

The Ethical Challenges of Representing Entities

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Common Challenges...

- **Decision-making authority**
- **Confidentiality**
- **Conflicting Interests**

Rule 1.12

“Organization as a Client”

- **No prohibitions**
- **Recognizes complexities of representing entities**
- **Offers practical guidance**
- **Extensive comments**

Rule 1.12(a)

- Who's the client?
 - Client = Organization, *as distinct from members*
 - Lawyer will report to, and take direction from, *duly authorized* constituents
 - Lawyer shall act in the *best interests of the organization*
 - Question *legitimacy* of constituent

Rule 1.12

Comment No. 1

- **Lawyer should be concerned “whether the constituent legitimately represents the interests of the organizational client.”**

Rule 1.12(b)

- **Lawyer must take remedial actions when:**
 - **Constituent has violated, or intends to violate, a legal obligation to entity (or violation which might be imputed to entity);**
 - **Violation is likely to substantially injure organization; AND**
 - **Is related to lawyer's scope of responsibility**

Rule 1.12(c)

- **The prescribed remedy?**
 - **Try to handle within the organization**
 - **Consider:**
 - **Severity of violation**
 - **Scope of lawyer's representation**
 - **Motive of Constituent**
 - **Policies with the organization**

Rule 1.12(c)

- **The prescribed remedy?**
 - **Determine if disclosure is mandatory**
 - **Ask for reconsideration of the matter**
 - **Advise client to get 2nd legal opinion**
 - **Refer matter to higher authority within the organization**

Rule 1.12(d)

- **When lawyer quits (or is fired)**
 - **Remedial obligations cease, provided that lawyer ends relationship properly (Rule 1.15)**
 - **Lawyer continues to be governed by confidentiality restrictions set forth in Rule 1.05**

Rule 1.12(e)

- **Imposes a duty...**
 - **When entity's interests are adverse to those of an individual constituent, lawyer *shall* explain the identity of the client, and that the lawyer may not represent the interests of the individual**
- **When entity's interests conflict with those of an individual constituent, lawyer should clarify role by:**
 - **Advising that entity is the client;**
 - **Clarifying that lawyer can't represent individual; and**
 - **Advising individual to get another lawyer**

Rule 1.05 Confidentiality

- Two types of confidential information.
- Shall not reveal confidential information of a client or *former client*.
- Shall not *use* confidential information to disadvantage (former) client or to benefit the lawyer or a third person.
- Lawyer *may* reveal confidential info:
 - When the client consents;
 - When necessary to prevent client from committing a criminal or fraudulent act; or
 - As necessary to rectify client crime or fraud in which lawyer's services were used.

Rule 1.06

Conflict of Interest

Don't represent opposing parties to same case.

Don't represent person if it would:

- Involve a substantially related matter in which that person's interest are directly and materially adverse to the interests of another client; or
- Reasonably appears to be or become adversely limited to another client, a third person, or your own interests

Unless...

- You reasonably believe that the representation of each client will not be materially affected; **AND**
- Each affected client consents to the dual representation after full disclosure of the nature of the conflict and possible adverse consequences.

Rule 1.07

Intermediary

- Do not act as an intermediary between clients, *unless...*
 - Each client consents in writing;
 - You believe that litigation is unlikely;
AND
 - You believe that you can be impartial and that neither client is likely to be harmed.
- If asked to withdraw, must cease representing both clients

Scenario

You are an attorney for a UT health institution. A member of the Board of Regents calls your president. In that call, the Regent asks the president to let him view the complete admissions application file of a currently-enrolled medical student. The president turns to you for advice.

Who's the client? What do you do?

Scenario

- You are the only campus lawyer for a UT institution, and you report directly to the President. One day, the President walks in, hands you a piece of paper, and asks you to review it and give him legal advice on what to do.
- You turn over the piece of paper and realize that it's a contract to sell his house. The house belongs to the President and his wife, and not to the institution. Who's the client? What do you do?

