

Government Attorneys and Ethics Issues they Face

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Client Identity

- ▶ State Agency
 - ▶ Represent the Agency
 - ▶ Is Agency authorized by law to provide legal services to public
- ▶ City or County Attorney
 - ▶ Represent city or county boards, managers, etc.
- ▶ Lobbyist
 - ▶ Represent entities and individuals

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Who's Your Daddy?



Why is it important?

- ▶ Decision-making
- ▶ Reporting malfeasance
- ▶ Protecting/disclosing confidential information
- ▶ Asserting the attorney-client privilege
- ▶ Avoiding conflicts
 - ▶ Avoiding imputed conflicts

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Are all departments/agencies your client?

- ▶ Ask questions
- ▶ Identify the client
 - ▶ And the decision-maker
- ▶ Obtain consent
 - ▶ To the scope of the representation
 - ▶ To advocate for one agency against another
 - ▶ To represent 2 or more agencies
- ▶ Confirm in writing

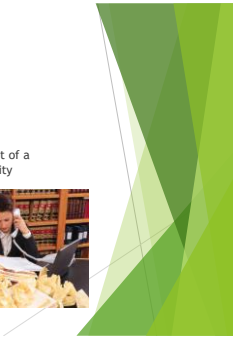


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Who is a member of your Firm?

Why should you care?

- ▶ imputed disqualification
 - ▶ assumption of shared confidential information
 - ▶ responsibility for professional conduct of subordinate lawyers and nonlawyer staff
- ▶ Firm = legal dept of a government entity



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Entity Representation



- ▶ Rule 1.13 Organization as Client
 - ▶ "...this Rule applies to government organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules." [Thanks a lot!]
- ▶ Organization vs. constituents
- ▶ Multiple constituents OR clients:
 - ▶ Board (members)
 - ▶ Chair
 - ▶ City Manager
 - ▶ Boards/commissions (members)
 - ▶ Department/agency manager(s)
 - ▶ Employees
 - ▶ Public



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Who is the decider?

- ▶ Rule 1.2, Scope of Representation and Allocation of Authority Between Client and Lawyer
- ▶ Client: "ultimate authority to determine the purposes to be served by legal representation"
- ▶ Lawyer: "the means by which the client's objectives are to be pursued"

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Organization as Client: Violation of Law or Legal Obligation

Reporting Up Not Out



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What if No One Listens?

- You May
 - Reveal confidential info per Rule 1.6,
 - Comment: "...in a matter involving government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private 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."
 - OR you can
 - Quit!

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Confidential Government Information

- ▶ Oxymoron?
 - ▶ Public records vs. lawyer's duty
 - ▶ First follow the law then the rules
 - ▶ Rule 1.11(c): use of info acquired when public employee
 - ▶ Former gov'n't lawyer cannot use gov'n't information to assist private practice client unless allowed by law or consent
- ▶ Rule 1.6, Confidentiality
 - ▶ "...information acquired during the professional relationship with a client..."
- ▶ Shall not be revealed unless...
 - ▶ Implied or actual consent
 - ▶ To comply with Rules, the law or court order



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Attorney Client Privilege

- ▶ Confidential communication
- ▶ Between lawyer and client
- ▶ Relating to matter about which lawyer is being professionally consulted
- ▶ Made in the course of giving or seeking legal advice for a proper purpose
- ▶ Client has not waived the ACP

- ▶ Who has the privilege when representing a public entity?

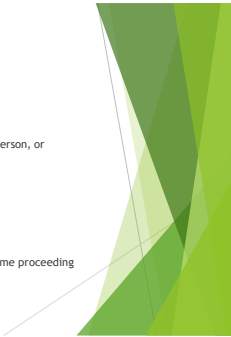
- ▶ Not governed by Rules of Prof'l Conduct



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Conflicts 101: Rule 1.7

- ▶ Concurrent conflict:
 - ▶ Direct adversity of one client against another
 - ▶ Material limitation of representation because of
 - ▶ responsibilities to another client, former client, 3rd person, or
 - ▶ personal interest of lawyer
- ▶ Notwithstanding, no disqualification if
 - ▶ Reasonable belief professional judgment not impaired
 - ▶ Representation not prohibited by law
 - ▶ No assertion of claims by one client against another in same proceeding
 - ▶ Informed consent, confirmed in writing



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Joint Representation: Rule 1.13

Lawyer representing organization may also represent any of its constituents:

- ▶ Subject to Rule 1.7, Conflict of Interest, and
- ▶ Consent of appropriate official
- ▶ Representation of government official in official and personal capacity?



