) pleadings, legal documents, evidence, discovery, legal research, work product, transcripts, correspondence, drafts, and notes, but not internal practice management memoranda. A lawyer shall not charge a client for the cost of copying any documents unless the client already has received one copy of them.

[10] Even if the lawyer has been discharged by the client, the lawyer must take all reasonable steps to avoid prejudice to the rights of the client.

[11] Lawyers may fulfill their ethical obligations with respect to client files by returning the file to the client. File retention policies should be disclosed to the client, preferably in writing and at the inception of the relationship.



Rules of Professional Conduct

ER 4.1. Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by ER 1.6.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see ER 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under ER 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in ER 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid

assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by ER 1.6. If disclosure is permitted by ER 1.6, then such disclosure is required under this Rule, but only to the extent necessary to avoid assisting a client crime or fraud.

STATE BAR OF ARIZONA

Rules of Professional Conduct

1. Client-Lawyer Relationship | Related Opinions

ER 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, 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 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 ER 1.7. If the organization's consent to the dual representation is required by ER 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.

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 ER 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 ER 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 ER 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 reasonable 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 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 interests 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 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. 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 ERs 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(d) 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(d)(1)-(5). 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(d)(1) and 1.6(d)(2) 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 lawyer who reasonably believes that he or she has been discharged 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 assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of lawyers may be more difficult in the government context. See Scope [18]. 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. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority 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. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope. Government lawyers also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so.

[10] A government lawyer may have an obligation to render advice to a government entity and constituents of a government entity.Normally, the government entity, rather than an individual constituent, is the client. Some government lawyers may also be elected officials or the employees of elected officials who have statutory obligations to take formal action against individual constituents under certain circumstances. The government lawyer, therefore, must clearly identify the client and disclose to the individual constituents any limitations that are imposed on the lawyer's other legal obligations. See ER 1.2(c) and related comments. Further, where a conflict arises between a constituent and the government entity the lawyer represents or between constituents of the same government entity, the lawyer must make the identity of the client clear to the constituents and determine which constituent has authority to act for the government entity in each instance.

Clarifying the Lawyer's Role

[11] There are times when the organization's interests 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 assure 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.

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

Dual Representation

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

Derivative Actions

[14] Under generally prevailing law, 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.

[15] 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 or 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, ER 1.7 governs who should represent the directors and the organization.

Managing the Conflict of Interest Maze for Public Lawyers

May 11, 2016

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Jennings Strouss
ATTORNEYS AT LAW

Agenda

- Ethical Rules generally as they apply (and do not apply) to public lawyers
  - Preamble to Ethical Rules
  - Statutory/Code authority defining roles of public lawyers
  - Application of Ethical Rules to certain situations
    - → Settlement authority
    - → Ex parte contacts with represented clients
    - → Confidentiality and disclosures

Agenda (cont'd)

- The conflicts maze:
  - Quandary of identifying the client
    → Statutory obligations, Ethical Rules. ...and Politics
      - Governing Bodies, Officers, Agencies, Elected Officials, and the General Public
  - The importance of potential clients' perceptions about attorney-client relationships
    → Managing different answers to the "who is my client" question in different and changing situations
  - Taking and keeping control over the delicate balance among actual and potential clients.

The Ethical Rules and Public Lawyers

The Preamble to the Ethical Rules Regarding Government Lawyers (Rule 42, Ariz. R. Sup. Ct.):

Paragraph [18]:

"Under various legal provisions, including constitutional, statutory and common law, the responsibility of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships."

Preamble, Para. [18] (cont'd)

"For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment."

Preamble, Para. [18] (cont'd)

"Such authority [to settle cases] in various respects is generally vested in the attorney general and the state's attorney in state government and their federal counterparts, and the same may be true of other government law officers.

Preamble, Para. [18] (cont'd)

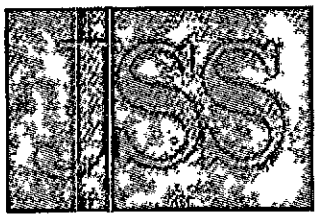
"Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients."

Preamble, para. 18 (cont'd.)

"They [government lawyers] also may have authority to represent the 'public interest' in circumstances where a private lawyer would not be authorized to do so."

Preamble, para. 18 (cont'd.)

