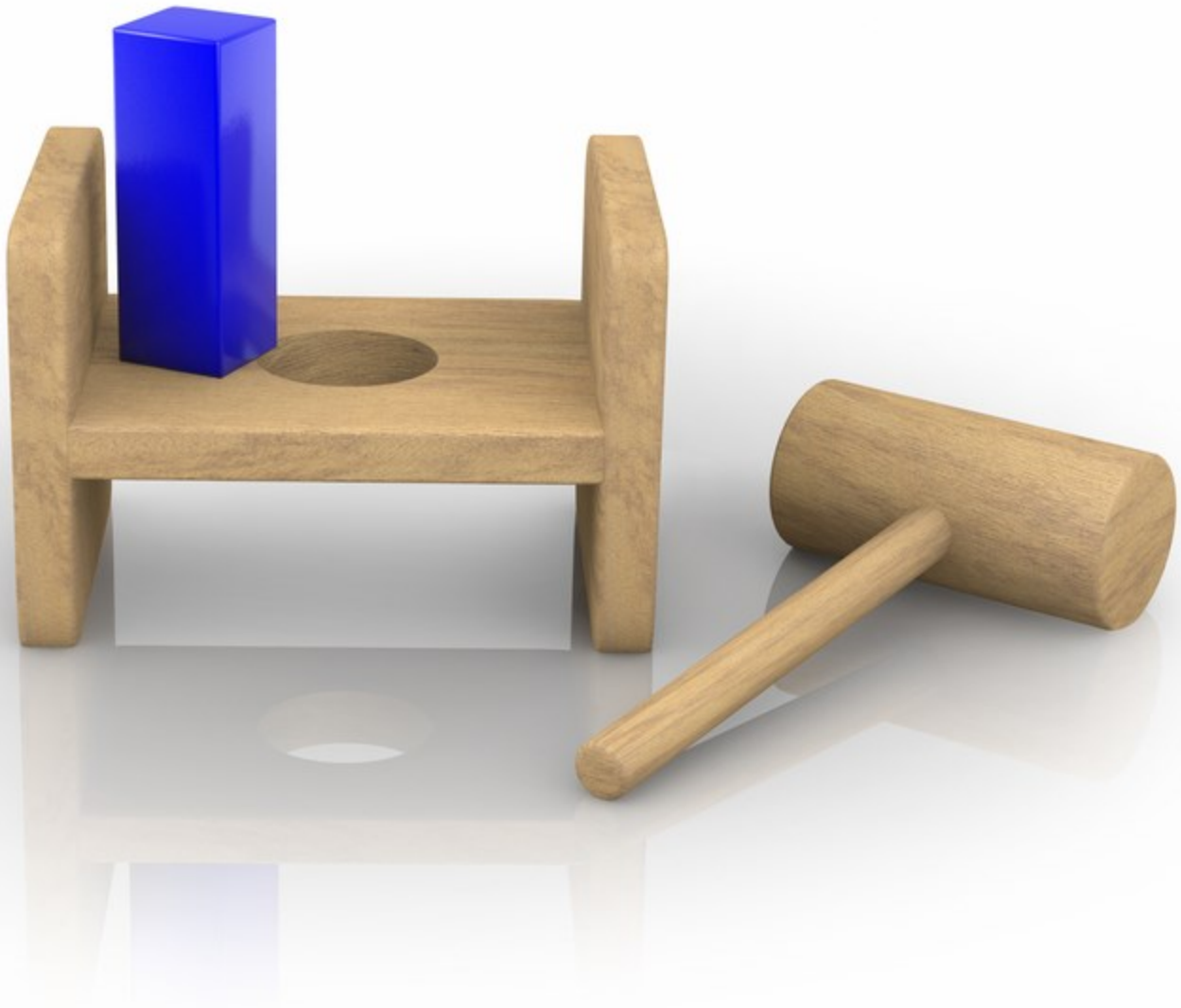


Rules of Professional Conduct:

A Refresher for In-House Counsel

January 10, 2019

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Ethics In-House

Client-Lawyer Relationship

Confidentiality, Competence

- Rule 1.1
- Rule 1.6

Conflicts of Interest

- Rule 1.7
- Rule 1.8
- Rule 1.9
- Rule 1.10

Organization as a Client

- Rule 1.13

Ethics In-House

Transactions with Persons Other than Clients

- Rule 4.1
- Rule 4.2
- Rule 4.3
- Rule 4.4

Law Firms and Associations

- Rule 5.1
- Rule 5.2
- Rule 5.3
- Rule 5.5



Competence and Confidentiality

Rule 1.1: “Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”

Competence and Confidentiality

Rule 1.6: (a) “A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”

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

Competence and Confidentiality: Technology

Rule 1.1 [Comment 8] “To maintain requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with the technology relevant to the lawyer’s practice**, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.”