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Imputed Disqualification: Rule 1.11 Government Employees

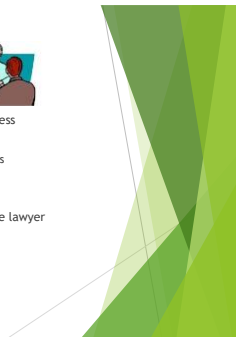
- ▶ Private practice → government
 - ▶ Former client conflicts from private practice are not imputed to other lawyers in your government "firm"
 - ▶ No financial incentive to reveal former (private) client's secrets because salaried
 - ▶ Cost of disqualification too great
 - ▶ Screen recommended but not required
- ▶ Government → private practice
 - ▶ Follow Rule 1.9
 - ▶ Screening sufficient
- ▶ Government agency → another agency?
 - ▶ Each agency is a client
 - ▶ Avoid Rule 1.7 and Rule 1.9 Conflicts



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Lawyer as a Witness Rule 3.7

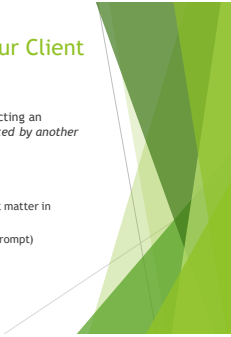
- ▶ Lawyer cannot be advocate and necessary witness unless
 - ▶ Uncontested issue
 - ▶ Testimony is about the nature and value of legal services
 - ▶ Disqualification would be substantial hardship to client
- ▶ No distinction between government lawyer and private lawyer
- ▶ Another lawyer in firm can testify unless
 - ▶ Testimony is adverse to client (current or former)
 - ▶ Client consent is always a cure



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Can Opposing Counsel Talk to Your Client Without You?

- ▶ Rule 4.2 → Generally prohibits an attorney from contacting an opposing party "that the lawyer *knows* to be represented by another lawyer in the matter"
- ▶ Unique Provision in Rule 4.2
 - ▶ Rule 4.2(b):
 - ▶ Lawyer may communicate with **elected** official about matter in controversy
 - ▶ copy opposing attorney on written communication (prompt)
 - ▶ "adequate notice" for oral communication
 - ▶ "official proceedings"?



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First Amendment Concerns

- ▶ Right to petition government
- ▶ Rule 4.2 likely does not/may not prohibit communications with government officials concerning *general policy concerns*



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- ▶ Discusses when and how communication from opposing attorneys to government officials is permitted under Rule 4.2
- ▶ "Adequate notice":
 - ▶ *sufficient information for opposing counsel to act on it to protect the client's interests*
 - ▶ When, where, and how, plus time to prepare



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Other Good Stuff

- ▶ 2014 FEO 3 (4/25/14): Government lawyer may provide pro bono legal services to private individuals and organizations
 - ▶ If not prohibited by law (e.g., GS 84-2 prohibitions on private practice for certain government lawyers)
 - ▶ Subject to the Rules of Professional Conduct
 - ▶ Competence
 - ▶ Conflicts
 - ▶ Confidentiality
- ▶ Determine whether liability insurance will cover you!



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Not So Good Stuff

YOU ARE YOUR BROTHER'S KEEPER

- ▶ Rule 8.3: Reporting Professional Misconduct
 - ▶ A lawyer who **knows** that another lawyer **has committed** a violation of the Rules of Professional Conduct that **raises a substantial question** as to **that lawyer's honesty, trustworthiness or fitness** as a lawyer in other respects, **shall inform** the North Carolina State Bar or the court having jurisdiction over the matter.
 - ▶ Does not require disclosure of information otherwise protected by Rule 1.6.

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Call for Informal and Confidential Ethics Advice

919-828-4620, extension 575
 Or email us at
ethicsadvice@ncbar.gov

THANK YOU FOR LISTENING

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