"These rules do not abrogate any such authority."

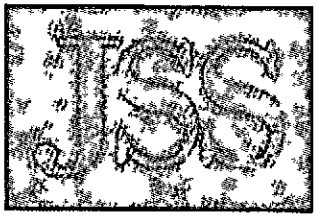


What does the Preamble mean?

- The Preamble is what the name implies – an introduction. It is a statement of principles. It's not an "Ethical Rule."
- The Preamble has some effect on how to interpret the Ethical Rules, but it is not itself a rule.
- The Preamble is descriptive. It illustrates how being a government lawyer can be different than being a private sector lawyer.
- It does not provide answers, direction, or guidance. It merely describes a context.

The Preamble's Unanswered Questions

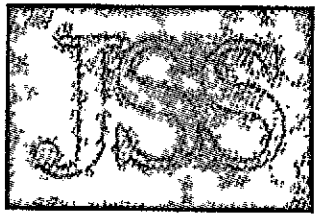
- What if the "various legal authorities" are silent, ambiguous, or contradictory about who has authority to make decisions related to a representation?
- Who decides whether a conflict of interest exists?
- Who is the client?



How helpful is "authority" when government lawyers need to analyze their duties and responsibilities?

"Authority" in general

- The legal "authority" mentioned in the Preamble often does not expressly state or provide guidance to public lawyers with respect to their ethical obligations.
- This includes lack of guidance on how to distinguish various potential "client" interests within the same governmental jurisdiction.



Statutes and Codes only loosely define public lawyers' duties and obligations.

County Attorneys

- Created by the Arizona Constitution with statutorily defined duties. See Ariz. Const. art. XII, § 3; A.R.S. § 11-532.
- Statutorily required to "[a]ct as the legal advisor to the board of supervisors . . . and oppose claims against the county which the county attorney deems unjust or illegal." A.R.S. § 11-532(A).
- Duty to other elected officers is statutorily limited to providing written opinions "on matters *relating to the duties of their offices*." A.R.S. § 11-532(A) (emphasis added).

City Attorneys

- No statutory provisions directly on point
- Look to City charters or City codes

City Code examples

Prescott:

- **2-9-1 DEPARTMENT CREATED:**

There is hereby created a Legal Department, said Department to be under the supervision of the City Attorney. The City Attorney will report to and be responsible for the operation of the Legal Department to the City Council. ...

- **2-9-4 CIVIL DIVISION; FUNCTION:**

The Civil Division shall have the responsibility of **advising the City Council, City Manager, and all departments, committees and commissions within the City**; of preparing and/or reviewing all documents, contracts, resolutions, ordinances and policies; shall lobby for or against legislation on behalf of the City; will review all claims filed against the City as more particularly set forth in Title I, Chapter 10 of the City Code; will defend the City against all lawsuits filed against the City; and will prosecute on behalf of the City all civil violations of the City Code and other City Codes and ordinances. (Emphasis added.)

City code examples (cont'd)

- Tempe City Charter Section 2.08(c):

City attorney. There shall be a city attorney appointed by the council, with the assistance of the manager. He/she shall serve as **chief legal advisor to the council, the managers, and all city departments, offices and agencies.** He/she shall represent the city in all legal proceedings and shall perform any other duties prescribed by this Charter, law, or ordinance. He/she shall serve at the pleasure of the council. (Emphasis added.)

City Code examples (cont'd)

City of Page:

- Section 3-1-1 Officers

There are hereby created the offices of City Manager, City Clerk, City Marshal, City Engineer, **City Attorney** and City Magistrate who shall be appointed by the Council. The City Manager, City Clerk, City Marshal, City Engineer and **City Attorney** shall serve at the pleasure of the Council. (Emphasis added.)

City Code examples (cont'd):

City of Mesa Charter Section 401(B):

CITY ATTORNEY. The Council shall appoint a City Attorney and fix his compensation. He shall serve as the **chief legal advisor to the Council, the Manager, and all City departments, offices, and agencies.** He shall represent the City in all legal proceedings and shall perform any other duties prescribed by this Charter, law, or ordinance. The City Attorney shall serve at the pleasure of the Council. (Emphasis added.)