ABA Model Rule Comments amended in 2012;

NC Rule Comments amended in 2014

New North Carolina CLE Requirement

News

Manafort Lawyers Botch Redactions, Revealing Details on Alleged Trump Contacts

Defense lawyers said prosecutors were overblowing a text message exchange cited as proof that Manafort tried to mislead investigators.

By **Ellis Kim** and **C. Ryan Barber** | January 08, 2019 at 03:02 PM



Competence and Confidentiality: Technology

ABA Formal Opinion 477 *Securing Communication of Protected Client Information* (May 2017)

- Opinion reviews whether the use of unencrypted email to communicate confidential information is reasonable in the current environment of cyber-threats
- Lawyers must take “reasonable efforts” to protect confidential client information when communicating over the internet
- Lawyers must constantly analyze how they communicate electronically and identify factors relevant to determining what security efforts are reasonable
- Rule 1.1, Rule 1.4, Rule 1.6

ABA Formal Opinion 483 *Lawyers' Obligations After an Electronic Data Breach or Cyberattack* (October 2018)

- Lawyers' ethical obligations relating to data breaches involving representation of a client
- Competence; Confidentiality; Communication
- Reasonable efforts
- Best practices for incident response efforts
- Notification obligation to current clients

Working with Outside Counsel: Best Practices

- How do you communicate/share data?
 - Email Encryption: TLS (request mandatory)
 - Secure File Transfer Options
 - Use of Cloud-Based Document Repositories/Exchange
- Wire Instructions: Oral Confirmation Protocol
 - NC Bar: Email Fraud Alert (April 2015, May 2017)
- Data Breach Notification/Incident Response
- Disaster Recovery/Business Continuance
- Insurance Coverage
- Vendors
- End of Matter – Disposition of records

Conflicts of Interest

Rule 1.7 Conflicts of Interest: Current Clients

(a) A concurrent conflict of interest exists if:

- (1) The representation of one client will be directly adverse to another client, OR
- (2) The representation of one or more clients may be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by the personal interests of the lawyer

- *“Directly Adverse” or “Material Limitation”*
 - *Directly Adverse: even if matters are wholly unrelated; adversity in transactions*
 - *Material Limitation: lawyer's ability to consider, recommend or carry out a course of action is limited because of other responsibilities or interests; forecloses alternatives*

Rule 1.7 Conflicts of Interest: Current Clients

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) The representation is not prohibited by law;
- (3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) Each affected client gives informed consent, confirmed in writing.

Rule 1.9 Duties to Former Clients

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Rule 1.9 Duties to Former Clients

Rule 1.9 [Comment 3]

Matters are “substantially related” for purposes of this Rule if they involve the same transactions or legal dispute or if there otherwise is a substantial risk that information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.

- *Confidential information (not publicly known; not obsolete)*
- *“Playbook” cases*

Rule 1.9 Duties to Former Clients

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.10 Imputation

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer . . . and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

Rule 1.0(d) “Firm” [includes] lawyers employed in a legal services organization or the legal department of a corporation, government entity, or other organization.

Rule 1.10 Imputation: Lateral Lawyers

(c) When a lawyer becomes associated with a firm [*legal department*], no lawyer associated with the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the personally disqualified lawyer is timely screened from any participation in the matter; and

(2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of the Rule.

Former Client Conflicts and Imputation

- Non-lawyer staff members/law students: must be screened to avoid conflict and protect confidential information/but no imputation
 - NC FEO 2012-10; RPC 176
 - Rule 1.10 [Comment 4]

Former Client Conflicts and Imputation

- *Risk: disqualification or sanctions because of lateral hire conflict*
 - *ABA Formal Opinion 99-415: Representation Adverse to Organization by Former In-House Lawyer*
 - *Messaging Technologies, Inc. v. EasyLink Services Int'l Corp.*, 913 F. Supp. 2d 900 (C.D.Cal 2012)
 - *Dynamic 3D GeoSolutions LLC v. Schlumberger Ltd.*, 837 F.3d 1280 (Fed. Cir. 2016) (affirming DQ of entire in-house and outside team, dismissing claims)

