



*ETHICS & THE
GOVERNMENT
LAWYER*

John Krauss

Adrienne Meiring

Charles Kidd

AGENDA

Who is the client?

Who is the boss?

Is there a conflict?

Can I talk to that witness?

Do I need to report that?

Speed Round



*WHO IS THE
CLIENT?*



PCR 1.13 – ORGANIZATION AS CLIENT

Rule 1.13. Organization as Client

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

HYPOTHETICAL #1

Michael Scott, former supervisor at Dunder Mifflin Paper Co., has been appointed the Deputy Executive Director of a state agency in charge of Parks and Recreation. Cindy Loo has filed a complaint with the HR Director alleging that Scott has poisoned the work environment with repeated insensitive remarks about gingerbread men, discussing comedy routines and programs with profane language. HR has referred the matter to Stanley Upstanding for an investigation. Upstanding is a staff attorney with Parks and Recreation who typically handles, on the Agency's behalf, defense of tort and negligence claims filed by citizens who suffer injuries at state parks. May Upstanding conduct the investigation, and who is his client?



HYPOTHETICAL #2



- A. No, because Upstanding has no expertise in employment law
- B. No, because everyone knows that Michael Scott is the World's Best Boss, and he's the client
- C. Yes, because staff lawyers should always conduct investigations in-house to keep things quiet to preserve the wholesomeness of the agency-client
- D. It depends.

RPC 1.6 - CONFIDENTIALITY

Rule 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to 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).

RPC 1.6 CONFIDENTIALITY EXCEPTIONS

- To prevent death or substantial bodily harm
- To prevent the client from committing a crime or from committing fraud (in which client has utilized lawyer's services)
- To prevent, mitigate, or rectify substantial injury to the financial interests of property of another that will result or has resulted from client's commission of a crime or fraud (in which client used lawyer's services)
- To get legal advice about the RPC
- To establish claim or defense in a controversy between the lawyer and client, to establish a defense to criminal charge or civil claim against lawyer based on client's conduct; or to respond to allegations regarding lawyer's representation of client
- To comply with other law or a court order.

HYPOTHETICAL #2

Betty Doesright is an attorney for a government agency that investigates and litigates alleged gaming violations. Sally Zealot is the owner of a novelty games business that sells pinball machines, mini-bowling, and mini air hockey tables to entertainment venues. Sally submitted a complaint to the agency about Fightin' Charlie's Bar (and is a key witness) regarding the presence and subsequent return after a police raid of illegal gambling machines. Sally is particularly interested in the agency's litigation because she has sued the owner of the gambling machines in a civil suit for making allegedly slanderous statements about the quality of Sally's games. Sally regularly calls and has asked Betty her legal opinion about Sally's civil suit. May Betty answer Sally's questions?



HYPOTHETICAL #2

- A. Yes, because Betty's client is the public at large, and answering Sally's question would serve the public.
- B. No, Betty can not provide legal advice to Sally because Betty represents the agency
- C. Yes, because it would just be nice, and Betty seems nice.
- D. No way – Sally is just a cheapskate and should pay Betty for her legal advice.

*WHO IS THE
BOSS?*



HYPOTHETICAL #3

D.C. lawyer Michael Fashion works in a government elder care office that has a particularly hands-on and difficult non-lawyer (Miranda Priestley) as its supervisor. Today she demands that the legal staff make its client files available to her within 24 hours so that she can compile demographic information about the clients (including their shoe sizes) that the agency lawyers represent.

Question: Can Michael and the other lawyers comply with the demand?



HYPOTHETICAL #3

- A. No, It's a breach of confidentiality.
- B. Yes, she's the boss.
- C. Only after getting the informed consent of all the clients.
- D. It depends.



*IS THERE A
CONFLICT?*



HYPOTHETICAL #4

In his next career move, Michael Fashion joins the Department of Transportation, which is immediately plunged into a budget-cutting crisis, with many staffers, including Michael, furloughed. After it all is worked out, DOT faces complaints from a number of the furloughed employees, and Michael, who is on staff as an employment specialist, is among them. His boss asks if Michael will feel comfortable representing the Department against those whose grievance is identical to his. Michael replied, "Frankly, I resent your implied doubts about my professionalism. I wouldn't be much of a lawyer if I couldn't represent a client who was opposing an adversary I happened to sympathize or even agree with. Isn't this the essence of our creed?"