Scenario

You work in OGC. A colleague of yours, George, leaves OGC to become a staff lawyer at a UT institution in the Houston area. One day, George emails you from his new institution and says “A few years ago, I remember sending UT Austin an advice memo about a FERPA question. Can you shoot it to me by email? I think I have a similar issue here and I don’t want to re-invent the wheel. Thanks!” Who’s the client? What do you do?

Scenario

You work at a UT health institution. An aide from the Governor's Office calls your VP for Governmental Relations. The aide wants a copy of an attorney-client privileged memo you wrote to your chief procurement officer. The memo was about the likely legal impact of a bill pending in the Texas Legislature. Who's the client? What do you do?

Scenario

- You are a staff attorney for a UT health institution. Your kids go to middle school with the kids of Dr. Angela Lee, who is a good friend of yours. Angela is a faculty member and anesthesiologist at your health institution.
- One day, Angela tells you she is taking a medication that often makes her very sleepy and disoriented. Because of these symptoms, she sometimes doesn't remember portions of the surgeries she supervises. She asks you whether her surgical notes are public information. You advise her that they are not.
- She then asks you if she's breaking the law by supervising surgery when she has these symptoms. She also wants to know if she will qualify for a disability accommodation or FMLA leave. Finally, she fears she will lose her job, so she doesn't want you to tell on her to anyone. Who's the client? What do you do?

Scenario

- You are an attorney for a UT academic institution. Madison, the Chair of your Department of Electrical Engineering, asks you if it's lawful to bring a plasma actuator with her when she visits China next month for a conference. After Googling the term "plasma actuator," you consult with OGC and outside counsel. Then, you send Madison an email advising her not to bring the device to China. You explain that, since she doesn't have a license from the U.S. government to transfer the device to a foreign country or a foreign national, she will be violating federal export controls laws and could go to jail if she brings it to China.
- Two days before Madison leaves on her trip, you learn that one of her graduate students is packing the device so she can take it with her. You call Madison and gently warn her that she could go to federal prison if she does this. By email, she replies, "I get it. You're just being a careful lawyer. But I'm only going to show this device to a few of my colleagues at the conference. I won't cause any problems. It won't be a big deal. And you'll bail me out if I have a problem, right?" She ends his email with a smiley-face emoji.
- The President and her cabinet are out of town and unreachable. You want to tell someone about this, but you don't know what to do. Who's the client? What do you do?

Scenario

- You're the chief legal officer for a UT academic institution. Your VP for Business Affairs, Abner, is in a disagreement with your VP for Student Affairs, Carla. Abner wants to allow an existing Confederate statue to remain on campus. Carla strenuously objects, saying that it's a relic of racism and needs to be removed.
- Abner asks you for legal advice about the university's obligations under Texas' historic preservation and antiquities laws. He also tells you to interpret the law very broadly, so the statues can stay on campus. Carla emails to ask you for the same legal advice and instructs you to interpret the law in a way that lets the university remove the statues.
- Your Provost is in Antarctica and unreachable, and your President tells you he trusts you to figure the mess out and make him a recommendation, which he will adopt. Who's the client? What do you do?

Scenario

- You work in OGC. You learn that Adam, an assistant football coach at one UT institution, is leaving to take a similar position at another UT institution. The two institutions' chief legal officers disagree about how to interpret a buyout clause in Adam's current contract.
- Both chief legal officers of both institutions separately call you for legal advice. Who's the client? What do you do?

Scenario

- You work in OGC. You learn that Steve, the Chair of Art History at a UT institution, is leaving to become Dean of Liberal Arts & Sciences at another UT institution. In a confidential discussion with the chief legal officer of Steve's current institution, you learn that Steve is under investigation for sexually harassing his administrative assistant, and that the President believes he actually did it.
- Two days later, you get a call from Beatriz. Beatriz is the chief legal officer of the UT institution that's about to hire Steve as its Dean. Beatriz asks you if there's any reason not to hire Steve. Who's the client? What do you do?

Governmental Clients

- **The tip of the day:**
 - “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.”
 - Rule 1.12, Comment No. 9

The End

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