Former Client Conflicts and Imputation

New Hire Best Practice:

- *Identify potential conflicts in hiring process and resolve conflicts before lateral starts*
- *Effective ethical wall (i.e., “timely screened”)*
 - *Before lawyer starts, two-way instruction not to discuss, limit access to files (paper and electronic)*
 - *Notice*
- *Ongoing efforts to identify and resolve conflicts*



Rule 1.13 Organization as Client

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

Comment [1] . . . Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Rule apply equally to unincorporated associations. “Other constituents” as used in this Rule means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

Why Does It Matter Who the Client Is?

- Current Client Conflicts of Interest (Rule 1.7)
- Former Client Duties & Conflicts of Interest (Rule 1.9)
 - Duty of Confidentiality (Rule 1.6)
- Ownership of Attorney-Client Privilege

For the In-House Lawyer: Client or Not a Client?

- Individual Constituents:
 - Officers
 - Directors
 - Employees
 - Shareholders/Others
- Related Corporate Entities:
 - Parent
 - Subsidiary (Wholly Owned; Indirect)
 - Affiliate

For the In-House Lawyer: Client or Not a Client?

- Inadvertent Clients
- Joint Representations

Inadvertent Client: Possible Outcomes

- Concurrent conflict of interest
- Duty of confidentiality can cause conflict
- Disqualification based on conflict or confidentiality
- Malpractice claims
- Breach of fiduciary duty claims

Client or Not a Client?

Officers, Directors, Employees, Other Constituents: Common Situations

- Negotiating employment agreements/other arrangements with financial interest of constituents
- Investigations
- Coordinating outside counsel representation
- Representation at deposition

Inadvertent Client

A relationship of client and lawyer arises when:

(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either

(a) the lawyer manifests to the person consent to do so; or

(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services;

Restatement (Third) of the Law Governing Lawyers § 14
(2000)

Inadvertent Constituent Client: Lawyer's Obligation to Clarify Role

Rule 1.13(f) – In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Rule 4.3 – In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:

(b) state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. (*NOTE: No requirement of adversity*)

Clarifying the In-House Lawyer's Role

1.13(f) [Comment 10] *There are times when the organization's interest 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**.*

[Comment 11] *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**.*

Inadvertent Constituent Clients: *Bevill* Doctrine

- In the absence of express agreement to represent individual or express disclaimer (*Upjohn*), courts evaluate individual's claim that he is client of company's counsel under *Bevill* rule.
- Employee must establish:
 - The employee approached the corporation's attorney for legal advice;
 - The employee made it clear that the request had to do with matters that arose in his or her individual capacity;
 - The attorney understood this request and advised on the matter even though there was a potential for conflict;
 - These communications were confidential;
 - The subject matter of the communication did not concern a more general corporate matter.

Avoiding Inadvertent Representation in Common Scenarios: Best Practices

Investigations:

- Provide Corporate “Miranda” Warning/*Upjohn* Warning
 - You represent the corporation
 - You do not represent the individual
 - Any information shared may not be confidential
 - Privilege belongs to corporation
 - Individual may obtain their own counsel
- Provide warning before interview
- Consider whether need witness/memorialize in writing
- Use of outside counsel if stakes are high

Avoiding Inadvertent Representation in Common Scenarios: Best Practices

Quasi-Business/Personal Matters:

- Analyze issues from organization's perspective
- Always phrase/document advice in terms of organization's interests (oral and email communication)
- Politely remind constituents that you aren't ethically allowed to give any advice that could be construed as inconsistent with the organization's interests

Avoiding Inadvertent Representation in Common Scenarios: Best Practices

Coordinating with Constituent's Separate Counsel:

- Coordinate with constituent's counsel
 - Engagement letter directly with constituent
 - Constituent's counsel to reinforce roles
 - Explain role of monitoring/participating but not representing constituent
 - Do not be sole contact or gatekeeper for constituent
 - Communicate only with counsel, not constituent (in some situations)
- Look and listen for conflicts

Deposition Preparation:

- Representing or just defending deposition? Clarify role as company counsel. (Outside counsel to do the same.)
- Look and listen for conflicts

Joint Representation – By Choice

Rule 1.13(g): A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment: Dual Representation

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder, director, employee, member, or other constituent.