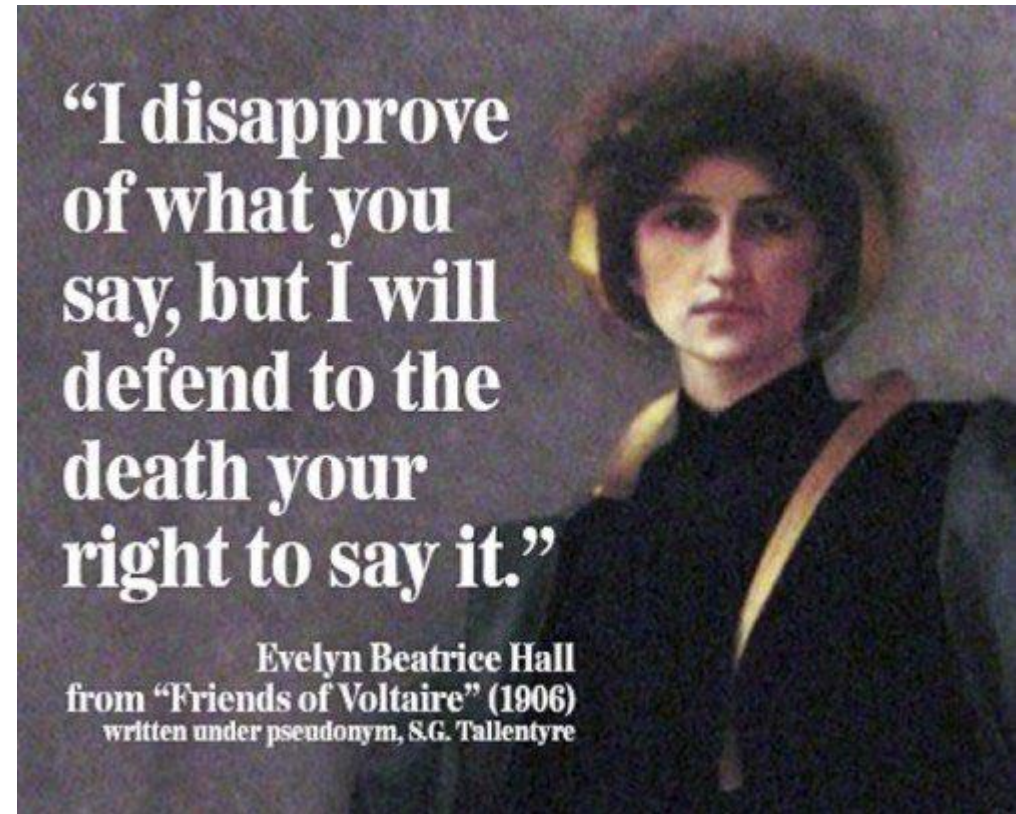
Can Michael ethically defend the agency against these complaints?

HYPOTHETICAL #4

- A. No. It's a conflict of issues problem.
- B. Yes. If he has a waiver from his agency, then it's ethical.
- C. Michael is the ultimate authority on whether he can put his personal interests aside.
- D. Of course it's a conflict, and it can't be waived.

RPC 1.2(B) – SCOPE OF REPRESENTATION

(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.



RPC 1.7 – CONFLICT OF INTEREST

Rule 1.7. Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person **or by a personal interest of the lawyer.**

HYPOTHETICAL #5

Harriet Nelson previously was an attorney with the U.S. Department of the Interior, and her responsibilities included providing legal advice on implementing a federal statute through a formal negotiated rulemaking committee. She assisted in the negotiations regarding language that preceded the proposed regulations ultimately published for public comment, and also prepared written comments and rendered advice on the proposed regulations. Harriet left Interior for private practice, and the negotiated rulemaking committee is now reviewing the public comment and conducting ongoing negotiations with interested parties as it decides upon its recommendations on final regulations. Several tribes have participated in this rulemaking process, and now one of them, the Hekawi tribe, wants Harriet to represent it in the continuing negotiated rulemaking process. Can she?



HYPOTHETICAL #5

- A. No, it's a conflict.
- B. Yes, this is not a "matter involving a specific party or parties."
- C. It depends.

RPC 1.11 - CONFLICTS

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

- (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
- (1) is subject to Rule 1.9(c); and
 - (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing to the representation.

