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Ethics for County Attorneys
Conflicts of Interest that May Arise in Representing Different Components of County Government: Understanding and Applying Rule 1.13[1]

(joint session with DSS Attorneys)

Background. Most client-attorney relationships are established when a man or woman walks into the attorney's office or calls and asks for help with a legal problem. Sometimes a business owned by the man or woman may be involved.

But, sometimes, an organization becomes the client. The organization may be a large private corporation, with its own in-house corporation counsel, or it may be a non-profit corporation with attorneys who advise it regularly at a remote national headquarters. The attorney may be asked to represent the organization as one of many clients in the attorney's private practice, or the attorney may be asked to take a position as corporation counsel or assistant corporation counsel, a full time position of employment with the organization. In any event, representing the client, when the client is an organization, is different work than representing an individual person. And, different rules of ethics apply.

Rule 1.13 of the Rules of Professional Conduct applies when the client is an organization. A local government is an organization under this rule. Comment [6] of the Rule provides, in part, as follows:

> "[6] The duty defined in this Rule applies to governmental organizations. . . ."

So, we look first at Rule 1.13 and its applicability to the way in which local government lawyers carry out their responsibilities.

[1] Much of this paper is adapted from a chapter of a book on the Rules of Professional Conduct that the late Bill Thornton, Adjunct Instructor at the UNC School of Government and former Durham City Attorney, was preparing at the time of his death. Bill was a great friend and mentor, and his untimely passing saddened all of us. By using Bill's materials, I hope to honor his memory.

The Rule:

Rule 1.13 Organization As Client

(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 refused 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 is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, 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. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign or withdraw in accordance with Rule 1.16.

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

(e) 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.

Cross-references:

Rule 1.16, to which reference is made in subparagraph (c), governs declining or terminating representation.

Rule 1.7, to which reference is made in subparagraph (e), is the general rule governing conflicts of interest.

Note: Rule 1.13 is identical to the ABA model rule.

Compare Rule 1.13 to repealed Rule 5.10. The repealed rule provided:

"**Rule 5.10. Responsibility of Counsel Representing an Organization**. A lawyer who represents a corporation or other organization represents and owes allegiance to the entity and shall not permit his or her professional judgment to be compromised in favor of any other entity or individual."

Selected Comments of Interest to Local Government Attorneys:

Government Agency

[9] 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 government context and is a matter beyond the scope of these Rules. See Scope [18]. 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. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of 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 in similar circumstances. Thus, 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. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope. Clarifying the Lawyer's Role[2]

[10] There are times when the organization's interest may be or may become adverse to those of one or more of its constituents. In such circumstances, the lawyer should advise any constituent whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to

[2] The provisions of Rule 0.2 Scope, of the Rules of Professional Conduct, to which reference is made in Comment [9] above, contain the following:

"[5] Under various legal provisions, including constitutional, statutory, and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These rules do not abrogate any such authority."

obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

[3] *When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization may be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is a violation of the law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(g), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious [* *This comment is presented out of the order in which it appears in the rule for convenience of reference here*]

<u>Selected Opinions of Interest to Local Government Attorneys</u>:

CPR 154. Because the town attorney owes allegiance to the town and not to particular officials of the town, he must disclose to any inquiring member of the town's board of commissioners the subject of a town business meeting involving town officials and other interested persons despite contrary instructions from the mayor.

Discussion:

Rule 1.13 does the following:

1) It applies to attorneys representing city and county governments and their constituent entities.
2) It establishes that the attorney's allegiance is owed to the local government, rather than to any individual member of the governing board.
3) It provides an ethical framework for dealing with conflicts between the attorney and managers, department heads, or other county or city staff members.
4) It requires the attorney to advise those staff members of the attorney's duty to the local government, whenever the interests of the staff member is adverse to that of the local government.

Illustrative Questions:

Question #1.a. You are asked to attend a meeting among the chair of the board of commissioners, the director of social services, and the county manager concerning next year's social services budget. The chair instructs you that you are not to discuss the meeting with the other members of the board of commissioners. The next day, a member of the board of commissioners asks you to tell her about the meeting. What is your response? What is your response to the chair and when do you make it?

Question #1.b. Suppose the director of social services instructs you not to discuss the meeting with the members of the board of social services. A member inquires about the meeting. Does the same analysis apply? Does it matter whether you are a full-time assistant county attorney providing services to the department of social services, a staff attorney of the department, or a contract attorney who provides services to the county and county departments on request?

Question #2. The county purchasing agent comes by your office to discuss the award of a contract for janitorial services at the county motor pool. Your feel your breakfast rising quickly in your throat when the purchasing agent identifies the prospective provider as one with whom you have been dealing in disputes involving janitorial service at the social services and health buildings and other

county facilities. Your wise and sage counsel notwithstanding, the purchasing agent indicates he is going ahead with the contract. What, if anything, are you ethically obliged to do.

