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*Ethics for In-House Counsel
Navigating Competence and Organizational
Responsibilities in a Modern Legal Landscape*

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AI GOVERNANCE Ethical Considerations

Gemma M. Dreher, Managing Counsel
TD Bank Group

Rules

1.1 Competence. A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”

1.3 Diligence. A lawyer shall act with reasonable diligence and promptness in representing a client.

1.4 Communication. (a) A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rules (cont.)

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

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

1.6(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.

Rules (cont.)

1.13 Organization as Client Client-lawyer relationship:

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

(b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

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

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

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

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

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

Rules (cont.)

2.1 Advisor. In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

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 to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

5.3 Nonlawyer Assistance. With respect to a nonlawyer employed or retained by or associated with a lawyer: (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer; (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

AI Policies

1. Creating a policy/examine existing policies
2. Key preliminary decision around use
3. Make up of team; tone from the top
4. Rules and responsibilities
5. Operationalizing policy
6. Documentation and inventory
7. Training
8. Ongoing Maintenance/refresh



The Ethical Duty of Technology Competence During the AI Explosion

Michael Delaney, Director
Chair, McLane Middleton's Litigation Department

Leveraging Technology in the Workplace

Joe Innovator, a contract manager in a profitable defense industry company, wanted to impress his new general counsel, Stan Boris. Joe saw an opportunity to transform his company's contracts to achieve pricing consistency and standardization of terms and conditions in RFQs and subcontracts throughout America and Europe. To show initiative, he uploaded all the firm's RFQs and contracts from 2023-24 into "ContractMakeover", a new generative AI contract review software platform. Joe says the ContractMakeover results are certain to boost profits for the company. Stan asks: who authorized this? Joe responds that CEO Fuller thought it was a "great idea," and he can prove it from the notes taken at the last CEO brown bag that were generated using his personal subscription to "AINotesfromQuotes," which AI notetaking application he downloaded on his work tablet. What should Stan do?

Ethics Rules Application to In-House Counsel

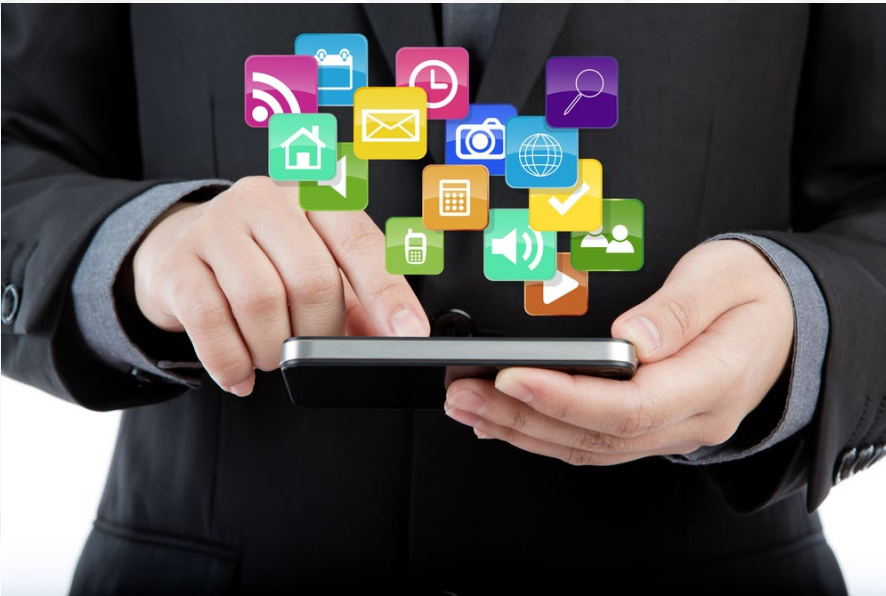
- N.H.R. Pr. Conduct R. 1.0 (c)

“Firm” or “law firm” denotes a lawyer or lawyers. . . .employed in a legal services organization or the legal department of a corporation or other organization