City Code examples (cont'd)

City of Tucson Charter Section 2:

- **Sec. 4. Appointment, term, removal of city attorney and city clerk.**

The city attorney and city clerk, hereinafter in this Charter designated "attorney" and "clerk," respectively, shall be appointed by the mayor and council. They shall hold office for a term of two (2) years from the date of their appointment, unless sooner removed by four (4) members of the mayor and council voting affirmatively therefor.

City Code examples (cont'd)

All preceding slides are at the Charter and Code level and do not include ordinances giving specific direction or authority to city attorneys.

If there is little guidance in the statutes/codes, then ...

... look at the rest of the Ethical Rules for possible guidance.

Ethical Rules

- Public lawyers are subject to *all* Ethical Rules applicable to a situation or matter.
- Some Ethical Rules that mention government lawyers:
  - ER 1.11: Special Conflicts of Interest for Former and Current Government Officers and Employees
  - ER 1.13: Organization as Client
  - ER 3.8: Special Duties of a Prosecutor [NOT COVERED IN THIS SEMINAR]

ER 1.11

- Subsections (a) and (b) pertains to *former* public lawyers now representing a "private client";
- Subsection (d) pertains to former *private sector lawyers* now working as public lawyers.
  - Prohibits participation in a matter in which the lawyer "participated personally and substantially while in private practice" except under limited circumstances.

ERs *cf.* the Preamble

Preamble [18]: "... For example, a lawyer for a government agency may have authority on behalf of the government **to decide upon settlement** or whether to appeal from an adverse judgment. ..."

ER 1.2 cmt. [1]: "The decisions specified in paragraph (a), such as whether to settle a civil matter, **must also be made be the client.**"

-- Paragraph (a) says the client determines the objectives of the representation, and states: "A lawyer shall abide by a client's decision whether to settle a matter."

Despite the comment in the Preamble, there is no exception or limitation stated in ER 1.2 for settlements.

Ethically bypassing a public lawyer ...

ER 4.2: Communication with Person Represented by Counsel

"In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

ER 4.2

Comment [1]:

"This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. **For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding another matter.**"

This comment pertains only to ex parte communications "regarding another matter."

ER 4.2(cont'd)

BUT comment [2] states:

"In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons have managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."

ER 4.2/ABA Op. 97-408

Comment [2] *should apply* to public lawyers representing a public "organization" (see ER 1.13 – discussed later). Nothing in the comment says it does *not* apply to public clients.

HOWEVER, the ABA disagrees –

ABA Formal Opinion 97-408 (August 2, 1997)

ER 4.2/ABA Op. 97-408 (cont'd)

- **Communication with Government Agency Represented by Counsel**

"Model Rule 4.2 generally protects represented government entities from unconsented contacts by opposing counsel, with an important exception based on the constitutional right to petition and the derivative public policy of ensuring a citizen's right of access to government decision makers. ...

ER 4.2/ABA Op. 97-408 (cont'd)

"Thus Rule 4.2 permits a lawyer representing a private party in a controversy with the government to communicate about the matter with government officials who have authority to take or to recommend action in the matter, provided that the sole purpose of the lawyer's communication is to address a policy issue, including settling the controversy. ..."

ER 4.2/ABA Op. 97-408 (cont'd)

"... In such a situation the lawyer must give government counsel reasonable advance notice of his intent to communicate with such officials, to afford an opportunity for consultation between government counsel and the officials on the advisability of their entertaining the communication. ..."

ER 4.2/ABA Op. 97-408 (cont'd)

" ... In situations where the right to petition has no apparent applicability, either because of the position and authority of the official sought to be contacted or because of the purpose of the proposed communication, Rule 4.2 prohibits communication without prior consent of government counsel."

ABA Opinion 97-408: Summary

What do we learn from 97-408:

- ER 4.2 as interpreted by the ABA creates an unequal playing field for public lawyers
  - In fairness, perhaps 97-408 only tries to balance established constitutional rights with a public client's rights
- Lawyers representing private clients can contact individuals with management responsibility even if such contact would be prohibited by ER 4.2
- Subject of such communication must be limited in scope "to address a policy issue, including settling the controversy"

ABA Opinion 97-408: Summary (cont'd)

- Such communications cannot occur for the purpose of obtaining statements against interest, admissions, confessions, or evidence or discovery of any kind.
- The public lawyer must be given advance notice.
  - But, no *consent* by the public lawyer is required. All the public lawyer can do is to try to talk the client into declining to meet.
- This exception does not apply if "the right to petition has no apparent applicability."

