

**DEVELOPING & MAINTAINING AN ETHICS PROGRAM IN A GOVERNMENTAL ORGANIZATION
TRANSPORTATION RESEARCH BOARD (TRB) ETHICS SESSION**

Cambridge MA

July 18, 2018

Bruce M. Smith

Apperson Crump PLC

6070 Poplar Avenue Suite 600

Memphis TN 38119

901-756-6300

bsmith@appersoncrump.com

I. APPLICABLE RULES—AMERICAN BAR ASSOCIATION (ABA) MODEL RULES OF PROFESSIONAL CONDUCT (MRPC)

a. MRPC 1.13: Organization as Client

The entity is the client (MRPC 1.13). “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” MRPC 1.13(a). “The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the governmental context and is a matter beyond the scope of these Rules...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.” MRPC 1.13 Comment [6].

...governmental attorneys are subjected to more exacting standards than attorneys in private practice. Appropriately, there exists a concern that governmental attorneys will take confidential information from their government practice and use it privately to foster their own interests. Governmental attorneys are also generally held to a higher standard because of the fact that their position within the government lends itself to publicity and notoriety. ‘Their conduct must be even more circumspect than the conduct of private attorneys because government attorneys are ‘invested with the public trust and because they are more visible to the public.’”

This is a question of first impression...but some commentary does exist on the subject of who is the “client” in a situation of this sort. At least four potential answers to the question have been set forth: A lawyer representing a governmental body represents (1) the public interest, (2) the State as a whole, (3) the agency itself, or (4) the head of the agency involved. Usually the public interest perspective is discarded as being too broad in scope, while the agency head approach has been abandoned because it is too narrow. Generally, it is agreed that the most practical answer is either that the government or the agency itself is the client. State Bar of Mont. Ethics Comm. Op. 940202, Mont. Law., May 1994, at 7.

Congress has taken the position that the entire government is the client by adoption of 18 U.S.C. §205, which prohibits an employee of the United States from acting as an attorney for anyone before any forum in which the United States is a party or has a

substantial interest in the matter.” Gray v. Rhode Island Dept. of Children, Youth & Families, 937 F. Supp. 153 (U.S.D.C. R.I. 1996) (citations omitted).

Under MRPC 1.13 the entity acting through its duly authorized constituents is the client. Persons within the entity—e.g., officer, directors, management, staff, consultants—are “constituents.” Conflict of interest rules must be examined whenever a question arises as to whether the lawyer can provide advice or representation to a constituent of an entity client.

When can or must a lawyer climb the Chain Of Command?

i. If a lawyer knows

- 1.** An officer, employee, or other person associated with the organization
- 2.** Engaged in action, intends to act, or refuses to act that violates a “legal obligation to the organization”
- 3.** Or a violation of law that reasonably might be imputed to the organization and
- 4.** 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 to include going to the highest authority in the organization.

In so doing, the lawyer must preserve the confidentiality of the Client’s information and attorney-client privilege.

If the highest authority within the organization declines or refuses to take the action based upon information provided by the attorney, the attorney may withdraw. However, in most instances this does not clear the way for the attorney to discuss the matter with or provide confidential or privileged information or records to the media.

b. MRPC 2.1: Attorney Advisor

i. Consideration of non-legal factors: moral objections

c. MRPC 1.16: Terminating Representation

- i.** Shall withdraw
- ii.** May withdraw

d. MRPC 1.6: Confidentiality

- i. The differences between the lawyer’s duty of confidentiality and attorney-client privilege.** Clients may have an unrealistic expectation as to what lawyers can and cannot realistically maintain as privileged and/or subject to attorney work product.

Although related, there are differences between the principles of attorney-client privilege and the lawyer's duty of confidentiality. An ABA Model Rule recently summarized the differences as follows:

...Although interrelated and often considered essentially the same, the requirements for and exceptions to the (1) attorney-client privilege and (2) confidentiality are substantively different. The attorney-client privilege and its exceptions are governed by statute and common law. Confidentiality and its exceptions are governed by the Rules of Professional Conduct (RPC). Confidentiality is far broader than the attorney-client privilege. Differences between the two are addressed in RPC 1.6, cmt. [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 applies in situations other than those 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. Tennessee Formal Ethics Opinion 2013-F-156.

NOTE: in some states, the duty of confidentiality is stronger than the duty of attorney-client privilege.

ii. Legal Ethics and Professional Responsibility Issues as to Attorney-Client Privilege, Attorney Work Product, and The Lawyer's Duty of Confidentiality

As a practical matter, every lawyer within the agency is an Ethics Officer. Every lawyer must be vigilant and diligent in promptly advising persons whether a communication is privileged and confidential, and take appropriate measures to assert, protect and defend attorney client privilege and attorney work product.

The best practice is to declare at the start of the meeting or phone call—not the end—that the conversation is attorney-client privileged and confidential. Exclude all persons from the meeting or call that do not have a “need to know.”

Many persons believe that every conversation or communication with a lawyer is privileged and confidential. In order for a conversation or communication to be subject to attorney-client privilege or confidentiality, it must be for the purpose of seeking legal advice or pertain to an actual or potential legal matter.

The attorney must also give the so-called “corporate Miranda” warning when approached by a person for legal advice. The board member, officer, manager or supervisor may not be the client of the lawyer for purposes of attorney-client privilege and confidentiality, and should be told that the conversation is not subject to attorney-client privilege.

Train board members, managers, supervisors and staff may believe that simply forwarding a communication to a lawyer after the fact or telling a lawyer about a meeting/conversation after the fact retroactively creates attorney-client privilege, attorney work product or confidentiality. The best practice is to include an attorney in every meeting, phone call, or email which the agency intends to be subject to attorney-client privilege, attorney work product and confidentiality.

The attorney must be proactive regardless of the setting or the persons involved. Otherwise, attorney client privilege, attorney work product or confidentiality may be compromised or deemed to have been waived.

iii. The Crime Fraud Exception to Attorney-Client Privilege

1. MRPC 1.6 (b): A lawyer **may** breach confidentiality to the extent the lawyer reasonably believes is necessary
2. To prevent reasonably certain death or substantial bodily harm;
3. To prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interest or property of another as to which the client has used the lawyer’s services;
4. 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.
5. NOTE: Several states Rule 1.6 (b) provide that a lawyer **shall** breach confidentiality in certain circumstances, such as to prevent reasonably certain death or substantial bodily harm The lawyer should check her/his state’s Rules.

II. OTHER APPLICABLE LAWS & RULES

- i. **State and local conflicts of interest statutes and policies.**
- ii. **Gift statutes and policies**
- iii. **Lobbying and Campaign Finance statutes and regulations**

PRACTICE POINTER:

--“Always Get Advice” from someone who knows—promptly

--like the West Point Honor Code, someone who knows and doesn’t report can have bad consequences to career even if she/he is not terminated or prosecuted. Failure to report can be a violation of law or of MRPC (for an attorney).

--contacting someone who knows shows you got advice from a highly knowledgeable person or entity

--seek advice promptly—not when the Marshall is at the door with the subpoena or warrant or when you get a call from Action News 9