Sources of Duties to Be Technologically Proficient

- Ethics rules
- Common Law
- Standard of Care
- Fiduciary Duty
- Contracts
- Statutes
- Rules of Civil Procedure
- Court-specific requirements (e-discovery)
- Employment policies (remote work benefits for employee)

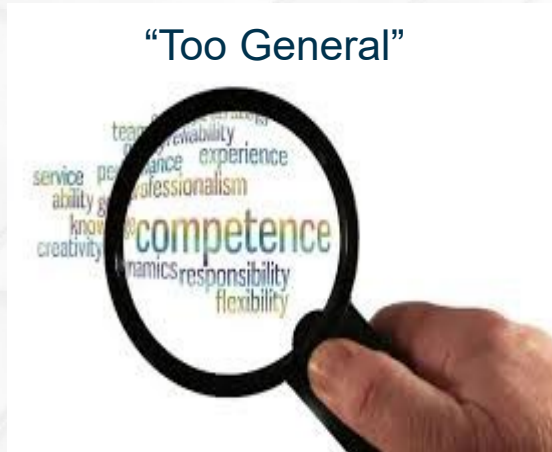
The Building Blocks Technical Competence – ABA Model Rule 1.1



Competent representation requires the **legal knowledge, skill, thoroughness** and **preparation** reasonably necessary for the representation.

Comment 8 - To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, ***including the benefits and risks associated with relevant technology*** . . .

NH Rule 1.1 (b) Rejects Model Rule 1.1



specific knowledge of fields of law in which the lawyer practices

performance of the techniques of practice with skill

identification of area beyond the lawyer's competence and bringing those areas to the client's attention

proper preparation; and

attention to details and schedules necessary to assure that the matter undertaken is completed with no avoidable harm to the client's interests

NH Ethics Cmte. Comment - Comment 8 “Broad Requirement”



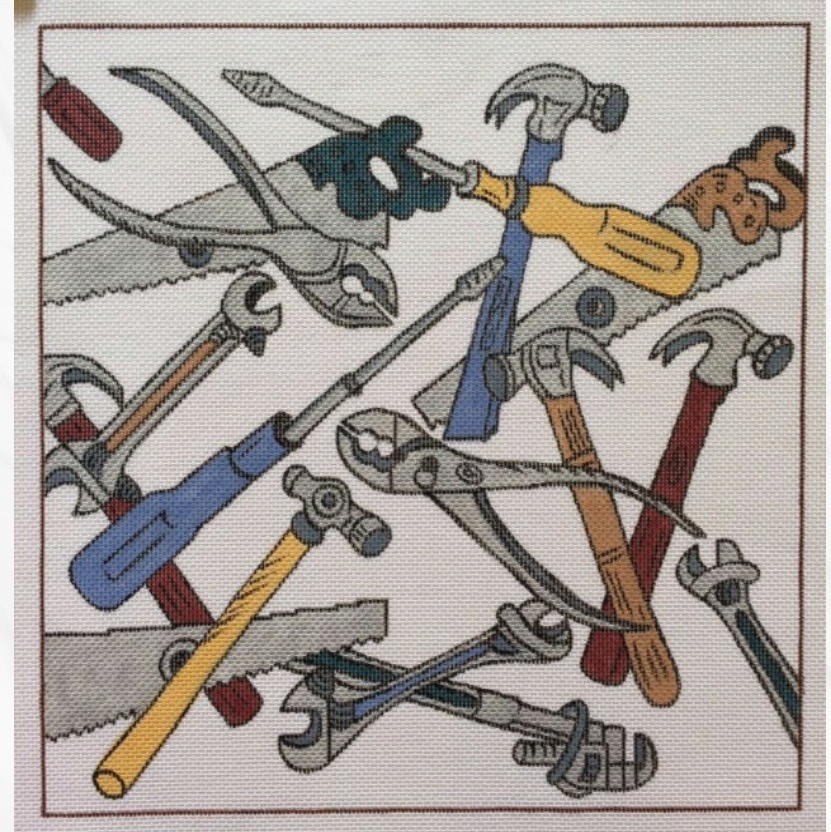
ABA Comment 8 requires that a lawyer should keep abreast of . . .the benefits and risks associated with relevant technology. This broad requirement may be read to assume more time and resources than will typically be available to many lawyers. Realistically, a lawyer should keep reasonably abreast of **readily determinable** benefits and risks with **applications of technology used by** the lawyer, and benefits and risks of technology lawyers **similarly situated are using?**

What Does It Mean to be Technologically Competent?