ABA Opinion 97-408: Summary (cont'd)

- Unanswered Question: What happens if a 97-408 contact occurs and the lawyer nevertheless obtains prohibited information, confessions, statements against interest, etc.?

Importance of ER 4.2 to Conflicts

A single public official's desire to meet ex parte with an opposing party can conflict with the public lawyer's opinion about what is in the client's best interest.

It might be a close call whether this is an actual conflict or a client management issue. Which it is can depend on client communications, clarification of roles, and other factors – as discussed later.

Public Lawyers and Confidentiality

There are no Arizona exceptions to ER 1.6 (Confidentiality) that are unique or specific to public lawyers.

The Preamble says: "They [government lawyers] also may have authority to represent the 'public interest' in circumstances where a private lawyer would not be authorized to do so."

Does this statement refer to possible exceptions to the duty of confidentiality that would not apply to private-sector lawyers?

ER 1.6 Refresher

"(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 or required by paragraphs (b), (c) or (d), or ER 3.3(a)(3)."

[NOTE: ER 3.3(a)(3) requires a lawyer to take reasonable remedial measures after offering testimony or evidence later learned to be false.]

ER 1.6(b), (c), and (d)

What are the "paragraphs (b), (c) or (d)" exceptions?

"(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm."

[NOTE: This and ER 3.3(a)(3) are the only *mandatory* ER 1.6 exceptions.]

ER 1.6(b), (c), and (d) (cont'd)

"(c) A lawyer may reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime."

ER 1.6(b), (c), and (d) (cont'd)

"(d) A lawyer may reveal such information relating to the representation of a client to the extent the lawyer reasonably believes necessary:"

[NOTE: Subsection (d) disclosures are *voluntary*. If disclosures are made, they must be limited only to "the extent the lawyer reasonably believes necessary" -- and no more!]

ER 1.6(d) (cont'd)

Seven subsection (d) exceptions --

"(1) 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;"

ER 1.6(d) (cont'd)

"(2) to 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;"

"(3) to secure legal advice about the lawyer's compliance with these Rules;"

ER 1.6(d) (cont'd)

"(4) 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;"

ER 1.6(d) (cont'd)

"(5) to comply with other law or a final order of a court or tribunal of competent jurisdiction directing the lawyer to disclose such information;"

"(6) to prevent reasonably certain death or substantial bodily harm;"

ER 1.6(d) (cont'd)

"(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."

ER 1.6(d) (cont'd)

"(e) 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."

[NOTE: This new sub-section is meant to cover cyber-security issues. In the context of public representation, could it affect, for example, a single city council member's public statement about an attorney-client privileged communication?]

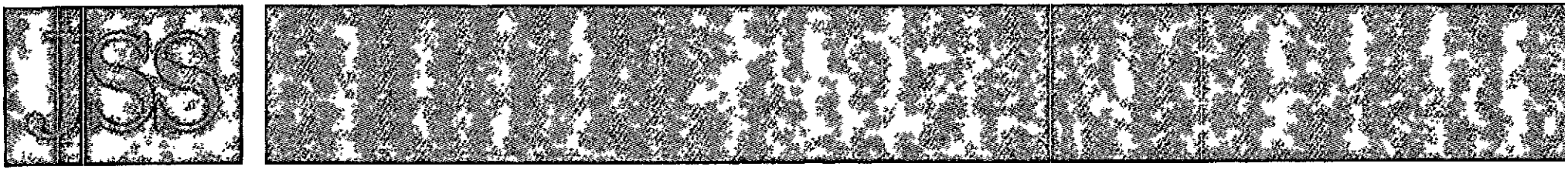
Applying 1.6 to Public Representation

Application of ER 1.6 often will be similar to application of ER 1.13.

Hawaii's version of ER 1.6 has an additional exception where disclosure is permitted "to prevent a public official or public agency from committing a criminal act that a government lawyer reasonably believes is likely to result in harm to the public good." (Also can be disclosed to rectify the consequences of such an act.)

