WHO IS YOUR CLIENT?

LEGAL REPRESENTATION OF GOVERNMENT AGENCIES

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As agency attorneys, we represent an organization. Rule 1.13 of the Rules of Professional Conduct (22 NYCRR 1200) sets forth our ethical obligations to the organization as client.
Who Do We Represent?

So who do we represent, the individual who we are talking to or are in court with? The department head of a county agency? The County Executive or County Legislature?
Rule 1.13(a)

When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.
What do we do if we become aware that an individual member of the organization intends to act in a way that may harm the organization?
Rule 1.13(b)

If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) 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. 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 an 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 in behalf of the organization as determined by applicable law.
“I Hear Nothing.”

What do you do if you have done all of the above and the highest authority in the organization still insists on breaking the law?
Rule 1.13(c)

If, despite the lawyer's efforts, the highest authority insists upon action or a refusal to act; and that is clearly in violation of law and is likely to result in a substantial injury to the organization, the lawyer may reveal confidential information only if permitted by Rule 1.6 and may resign in accordance with Rule 1.16.
Rule 1.6

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonably under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b). "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.
Rule 1.6

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

(2) to prevent the client from committing a crime;

(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or

(6) when permitted or required under these Rules or to comply with other law or court order.
So What Were You Saying About Resignation?
Rule 1.16 Declining or terminating representation.

(b) Except as stated in paragraph (d), a lawyer shall withdraw from the representation of a client when:

• (1) the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law; or

• (4) the lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.
Rule 1.16 Declining or terminating representation.

(c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when:

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
(3) the client has used the lawyer's services to perpetrate a crime or fraud;
(4) the client insists upon taking action with which the lawyer has a fundamental disagreement;
(6) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;
(11) withdrawal is permitted under Rule 1.13(c) or other law;
(13) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.
Rule 1.16 Declining or terminating representation.

(e) Even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.
BUT: Here’s Comment #9 to the Rule...

[9] The duties defined in this Rule apply 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.
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. **Defining or identifying the client of a lawyer representing a government entity depends on applicable federal, state and local law and is a matter beyond the scope of these Rules. See Scope [9].**
Moreover, a government lawyer may have greater authority under law to question a government official’s conduct than 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. In addition, the duties of government and military lawyers may be defined by law. This Rule does not limit that authority.
Who Is The Client: Conflict Scenarios
“Representation” of Non-District Employees.

• Court Appointment of the County Attorney
  • Child Support
Court Appointment of the County Attorney

Family Court Act § 254
Presentation by corporation counsel, county attorney or district attorney

The family court or the appropriate appellate division may request the appropriate county attorney to present the case in support of the petition when it believes such presentation will serve the purposes of the act.

When so requested, the corporation counsel or county attorney shall present the case in support of the petition and assist in all stages of the proceedings, including appeals.

Note: the statute refers to “present the ... petition”, not “representation” of a party. Usually occurs in PINS and JD cases.
A social services district represents the interests of the district in performing its functions and duties and not the interests of any party. The interests of a district shall include, but are not limited to, establishing paternity, and establishing, modifying and enforcing child support orders.

The provision of child support services pursuant to this title does not constitute nor create an attorney-client relationship between the individual receiving services and any attorney representing or appearing for the district. A social services district shall provide notice to any individual requesting or receiving services that the attorney representing or appearing for the district does not represent the individual and that the individual has a right to retain his or her own legal counsel.
Disputes Within or Between County Departments

- “Intramural” disputes
- Disputes between agencies
  - Illegal actions
Disputes Within Agencies-“Intramural” Disputes
For example, let’s say that you have an Article 10 abuse/neglect case in Family Court.
The fact finding hearing on an Article 10 neglect case is imminent. The child is in foster care.

There is a child protective case worker and a foster care case worker. Both are employees of the local district. One believes that something less than a neglect finding would be an appropriate resolution of the fact-finding portion of the case. The other is of the view that a neglect finding is required.