- Individually
 - No formal ethics guidance has listed competencies by type of technology
 - You don't need to be an expert – but know what you don't know
 - Consider a Litigation Technology Assessment (Procertas)
 - Consider trainings on technology you regularly use
 - Rely on outside counsel procedures/competencies
 - Close ties with technology department

Traditional Tools of the Legal Trade

- Case Management Software
- E-Discovery
- Preservation Obligations/Litigation Holds
- Document Protection / Meta Data Scrubs
- Redaction Technology
- Client Files
- Security of Funds and Information
- Remote Work Protocols
- Social Media Use
- Legal Research Databases



What Does It Mean to be Technologically Competent?

- Organizationally
 - Secure communication
 - R. 1.6(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.
 - Encryption
 - Video conferencing tools
 - Instant messaging
 - Planning (Cybersecurity training, network security audits, network segmentation, user access/management)
 - Remote working
 - Shared personal office space
 - Forwarding to personal devices
 - Video chatting (privacy protocols)
 - Alexa

What Does It Mean to be Technologically Competent?

- Data Security

- Internal: Map Data (what data, where is it, who has access, shared data security protocols)
- External: Vendors and Outside Law Firms
 - Ask questions: Physical security? Encryption? ESI storage? Phishing prevention? Return/destruction?
 - Third party distribution by vendors/law firms?
 - Security certifications?

What Does It Mean to be Technologically Competent?

- Best Practices
 - IT experts in-house or external
 - Software update protocols
 - Encryption (at rest and in transit)
 - Passwords/multi-factor authentication
 - Metadata scrubbers
 - Public Wifi dangers
 - Regular security reviews
 - Email attack training
 - Voice data protocols

What Does It Mean to be Technologically Competent?

- Supervision of Third Party Service Vendors
 - R. 5.1 – Nonlawyers retained by lawyers: reasonable assurances that nonlawyers conduct is compatible with the professional obligations of the lawyer
 - Due Diligence
 - Terms of Service (Indemnification, Insurance Req'ts, Liability Caps, Scope of Access)

AI and legal ethics

ChatGPT explodes:

Nov. 30, 2022
ChatGPT debuts

September 2024:
estimated 200
million active users,
100 million per
week



AI and legal ethics

- Current lawyer tools using AI:
 - Casetext
 - Lexis+ AI
 - Westlaw Precision
 - Microsoft Co-Pilot
 - Harvey.ai
 - HighQ Collaborate
 - Gideon
 - LexMachina
 - various e-discovery tools

In-House Counsel AI Areas of Focus?

Key Ethical Considerations

Competence (R. 1.1 and 1.3)

Fully understand each tool you use as a lawyer.

Does it contain/rely on AI?

How does it work?

Built with lawyers in mind?

Confidentiality (R. 1.6 and 1.9(c))

Read TOS – any obligation of confidentiality?

Inputs: What data is it trained on?

Store or use others information?

Outputs: How used? Verify results.

Use of Nonlawyer Assistance (R. 5.3)

ABA: R. 5.3 extends to assistance provided by “non-human technology”

Substantive research – current area of risk

Other Ethical Rules Touching on AI Use

- Diligence (Rule 1.3)
- Client Communications (Rule 1.4)
- Fees (Rule 1.5)
- Confidentiality (Rules 1.6 and 1.9)
- Prospective clients (Rule 1.18)
- Candor toward tribunals (Rule 3.3)
- Supervision (Rules 5.1 and 5.3)
- Unauthorized Practice of Law (Rule 5.5)
- Advertising (Rule 7.1)

Other Sources of Authority at Play

Other sources of law governing lawyer obligations concerning AI impacting competent representation

- Standard of care
- Fiduciary duty
- Statutory duties (*e.g.*, deceptive trade practices acts)
- Contracts (*e.g.*, outside counsel guidelines)
- New court rules and standing orders
- Other law on AI



Ethics Guidance So Far . . .