Importance of Confidentiality to Conflicts

- To whom does a public lawyer owe a duty of confidentiality?
- The issue of who owns the attorney-client privilege can arise in many contexts.
- A public lawyer can have information that one public official believes is confidential but that the lawyer believes he/she has a duty to disclose to another public official.
- Issues of confidentiality can either be the source of a conflict of interest or reveal the existence of one.



Conflicts of Interest

Who is the Client?

General Answer

The client is the governmental jurisdiction (e.g., the County or City) acting through its governing body (e.g., the Board of Supervisors or City Council).

- *Cf.* City charters and codes covered earlier

Application of ER 1.13 (client as an organization)

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

ER 1.13 (Cont'd)

- Cmt. [9]: "The duty defined in this Rule applies to governmental organizations."
  - "Defining precisely the identity of the client and prescribing the resulting obligations of lawyers may be more difficult in the government context. ...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."

ER 1.13 (cont'd)

Why is ER 1.13 important?

- Establishes the general rule for the identity of the client
- Sets parameters as between the "constituents" of an organization and the organization as the client
- Directs how lawyers should act when there are bad actors in the organization ...

ER 1.13: When there's trouble ...

When there are bad actors, look first to sub-section (b):

"(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 ..."

ER 1.13(b) (cont'd)

"... the lawyer shall proceed as is reasonably necessary in the best interest of the organization. ..."

ER 1.13(b) (cont'd)

" ... 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.***" (Emphasis added.)

This is known as ER 1.13's "up the ladder" approach.

ER 1.13(b) (cont'd)

How high does the ladder go?

Remember the Preamble?

"They [government lawyers] also may have authority to represent the 'public interest' in circumstances where a private lawyer would not be authorized to do so."

ER 1.13(b) (cont'd)

Does the Preamble give public lawyers authority to "go public" if they believe that is necessary?

What about in Hawaii?

ER 1.13: UP THE LADDER ...

WHAT IF GOING UP THE LADDER DOESN'T WORK?

ER 1.13(c) and (d)

Subsections (c) and (d) tell us what to do if the "top rung of the ladder" doesn't respond appropriately. The answer leads back (sort of) to the ER 1.6 exceptions:

"(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 refusal to act, that is clearly a violation of law, and"

ER 1.13(c) and (d) (cont'd)

"(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."*** (Emphasis added.)

ER 1.13(d)

What about subsection (d)?

"(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."

ER 1.13: Safety Net?

Is there an ER 1.13 "safety net" for lawyers who follow subsections (b) and (d)?

Subsection (e):

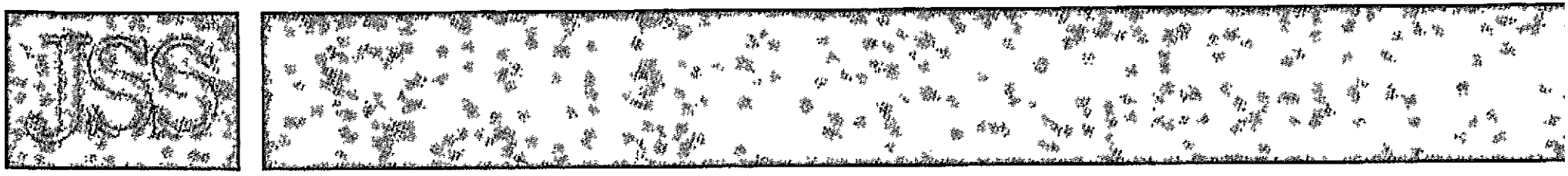
"(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably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

ER 1.13(e) (cont'd)

Is "the organization's highest authority" the general public?

ER 1.13 and Conflicts

- ER 1.13 and ER 1.6 are linked and need to be reviewed and applied together.
- Many of the issues pertaining to confidentiality and conflicts also pertain to ER 1.13.
- ER 1.13 provides the roadmap for the path that a public lawyer has to follow in the event of actual or potential misconduct by government constituents or the government entity itself.
- Neither rule exists in a vacuum. Other ERs, especially ER 1.4 (communication) and ER 4.3 (Unrepresented people) may apply.



Represented/Unrepresented People: Are Officers or Agencies Ever Clients?

General Rule for Public Officials

- Organizations act through officers and other constituents, but the constituents usually are not the attorney's clients. See ER 1.13, cmt. 2.
- This concept applies to individual members of the governing board as well as to elected or appointed officers in charge of agencies or other sub-divisions of the governmental entity.