What do you do?
Initially, you identify that as the employees of the organization (the local district), the caseworkers are representatives of the client, the local district. As such, they have the apparent authority to act for the organization. You do need to have one opinion to present to the Court.
Consider and frankly discuss the strength of the case, witness, proof and legal issues, the likelihood of success and likely outcomes with the caseworkers. This might help them with their decision making process and lead to one opinion.
Another consideration might be the point of view of the case worker who will have to work with the order. Do they need the neglect finding or can they accomplish what they need to do with an order that has less than that?
If after these discussions, there is still no agreement, then what?
Coin Flip?
Or

Wait until you are in court and ask for an adjournment to talk it over some more with the caseworkers?
Or

Well before the court date, advise the case workers that when you need to have one position to represent in court. Indicate they need to sit down with their supervisors and come to an agreement on what the agency’s (the organization that you represent) position is. Request they let you know what that position is well before the day of court so you can prepare to advocate for it?
• This is not an option when you only learn of the conflict on the hearing date. Then, if instant communication with supervisors can not resolve the difference quickly, an adjournment may be needed or a quick decision reached.
A variation on this scenario is a dispute between a case worker and their supervisor.
Assume the caseworker supports something less than a neglect finding, but the supervisor insists upon a neglect finding. Whose position prevails? What happens when the judge asks you whether the caseworker would be okay with something less than a neglect finding?
Think about that one
• The organization is your client and the view of the higher authority prevails. When the judge asks you the caseworker’s position, you inform the judge of your client’s position, here the supervisor’s. The caseworker should be prepared prior to the court appearance that you will be advocating the supervisor’s position and expect that in the court appearance, she will support that position.
Recap

Since it is the organization that you are representing, you have to make sure that you understand what the organization’s position is.
Recap

Although the concept of “the organization is the client” is fairly simple, the client’s staff may have different views regarding what the client’s position should be.
Recap

In those situations, part of your job is to help the organization determine what its position is, which may include mediating between its members.
Disputes between County agencies
For example, you meet with personnel from various County departments concerning the failure of a vendor to timely repay the County for overcharging a County agency.
The vendor is a large, not-for-profit corporation. It spends large sums on advertising, touting their good works. It has numerous contracts with the county social services district and other county agencies, worth millions of dollars in total.
Although there are supervisory personnel at this meeting, there are no department heads present.
At the meeting, you resolve that the vendor owes about $500,000 to the agency. Despite agreeing to a repayment plan, the vendor has made only one monthly payment in the past year. In light of that, all at the meeting agree that it would be appropriate to initiate some form of collection action.
Having formulated this plan of action, do you:

a) Initiate a collection action, without consulting the County Executive’s Office, the County Attorney or the Social Services Commissioner, confident that they won’t mind the unexpected, angry phone call from the CEO of the vendor or the resulting publicity?
Or

b) Notify those offices and officials at the same time that you commence the action, confident that none will have qualms about your plan or any information that might make you reconsider the decision?
Or

c) Before proceeding further, tell those at the meeting that they should inform and get the approval of the County Executive’s Office, the County Attorney and the Commissioner of Social Services before proceeding?
If you answered (c), you have probably protected your client, the organization, by informing higher decision makers in the organization of your advice and giving them the opportunity to decide if this is best for the County and the local district.
“It’s easier to seek forgiveness than to ask permission” is a perilous path to travel for at will employees.
The stickier wicket arises there is a real disagreement among agencies, especially where you are assigned to represent the agencies in conflict.
In those situations, you will need a higher authority to make the decision. You still need to be prepared to offer facts and advice to those decision makers.
Although for the most part, these disputes will be resolved internally, keep in mind...
Comment to Rule 1.13

Acting in the Best Interest of the Organization

[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.

(h)owever, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization.
Illegal Actions
If you find yourself working for an entity where illegal actions are contemplated or occurring, keep in mind...
Rules 1.13(b) and (c)

(b) If an organization’s lawyer knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that
(i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and
(ii) 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.
The lawyer shall consider:
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:

(1) asking reconsideration of the matter;

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

(3) referring the matter to a higher organizational authority, including, if warranted by the seriousness of the matter, to the highest authority that can legally act on behalf of the organization.
If, despite the lawyer's efforts, the highest authority insists upon action or a refusal to act; and that is clearly in violation of law and is likely to result in a substantial injury to the organization,

the lawyer may reveal confidential information only if permitted by Rule 1.6 and may resign in accordance with Rule 1.16.
QUESTIONS?
Thank You!