Joint Representation – By Choice

- Good Reasons To Do It
 - More economical
 - More control
 - Relationships
 - Aligned Interests
- Good Times To Do It
 - Litigation/Regulatory: no adversity (with sufficient understanding of the facts)
 - Governance/Transactional work: aligned interests

Joint Representation – Issues

- Conflicts (existing and potential)
- Confidentiality & Privilege – Special Rules
- Results of terminated joint representation
 - Former client confidentiality & conflicts
 - Privilege issues

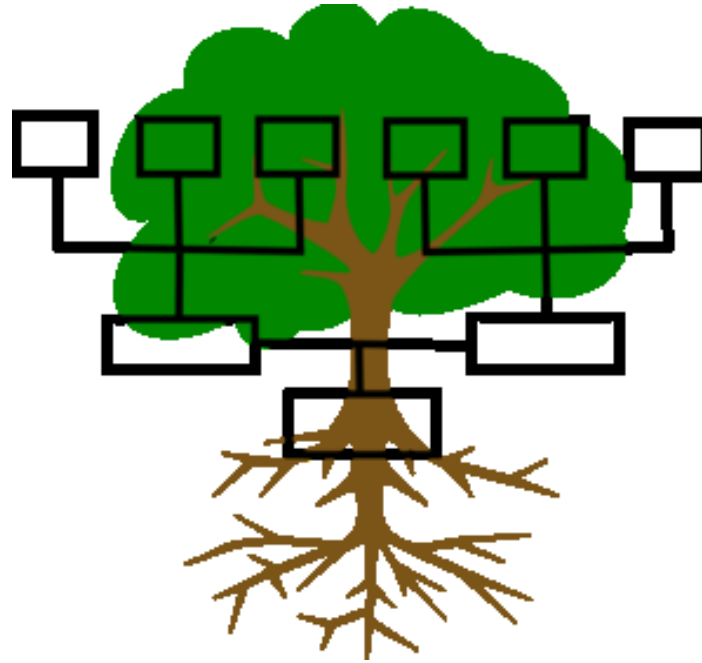
- All must be explained and documented as part of informed consent to representation [Rule 1.7 Comments 29 & 30]

Joint Representation

- Be thoughtful about conflicts:
 - Is there a conflict today?
 - Is it likely a conflict could arise in the future?
 - Keep asking: any changed circumstances?
- Carefully consider scope of joint representations
 - May avoid some conflicts
 - May avoid some obligations upon termination of joint representation

Best Practice: Outside Counsel Joint Representation – Terms of Engagement

- Conflicts
 - What is required for informed consent?
 - Limit scope of representation (Rule 1.2) to avoid conflicts
(describe role narrowly/with specificity; describe what not doing)
- Confidentiality Issues
- Privilege Issues
- Former Client Rules
 - Advance consent to represent one client (your employer)
 - At conclusion of joint representation (even if conflict arises)
 - Including ability to use confidential information learned during course of joint representation
- Opportunity for own counsel to review



Parent, Subsidiaries, Affiliates

Related Corporate Entities

NC Rule 1.0 [Comment 3]

With respect to the **law department of an organization**, including the government, there is ordinarily no question that the members of the department **constitute a firm** within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. **For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed.** A similar question can arise concerning an unincorporated association and its local affiliates.

Related Corporate Entities

NC Rule 1.13 [Comment 10]

There are times when the organization's interest may be or become adverse to those of one or more of its constituents.

. . . .

Rule 1.7 [Comment 34]

A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). . . .

Related Corporate Entities: Conflicts Guidance

- New York City Bar Ethics Opinion 2008-2
- *Teleglobe Communications Corp. v. BCE, Inc.*, 493 F.3d 345 (3rd Cir. 2007)

New York City Bar Ethics Opinion 2008-2

First Scenario: Parent and Wholly Owned Affiliates

- No potential for conflicts, because parent's interests completely preempt
- As a matter of corporate law, "in a parent and wholly-owned subsidiary context, the directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders." *Anadarko Petroleum Corp. v. Panhandle E. Corp.*, 545 A.2d 1171, 1174 (Del. 1988).