- In order for an attorney-client relationship to exist by virtue of being an organization officer, the constituent's conduct must be "duly authorized" by the organization.
  - In other words, there is no attorney-client relationship in regard to unauthorized (*ultra vires)* acts by public officials.
  - Exceptions to this rule only occur inadvertently – as discussed later.

Unauthorized Acts

A public lawyer "must proceed as is reasonably necessary" to protect the best interests of the organization if the attorney has reason to believe a constituent is violating a legal obligation to the organization. ER 1.13, cmt. [3].

DILEMMA: WHAT CAN/SHOULD A PUBLIC LAWYER DO IF A CONSTITUENT'S BELIEF THAT HE/SHE IS"DULY AUTHORIZED" IS THE VERY ISSUE THAT LEADS THE PUBLIC LAWYER TO CONCLUDE THAT ACTION IS NECESSARY TO PROTECT THE ORGANIZATION?

More ER 1.13 provisions are related to this dilemma:

Obligation to clarify the identity of the client –

"(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."

[NOTE: See also ER 4.3.]

To complicate the situation more, it is possible for a public lawyer to have a dual or common representation of both the organization and the constituent:

"(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 ER 1.7. If the organization's consent to the dual representation is required by ER 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."

Dual/common representations

In fact, dual/common representations not only are possible, they happen very often –

At least as perceived by an officer or agency ...

This is the source of many conflicts that "spring up" during the course of a representation due to circumstances that change and create a conflict that did not exist before.

Arizona case law is consistent with the principles of ER 1.13.

- *General rule regarding identity of the client*
  - Arizona courts consider that, like a corporation, the governmental entity and not its officers holds the attorney-client privilege.
    - → See *e.g., State v. Brooks*, 126 Ariz. 395, 399, 616 P.2d 70, 74 (1980) (rejecting a board member's argument that, because he was an elected member of the board and the board was a client of the Maricopa County Attorney, he was individually a client of the Maricopa County Attorney).

When an officer or agency might hold a privilege with a governmental lawyer

Despite the general rule, can constituents ever claim communications with counsel are privileged?

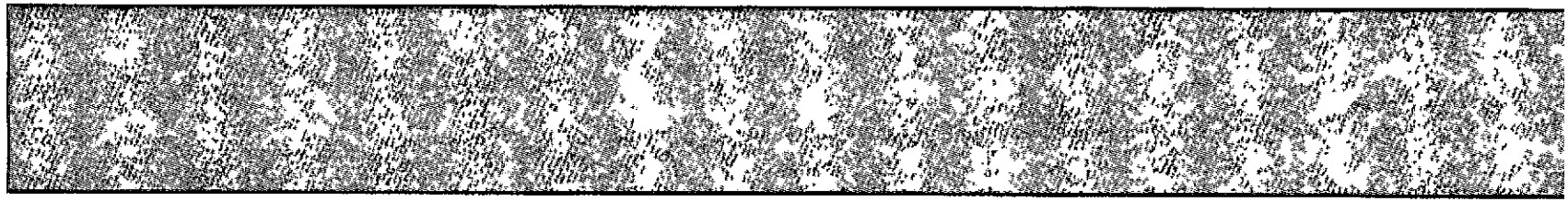
Governmental officers may claim privilege in conversations with a public attorney "at least insofar as the communications concern[] 'matters relating to their official powers and duties.'" *State ex rel. Thomas v. Schneider*, 212 Ariz. 292, 296, 130 P.3d 991, 995 (Ct. App. 2006) (examining the privilege that exists between a city attorney and city officers).

Attorney-Constituent Communications

For a communication between attorney and a public officer to be privileged, the communication must concern "the employee's own conduct *within the scope of his or her employment* and [be] made to assist the lawyer in assessing or responding to the legal consequences of that conduct." *Id.* (citations omitted and emphasis added).

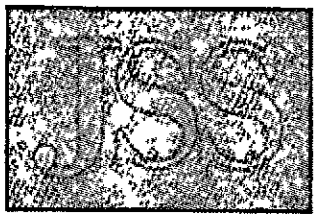
Representation if authority is the issue

The Court in *Brooks* applied A.R.S. § 11-532(c) to hold that a county attorney may represent a school board member "until such time as it is established as a matter of law that the alleged activity or events which form the basis of the complaint were not performed . . . within the scope or course of the member's duties."