- ABA Formal Opinion 512 (July 29, 2024),
https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-512.pdf

New Hampshire

- NH Ethics Committee, *Ethics of Drafting Documents with Artificial Intelligence (September 10, 2024)*,
<https://www.nhbar.org/drafting-documents-with-artificial-intelligence/>
- NH Ethics Committee, *Ethics of Using Artificial Intelligence in Practice (May 15, 2024)*,
<https://www.nhbar.org/using-artificial-intelligence-in-practice/>

Sampling of Ethics Guidance So Far . . .

- D.C. Ethics Opinion 388 (April 2024), <https://www.dcbar.org/For-Lawyers/Legal-Ethics/Ethics-Opinions-210-Present/Ethics-Opinion-388>
- Florida Opinion 24-1 (Jan. 19, 2024), <https://www.floridabar.org/etopinions/opinion-24-1/>
- Ky. Bar Ass'n, Ethics Opinion KBA E-457 (March 15, 2024), [https://cdn.ymaws.com/www.kybar.org/resource/resmgr/Ethics_Opinions_\(Part_2\)/kba_e-350.pdf](https://cdn.ymaws.com/www.kybar.org/resource/resmgr/Ethics_Opinions_(Part_2)/kba_e-350.pdf)
- Mo. Informal Opinion 2024-11 (May 2024), <https://mo-legal-ethics.org/informal-opinion/2024-11/>
- N.Y. City Bar Ass'n, Cte. on Prof'l Eth., Formal Opinion 2024-5 (Aug. 7, 2024), https://www.nycbar.org/wp-content/uploads/2024/08/20221329_GenerativeAILawPractice.pdf
- Pa. Bar Ass'n and Phila. Bar Ass'n, Joint Formal Opinion 2024-200 (May 2024), <https://www.pabar.org/Members/catalogs/Ethics%20Opinions/Formal/Joint%20Formal%20Opinion%202024-200.pdf>
- W. Va. Lawyer Disc. Bd., Legal Eth. Op. 24-01 (June 14, 2024), <https://storage.googleapis.com/msgsndr/Rgd68xOkcVdteTsBkf6O/media/667ac9c219bb7a1f7a4df4c2.pdf>

Court Rules On Use of AI

- Responsible AI in Legal Services (RAILS), Duke Center on Law and Tech: Comprehensive, available at: <https://rails.legal/resource-ai-orders/>



Practical Guidance

- “A lawyer’s professional judgment cannot be delegated to generative AI and remains the lawyer’s responsibility at all times. A lawyer should take steps to avoid over-reliance on generative AI to such a degree that it hinders critical attorney analysis fostered by traditional research and writing.”

California Bar Assoc.

Diligence in Adopting / Using AI Tools

- Review of TOS
 - Evan Harris & David W. Tollen, “Fine print face-off: which top large language models provide the best data protection terms? (352),” <https://www.legalevolution.org/2024/04/fine-print-face-off-which-top-large-language-models-provide-the-best-data-protection-terms-352//>
 - Confidentiality; use of data; ownership of data
- Market research
 - Designed for lawyers; used by lawyers
- Need for client consent
 - Risks/Benefits reviewed by GC



Considerations in lawyer use of an AI tool

- Lawyer competence
 - Does it **require** use of some AI tools? Does it **prohibit** use of some AI tools?
 - How can we tell the difference?
- Role of the client in lawyer AI use
 - Is disclosure to the client required?
 - Is client consent required?
- Tool-by-tool, use-case-by-use-case analysis needed?
 - Meeting bots
 - Contract or document analysis tools
 - Predictive analytics

Ethical Duties in Representing an Entity

Benjamin Folsom, Director
McLane Middleton's Litigation Department

Rule 1.13 – Organization as Client

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
 - Who are the “duly authorized constituents”?
 - ABA comment 1: “Officers, directors, employees and shareholders are the constituents of the corporate organizational client.”
 - ABA comment 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 Rule 1.6 .”
 - Rule 1.6 provides that a “lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).”