See also ABA Informal Opinion 973 (Aug. 26, 1967)

New York City Bar Ethics Opinion 2008-2

Second Scenario: Parent and Affiliates (not wholly owned) or Several Affiliates controlled, but not wholly owned, by Parent

- Potential for conflict of interest exists, must analyze under Rule 1.7
- *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710-11 (Del. 1983) (when the parent does not wholly own the affiliate, the joint directors of both parent and affiliate, “owe the same duty of good management to both” companies, and “this duty is to be exercised in light of what is best for both companies.”) This is so even when the parent “has sufficient ownership or influence to exercise working control of the [affiliate]” *Restatement (Third) of the Law Governing Lawyers*. § 131, cmt. d. (2000).” NYC Eth. Op. 2008-2 (Sept. 2008)

Related Corporate Entities: Other Conflicts Concerns

- *Teleglobe Communications Corp. v. BCE, Inc.*, 493 F.3d 345 (3rd Cir. 2007)
 - Subsidiary Insolvency: Interests may diverge because of creditors' interests
 - Parent/subsidiary interests may diverge in spin-off or sale
 - Scope of joint representation is important to conflicts analysis

Related Corporate Entities: Other Conflicts Concerns

- Insolvency of member of corporate family may create a conflict where one did not exist previously
 - Corporate fiduciary obligations owed to creditors of insolvent entity
 - Conflict between interest of shareholders of solvent parent and creditors of insolvent subsidiary?
- Spin-off or sale . . . aligned interests diverge at some point
- Highly regulated subsidiary (even if wholly owned)
 - Financial/insurance industries

Representing Affiliates: Best Practices

- If not wholly owned affiliate/subsidiary or if spin-off/sale or insolvency is on the horizon, analyze conflicts
 - Have outside counsel assist with analysis
 - May be an iterative process: circumstances change
- Limit scope of joint representation of affiliates
- Utilize outside counsel if conflict exists or circumstances change

Other Third Parties: Client or Not a Client?

Partnerships, Joint Ventures, Etc.

- Who is your client?
- Conflicts can exist – must analyze

Other Conflicts of Interest Rules

Rule 1.8: Business Transactions with Clients

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

Rule 1.12: Former Judge, Arbitrator, Mediator, or Other Third-Party Neutral

Rule 1.18: Duties to Prospective Clients

Other Conflicts of Interest Rules

Rule 1.8: Business Transactions with Clients

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest directly adverse to a client unless:

- Transaction is fair to client, terms are communicated in writing in a manner that can be reasonably understood
- Client is advised in writing of desirability of seeking independent counsel to obtain advice
- Informed consent to (i) terms of transaction and (ii) lawyer's role

[Comment 1]: Does not apply to standard commercial transactions

Rule 1.8: Business Transactions with Clients

- *Issue: In-House Lawyer is offered equity position, stock options*
 - *ABA Formal Opinion 00-418*
 - *Also must satisfy Rule 1.5 (reasonableness of fee), be wary of Rule 1.7(b) conflicts, and consider Rule 2.1 (independent judgment)*
- *Risk: Challenge by constituents/Shareholder suits/Disgorgement*
 - *Kaye v. Rosenfield, 75 A.3d 1168 (N.J. Supp. Ct. App. 2013)*
- *Best Practice: Satisfy rule and written agreement reviewed by outside counsel*

Rule 1.13: Organization as a Client

- Up the Ladder
- Disclosure

Rule 1.13: Up the Ladder

(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 which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization**, then the lawyer **shall proceed** as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, **the lawyer shall refer** the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

Up the Ladder

- “in a matter related to the representation”
 - In-house counsel: no limitation on scope of representation
- “if lawyer knows” that actor will take action that is
 - Violation of a legal obligation to the organization
 - Violation of law that might be imputed to the organization
 - And, is likely to result in substantial injury to the organization
- Must act in “best interests” of the client

Note: knowledge inferred from circumstances, lawyer cannot ignore the obvious [Comment 3]

When?

- Factors lawyer should consider:
 - 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
 - Time constraints?
 - Were lawyer's services utilized?

Up the Ladder: May or Must?

- Must refer to higher authority unless lawyer believes not necessary in best interest of organization
- May ask constituent to reconsider
- May go to higher authority without communicating with constituent if sufficiently important to best interests of organization
- Must minimize risk of revealing confidential information outside of company

Rule 1.13, Comment 4

Best Practice: Outside Legal Opinion

- Confronted with situation that may materially injure client, ask management to seek legal opinion of outside counsel
- Outside Counsel: competent, independent, free of conflicts

Note: differences with ABA Model Rules, SEC Rules (Sarbanes Oxley)

Rule 1.13: Disclosure

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action – or a refusal to act – that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer **may** reveal such information outside the organization **to the extent permitted by Rule 1.6** and may resign in accordance with Rule 1.16.