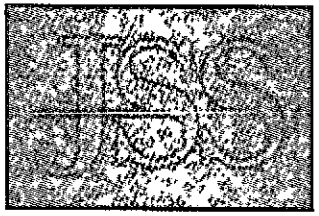
Distilling the rules and cases...

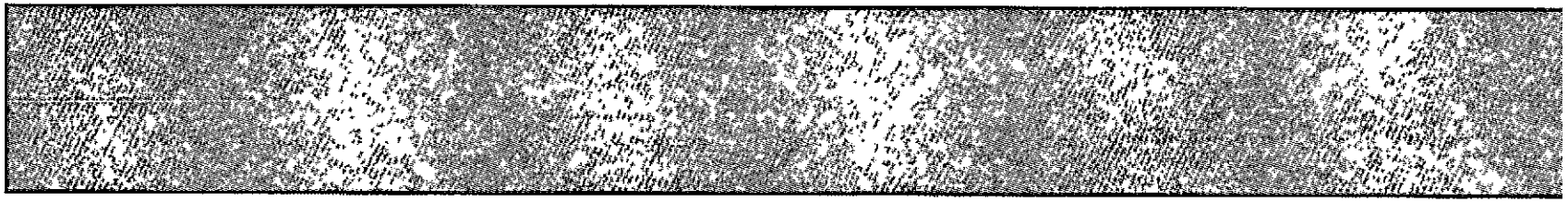
- A public attorney's duties run to the governmental entity, not its subsidiary officers or agencies.
- The scope of a public attorneys' duties to officers or agencies is limited to providing legal advice on matters within the constituent's authority as an agent of the governmental entity.
- There is not an attorney-client relationship with an officer regarding his or her *ultra vires* acts.



When an officer commits an ultra vires act...

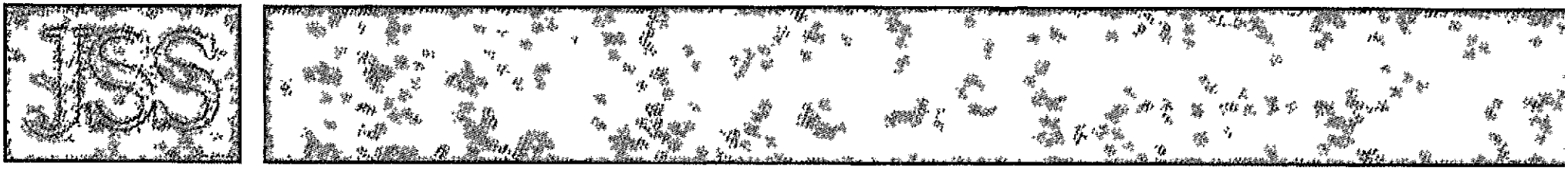
A governmental lawyer has an ethical duty to report to the governing board or other higher authority any conduct by an officer that is a violation of his or her legal obligations or that constitutes a violation of law that may be imputed to the governmental entity or governing body and that is likely to result in substantial injury to the entity or body. See ER 1.13(b).





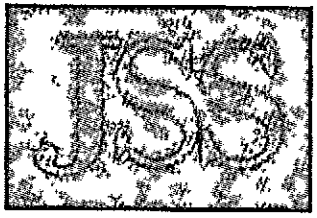
Balancing duties and interests...

- The ER 1.13 reporting duty must be balanced with the government attorney's other ethical obligations, including the duty to clearly and timely communicate the attorney's scope of representation to prevent the officer from disclosing non-privileged information he or she believes to be confidential.
  - See ER 1.13, Cmt. 9 ("[W]hen 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.").



Not all conflicts pertain to ultra vires acts...

- Some conflicts arise because an officer or agency disagrees with the governing body.
- The lawyer's duty in those circumstances is the same as where there is a possible *ultra vires* act (indeed, depending on who ultimately is judged correct, the officer's position might later be determined to have been *ultra vires*).



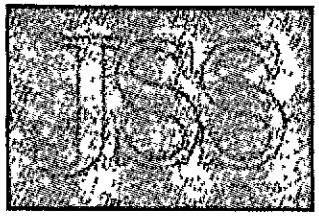
The duty of communication as prevention and cure...