RPC 1.11 - CONFLICTS

(e) As used in this Rule, the term "matter" includes:

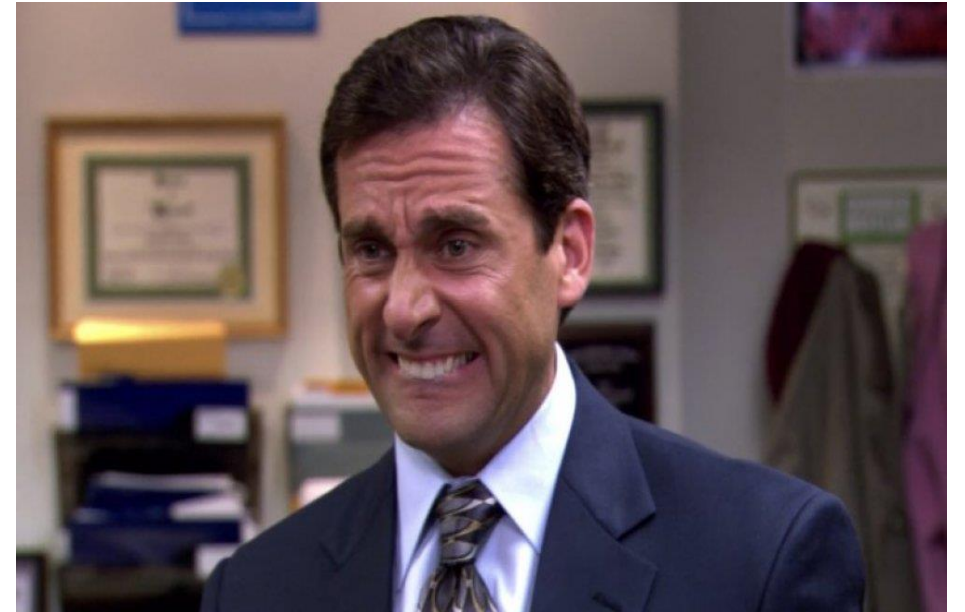
- (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and
- (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

*CAN I TALK TO
THAT WITNESS?*



HYPOTHETICAL #6

Back to Stanley Upstanding – he has begun his investigation of Cindy Loo’s allegations and sits down to interview agency employee Olive Oyl. As Upstanding begins his interview, Oyl discloses that Michael Scott has openly made derogatory remarks about gingerbread men in her presence that have offended her, and she has hired an attorney to decide whether to file a suit against Scott. May Upstanding continue to interview Oyl?



HYPOTHETICAL #6



- A. No, not unless Oyl's attorney is present
- B. Certainly, you need to talk to a witness when you find them
- C. Yes, because Upstanding is not questioning Oyl about her claim, only about what she observed on Cindy Loo's allegations.

RPC 4.2 - COMMUNICATION

Rule 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 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 by law or a court order.

*DO I NEED TO
REPORT THAT?*

WHISTLE
BLOWING



HYPOTHETICAL #7



Stanley Upstanding left Parks & Recreation and is now working for the Dept of Natural Resources. One day he observed the Executive Director being overly friendly with Admin Asst Norma Jean in a physical manner. Jean later came crying to Upstanding and told him that the Exec. Director has been grabbing her regularly and has told her that she will lose her job if she doesn't accept his sexual advances. What are Upstanding's obligations?

HYPOTHETICAL #7

- A. Nothing, Upstanding does not have an attorney-client relationship with Norma Jean
- B. Report the matter to HR and let them handle it.
- C. Report the matter to the Inspector General's Office or some other investigating body
- D. It depends on whether the Executive Director is an attorney or not

RPC 1.13(B) – ORGANIZATION AS CLIENT

(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 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.

RPC 1.13 – ORGANIZATION AS CLIENT

(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.

SPEED ROUND



SPEED ROUND

Question 1: Are there situations in which Rule 1.6 (Confidentiality) does not apply to government lawyers?

A. No

B. Yes

C. I sure hope not.

SPEED ROUND

Question 2: Everybody and their sister seem to be lawyers in Indianapolis. Are you prevented from opposing your sister's client in an adversary proceeding as a government lawyer?

A. No.

B. Yes.

C. I don't have a clue

SPEED ROUND

Question 3: If the Department of Justice were found to be massively conflicted in a matter involving its defense of a government agency, would it have to be disqualified if the conflict could not be remedied?

A. No.

B. Yes.

C. I don't know.

SPEED ROUND

Question 4: If a lawyer knows that another lawyer has committed a violation of the RPF that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer or a judge has committed a violation of the CJC that raises a substantial question as to the judge's fitness for office must inform the DC or the JQC?

- A. Yes
- B. No
- C. I hope not

THANK YOU



John Krauss
Commission
Member



**Adrienne
Meiring**
Executive
Director



Chuck Kidd
Chief Deputy
Director

Request Ethics Guidance:
www.in.gov/courts/discipline/guidance/