Disclosure; Rule 1.6 (All Permissive)

A lawyer may reveal information relating to the representation of a client:

To the extent the lawyer reasonably believes necessary

(1) to comply with the Rules of Professional Conduct, the law or court order;

(2) to prevent the commission of a crime by the client;

(3) to prevent reasonably-certain death or bodily harm;

(4) to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used; and

(5) to secure legal advice about the lawyer's compliance with these Rules.

Transactions with Persons Other than Clients

Rule 4.1 Truthfulness in Statements to Others

- In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.
- Negotiations: Never Tell a Lie

Rule 4.2 Communication with Person Represented by Counsel

(a) During the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. It is not a violation of this rule for a lawyer to encourage his or her client to discuss the subject of the representation with the opposing party in a good-faith attempt to resolve the controversy.

Rule 4.2 Communication with Person Represented by Counsel

- Communication about the matter
 - Know to be represented “in the matter”
 - Consent must come from counsel
 - Even if organization has outside counsel, it is permissible to contact in-house counsel directly
 - Reasoning: same concerns do not exist when communicating with a lawyer
 - Client-to-Client contact allowed but caution:
 - Comment 4: Can advise client, but cannot act through others
- Rule 8.4

Rule 4.2 Communication with Person Represented by Counsel: Constituents of Organization

[Comment 9] In the case of a represented organization, **this Rule prohibits communications with a constituent of the organization who supervises, directs or consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.** It also prohibits communications with any constituent of the organization, regardless of position or level of authority, **who is participating or participated substantially in the legal representation of the organization in a particular matter.** Consent of the organization's lawyer is not required **for communication with a former constituent unless** the former constituent participated substantially in the legal representation of the organization in the matter. If an employee or agent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication would be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4, Comment [2].

Rule 4.3 Dealing with Unrepresented Persons

- Do not indicate you are disinterested
- Avoid confusion regarding your role

Note: applies to your unrepresented constituents

Rule 4.4 Respecting Rights of Third Parties

- Documents Inadvertently Produced or Mistakenly Sent
 - Rule 4.4(b) Comments 3 & 4; NC RPC 252 (1997)
 - Review? – no; Notify? – yes, promptly; follow sender’s instructions
- Metadata in documents/emails
 - Rule 4.4 Comment 3; NC 2009 FEO 1
 - Review? – no; Notify? – yes, promptly; don’t go looking for it; as sender, Rule 1.6 duty
- Employee’s email with personal counsel on company system
 - NC 2012 FEO 5
 - Review? – must analyze case law on privilege/expectation of privacy; Notify? – no, Rule 4.4(b) does not apply

Rules for Law Firms and Associations

Rule 5.1 Responsibilities of Managers and Supervisory Lawyers

- **Managerial authority:** shall make **reasonable efforts** to ensure that the organization has in effect measures giving reasonable assurance that all lawyers in the organization conform to the Rules of Professional Conduct.
- **Direct supervisory authority over another lawyer:** shall make **reasonable efforts** to ensure that the other lawyer conforms to the Rules of Professional Conduct.
- **Lawyer shall be responsible for conduct of another lawyer** that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer **orders or ratifies** the conduct involved; **or**
 - (2) the lawyer has managerial authority or direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but **fails to take reasonable remedial action** to avoid the consequences.
- Comment 1 – applies to legal departments
- Rule 5.3 Responsibilities Regarding Non-Lawyer Assistants

Rule 5.2 Responsibilities of Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Lawyer Impairment

- NC 2013 FEO 8: Lawyer Impairment (duties of supervisory and subordinate lawyers)
- ABA Commission on Ethics and Professional Responsibility, Formal Opinion 03-429 (2003)

Resource: North Carolina Lawyers' Assistance Program

Rule 5.5 Unauthorized Practice of Law

- Rule 5.5(d)(1) In-house counsel – in good standing in another jurisdiction
- Many – but not all – states have adopted ABA Model Rule
 - Some states are more territorial
 - Some states require registration
 - ABA summary of state rules on in-house lawyer registration: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/in_house_rules.authcheckdam.pdf
- North Carolina: Guidance to Out of State Lawyers (2003)
- NCGS 84-5

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