In the event of a conflict or potential conflict

- When a government attorney knows or reasonably should know that the officer's position or interests are or may be adverse to those of the governmental entity, the governmental attorney must:
  - advise the officer that the attorney does not and cannot represent the officer with respect to the adverse matter; and
  - confirm that the officer understands that, if there is an adversity of interest, the public lawyer cannot provide legal representation or advice to the officer, and any discussions with the lawyer are not confidential.

→ See ER 1.13, cmt. 10; *State ex rel. Thomas v. Schneider*, 212 Ariz. 292, 299, 130 P.3d 991, 998 (Ct. App. 2006) ("When a government attorney otherwise represents both an entity and its officials, and circumstances arise in which the attorney believes their interests may conflict, the attorney is ethically obliged to clearly inform both the entity and its officials concerning the scope of the attorney's representation so that those who might otherwise believe a confidential relationship exists do not compromise their legal interests.").

- If the public lawyer fails to clearly and timely provide such a clarification, communications between the officer and the attorney may be privileged, even if the attorney cannot represent the officer.
  - *Schneider*, 212 Ariz. at 299, 130 at 998; see *also* 3 McQuillin Mun. Corp. § 12:85 ("[W]here a city attorney has had regular and frequent contact with certain municipal employees in the course of handling municipal business, it may be unethical for him or her to represent the city or its interest in any administrative or judicial proceedings against those employees.").



Some practical considerations...

Much Ado About Nothing?

Hopefully, yes –

- Most (virtually all) of the time, a public attorney's office lawfully and ethically represents the interests of a governmental officer or agency consistent with the attorney's representation of the governmental entity through its governing body.
- Most (virtually all) of the time, there is no conflict of interest because all constituents are operating within the course and scope of their lawful duties in the best interests of the governmental entity.

- Consequently, day-to-day relationships develop between attorneys and officers and agents, and the latter naturally start to think of the attorneys as "their" attorneys. They develop expectations of confidentiality, loyalty, etc. that are consistent with an attorney-client relationship.
- The situation described above is normal, expected, and contributes to efficient government operations.

Even if possible issues are remote ...

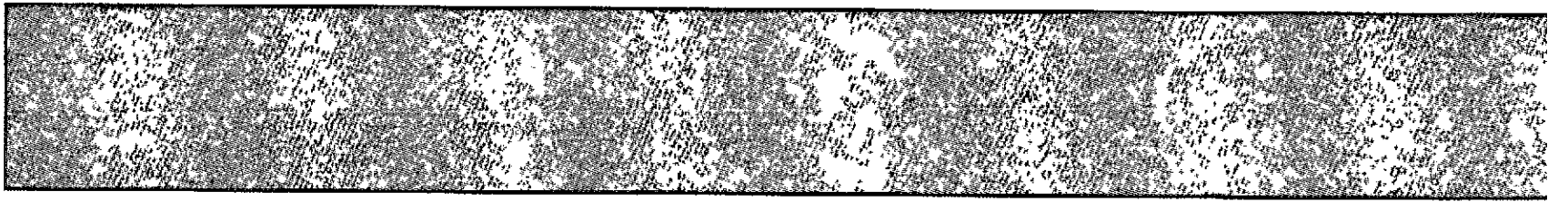
Vigilance is essential

- The vital "delicate balance" for a public lawyer to maintain is (1) to continue to do the day-to-day job of providing legal counsel to all officers and agencies, while (2) remaining aware of actual *or potential* conflicts.

- When issues arrive, they can:
  - Cause stress among elected and appointed officials;
  - Distract from the efficient course of government;
  - Cost money to investigate and resolve;
  - Require possible referral to other governmental lawyer offices;
  - Cause embarrassment;
  - Lead to warranted or unwarranted State Bar investigations and possible prosecution.

Possible tools to avoid issues

- Letters to all newly-elected or appointed officials regarding the public attorney office's role and who is (and is not) the client.
- In-person meetings with all new officials.
- Reminders to existing officials.
- Training, re-training, re-re-training.
- Cultures in public lawyer offices of open disclosure in order to catch possible issues *before* they happen or recognize small errors *before* they become big ones.



Thank you!