Question #3. An audit of federal and state money received by the department of social services shows that there is in excess of $100,000 of funds missing. The board of county commissioners has directed you to conduct an investigation into the matter [with the view of recovering the missing money] and to report your findings back to the commissioners. With the cooperation of the social services director, you decide to interview ten employees of the department. You meet with the first of the ten. What is the first thing you say? What else?

Question #4. During its regularly scheduled November meeting following a county election, the board of commissioners appointed two members of the county board of social services. The new members, A and B, were sworn into office by the clerk to the board of commissioners immediately following the meeting.

An entirely new board of commissioners took office on December 1. That board declared the previous appointments invalid, and voted to revoke them. Thereafter the new board of commissioners authorized the appointment of two different persons, C and D.

You are the county attorney. You advised the old board of commissioners concerning the original appointments, and it is your opinion that they were handled properly and that A and B validly hold three-year terms of office. A and B have now filed suit against the county, the county manager, and the new commissioners. They allege numerous violations of their rights under the Constitution and laws of North Carolina.

As part of your firm's county attorney responsibilities, your junior associate regularly advises the five-member board of social services and the social services department. The current chair of that board, who is not up for reappointment, tells your associate that he and the other two members of the board who are not involved in the controversy want to support A and B by having the board of social services joined as a party in the lawsuit.

He tells your associate that the board wishes to hold a closed session on legal matters at its next regular meeting on Tuesday, to discuss the legal strategies that

it should follow. Unbeknownst to you, your associate attends and advises the board.

As luck would have it, the chair of the board of commissioners calls a special meeting for Thursday, also for legal matters, in order to discuss the county's strategy in the lawsuit. She asks you to be prepared to analyze the case and to offer the commissioners advice about their options.

During the meeting, the chair tells you that she is aware that your associate met with the board of social services on Tuesday. She asks you what your associate told the social services board during its closed session.

Can you represent the new board of commissioners in this dispute, given that you represented the previous board and you think that they acted properly? If you represent the commissioners, what should your associate do?

Practice Pointers:

1. It is often difficult for members of governing boards to understand that the local government's attorney is not their individual attorney for any matter that involves city or county business. It is often a good idea for the attorney to meet with governing board members to go over this principle with them [i.e., that the duty owed by the attorney is to the county or city rather than to individual members of the governing board]. A meeting held soon after the board elections is often helpful to new members of the governing board. The attorney should let board members know that, as a matter of ethics, this is not something over which the attorney has control and that, indeed, any attorney would be subject to the same ethical constraints. If the attorney subsequently finds him or her self being drawn into a situation similar to that suggested by Question #1 above, a simple reminder to the governing board member involved should suffice.

2. The line between the responsibilities of the city/county attorney and the city/county manager is an important one. Rule 1.13 (b) gives the attorney broad latitude when deciding what to do when confronted by action, intended action or lack of action on the part of management which is likely to result in substantial injury to the city or county. The attorney is required, by the rule, to "proceed as is reasonably necessary in the best interest of the organization". The attorney's ethical obligation is not an unlimited one however:

First, the attorney must "know" that "an officer, employee or other person associated with the organizations" is engaged in the detrimental conduct;
Second, the action or inaction must relate "to the representation", i.e. be within the area for which the attorney's services have been engaged by the organization;
Third, the action or inaction must be one that involves things about which the lawyer is likely to have special knowledge – i.e., "a violation of a legal obligation to the organization" or " a violation of law" that may be imputed to the organization; and,
Fourth, substantial injury to the organization is likely to be the result.

If these four elements are present, then an ethical obligation arises for the attorney to act in the organization's best interest.

If these four elements are not present, then the attorney may be confronted with one of those situations, such as the one described in Question #2 above, where an intended action of management appears to the attorney to be unwise but where the attorney nevertheless has no ethical obligation to act.

The Rule does not prohibit the attorney from acting in such instances, however, and there may be good reason for the attorney to do so. For example, the governing board may have instructed, or by implication instructed, the attorney to alert the board to problems which the attorney encounters in the operation of the city or county. Or, the manager may have invited or requested the attorney to call such matters to his or her attention when a subordinate department head or other employee is involved. But whatever action the attorney decides is appropriate, it should be designed to minimize disruption to the organization, and "should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization." Comment [4]

For these reasons, an early discussion with the county or city manager concerning these matters is often a desirable thing. Arriving at a common understanding with the manager on the line between the manager's area of responsibility and that of the attorney can be very helpful to the ongoing, important relationship between attorney and manager.

3. Many local government employees have long and comfortable working relationships with the attorney. They may have consulted with the attorney on a wide range of ongoing issues or worked with the attorney in litigation. It is

not unusual for those employees to feel that a client-attorney relationship exists between them and the attorney. They may not readily recognize when their interests and those of the local government become adverse. It is especially important, therefore, for the to be sensitive to these situations and to advise these employees, in the clearest terms, that no such relationship exists and that there may be bad consequences (from the employee's standpoint) if the employee chooses to discuss such matters with the attorney under the mistaken belief that a client-attorney relationship does exist. Please see the analysis following Question #3 above for a recitation of those things the attorney should tell employees in most such circumstances.