

Ethical Representation of Agency Clients:

*Who is my client, and
what are my duties?*

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Representing an Agency Client

Who is the client?

- Besides KRPC 1.13, what Rules of Professional Conduct should I consider?

Once I clearly identify my client, what's next?

What if I am concerned about the actions of one of the constituents? What are my obligations and what do I do?

Case examples

Hypotheticals

Representing an Agency Client

- **Who is the client?**

- **KRPC 1.13 (Organization as Client)**

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

- *Comment 1:*

- An organization's client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders, and other constituents.

- *Comment 2:*

- Officers, directors, employees, and shareholders are the constituents of the corporate organizational client.

- **What does this practically mean?**

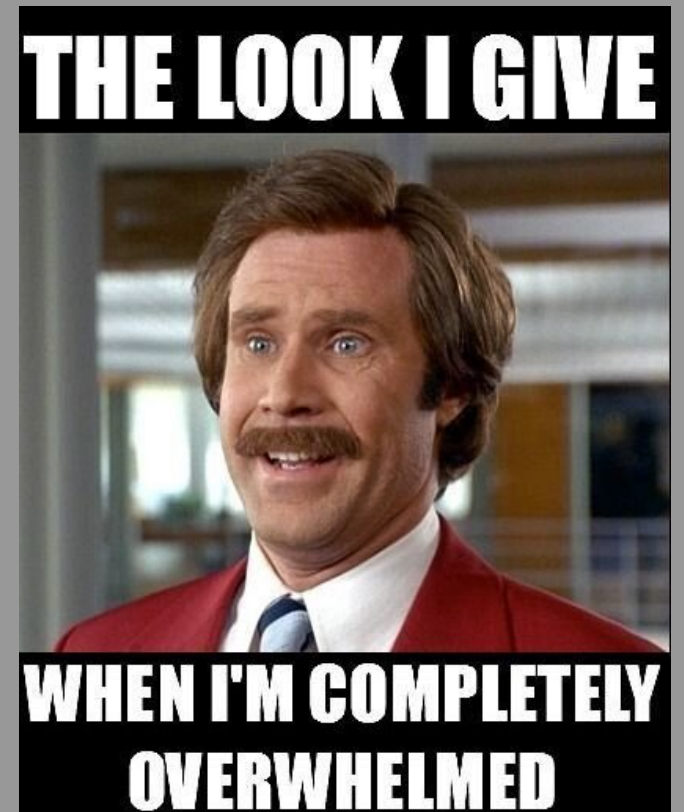


Representing an Agency Client

- Who is the client?

The agency itself!

- Seems simple, right?



Representing an Agency Client

- The comments suggest, that it isn't always so easy, but fortunately they give guidance to help us identify who our client is.
- *Comment 7:*
 - “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 is generally the government as a whole.”

Representing an Agency Client

Scope (2021 Kan. S. Ct. R. 316-17)

- 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 a private client-lawyer relationship. 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.

Implication of other Rules

KRPC 1.13 Comment 3 gives further guidance:

- “When one of the constituents of an organizational client communicates with the organization’s lawyer in that person’s organizational capacity, the communication is protected by Rule 1.6 [. . .] This does not mean, however, the constituents of an organizational client are the clients of the lawyer.”

How else is KRPC 1.6 implicated?

- Comment 3 continues: “**The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.**”

Implication of other Rules

- **Authorized dual representation?**
 - **Other government entities? Yes**
 - **Constituents of your client? Yes**

Subject to 1.7 (Conflict of Interest: Current Client) and 1.11 (Successive Government and Private Employment)

Examples across the country— Identifying the client

Maryland Attorney General's opinion advises that the County Attorney represents the corporate entity, not the county's citizens. "[T]he county attorney should act with due regard for the public interest; an attorney-client relationship as such does not ordinarily exist between the county attorney and the citizens of the county."

Montana Bar Ethics Committee found that a staff attorney for a state administrative agency represented the state agency and must proceed as is reasonably necessary in the best interest of that agency. It further noted that the duty of confidentiality was to the agency as a whole, not to its individual members.