Rule 1.13 – Organization as Client

Company A receives a report that a consumer has been seriously injured using one of the company's products. Based on the information Company A received, there is a question as to whether the product was defective. At the direction of senior management, Company A's in-house attorney interviews several non-management workers at the plant where the potentially defective product was manufactured. The attorney takes notes of the interviews and later prepares a written summary of the interviews and provides it to senior management.

Rule 1.13 – Organization as Client

- What information can the attorney provide to the employees being interviewed about the reason for the interview?
- What should the attorney disclose to the employees?

Rule 1.13 – Organization as Client

- Is the information provided to the attorney by the employees subject to Rule 1.6?
- What about information provided by the attorney to the employees interviewed?
- Is the written report protected from disclosure in subsequent litigation brought by the injured consumer? The attorney's notes? Oral statements made by the employees?

Rule 1.13 – Organization as Client

- Attorney ordinarily has to accept decisions made by constituents of the organization, even if utility or prudence is doubtful or they entail serious risk. ABA Comment 3.
- Exception in Rule 1.13(b)

Rule 1.13 – Reporting Up

- Elaine is in-house counsel for Seinfeld Corp., a privately held corporation. The majority of stock in Seinfeld Corp. is held by its CEO, Jerry. Seinfeld Corp.'s board of directors is largely comprised of Jerry's friends. Elaine discovers in the course of her in-house counsel work that Seinfeld Corp., based on a scheme implemented by its CFO, George, has altered consumer transaction documents in a way which defrauds consumers in very small amounts, but for a large number of transactions such that fraudulent gains are in the millions.
- What are Elaine's ethical obligations as the attorney for Seinfeld Corp.?

Rule 1.13 – Violation of Legal Obligation or Law

- (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

Rule 1.13 – Violation of Legal Obligation or Law

- Elements that trigger attorney's duty under Rule 1.13(b):
 - Does the lawyer have knowledge that an officer, employee, or other person associated with the organization is acting, intending to act, or refusing to act?
 - Does the act, intention, or refusal constitute a violation of legal obligation to the organization or a violation of law that could be reasonably imputed to the organization?
 - Would the act or refusal to act likely result in substantial injury to the organization?

Rule 1.13 – Violation of Legal Obligation or Law

- NH RPC 1.0(f): Knowledge can be inferred from circumstances. That is to say, we cannot bury our heads in the sand.
- Ordinarily, referral to a “higher authority” is necessary.
 - “Unless the lawyer reasonably believes that it is not in the best interest of the organization to do so...”
 - Example: Constituent had innocent misunderstanding of the law.
 - Practical considerations

Rule 1.13 – Violation of Legal Obligation or Law

- In assessing how to proceed as reasonably necessary in the best interest of the organization, 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.

Comment 4.

Rule 1.13 – Violation of Legal Obligation or Law

- When to report to the “highest authority”
 - Typically a board of directors or similar body
 - “Higher authority” does not adequately address issue
 - Timing / urgency

Rule 1.13 – Permissible Disclosure of Confidential Information

- Under certain, limited limited circumstances, an attorney may (but is not required to under Rule 1.13) disclose information relating to the representation under Rule 1.13(c);
 - Highest authority 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
 - The lawyer reasonably believes the violation is reasonably certain to result in substantial injury to the organization; and
 - The lawyer reasonably believes disclosure is necessary to prevent substantial injury to the organization.

Questions

Thank You!

Disclaimer: The information presented is for general education and no attorney-client relationship has been created hereby. You should engage and consult with counsel regarding the applicability of the concepts presented to your circumstances.



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