Examples across the country—Dual Representation

- **Maryland State Bar Association Committee on Ethics (2003) was faced with a question: “May a county attorney’s office simultaneously represent a zoning appeals board and a county agency that is a party to litigation before the board?”**
 - **Analysis:**
 - **Review 1.7—conflict check**
 - **Review 1.6—confidentially. What procedure or policy is in place to avoid inadvertent disclosure of confidential information?**
 - **Local legislative standards that prohibit representation?**

Examples across the country—Dual Representation

There is the authority for two propositions:

(1) that an attorney for a governmental entity usually has only one client, the entity itself, which acts through constituent sub-entities and officials; and

(2) that a constituent sub-entity or official may become an independent client of the entity's attorney only if the constituent's sub-entity or official possesses the authority to act independently of the main entity and if the entity's attorney is asked to represent the constituent sub-entity or official in its independent capacity." (State Bar of California, Standing Committee on Professional Responsibility and Conduct)

Additionally, in 1997 California Court ruled that a public attorney may advise both the governmental entity and its independent retirement board as long as written consent is received. *Chapman v. Superior Court*, 70 Cal. App. 3d 23.

**Now the
client is
identified.**

What next?

- **What happens if the Client's interests are adverse to a constituent?**
 - Back to the comments!
 - *Comment 8:* The lawyer should advise these constituents:
 - **Of the conflict or potential conflict**
 - **That the lawyer cannot represent such constituent**
 - **That the constituent may wish to obtain independent representation**
 - **Discussions between the lawyer and the constituent may not be privileged**

**What if
you're
worried
about
decisions or
actions
being made?**

- **What do I do if I have knowledge that someone associated (officer, employee, etc) is engaged in action, intends to act, or refuses to act in a manner that violates the legal obligation of the organization or violates the law that could be imputed to the organization and cause substantial injury to the organization?**

What should you do?

A. Nothing, not my problem; the constituent is not my client.

B. Go to the media; this must be known to protect my client or the public.

C. Follow the procedure outlined in KRPC 1.13.



What if you're worried about decisions or actions being made?

- CRPC 1.13 (b)(1)-(3)
 - As the attorney for the organization, you have an ethical duty to follow these steps. You **MUST** follow the “chain of command”.
 - This list is not exhaustive. “may include among others”
 - 1-Ask for reconsideration
 - 2-Advise individual to seek separate legal opinion on the matter
 - 3-Refer the matter to higher authority in the organization.
 - Comment 4 gives more instruction, including reviewing your organization’s stated policy.




Report Up, Not Out

- **“The lawyer has a duty to ‘report up’ if a reasonable lawyer would believe that the constituent's conduct violates a legal obligation and is likely to result in substantial injury to the organization.”**

Up the Ladder or Out the Door: Corporate Counsel's Obligations with Respect to Corporate Misconduct (Journal of the Kansas Bar Association, March/April 2021)

**IF YOU COULD JUST REPORT
ALL ALLEGATIONS ABOUT ME TO ME.**

THAT WOULD BE GREAT



What if those actions don't work? What now?

- **KRPC 1.13(c):** “If, despite the lawyer’s efforts in accordance with paragraph (b) [. . .] the lawyer shall follow Rule 1.16.”
- **Reminder, if you withdraw, the organization becomes a former client, and you have additional legal obligations under KRPC 1.9. The rules of KRPC 1.6 also survive the termination of representation.**

Learn from others.

In re Harding, 290 Kan 81 (2010).

- 90-day suspension of city attorney, rather than censure, was warranted when he violated ethics rules by disclosing confidential information, some of which surfaced in the newspaper, that was obtained via an attorney/client relationship with the city and by failing to proceed in a manner consistent with the best interest of his organizational client.
- While he had practiced law for 32 years without any discipline, was respected by peers, acknowledged his wrongful conduct, and apologized, the court found he knowingly violated his duty to the city and caused actual injury to the city and to the reputation of city council members. Further, his conduct was motivated by anger and selfishness.

- ***In re Diaz*, 295 Kan 1071 (2012)**

- **Disbarment was appropriate discipline for misconduct of attorney, who received commission from United States Navy to serve as judge advocate, in disclosing classified information regarding individual detainees at Guantanamo Bay, which resulted in four felony convictions, six months' actual confinement, and dismissal from naval service.**

Learn from others.

Matter of Bergman, 305 Kan. 429 (2016)

**Learn from
others.**

- In analyzing finding a violation of KRPC 1.13, the hearing panel found:
 - Under subsection (b), the respondent failed to address or report substantial injury to KCT caused by Mr. Somervell and Mr. Mader—the diversion and appropriation of the railcar purchase which had been negotiated for KCT, the attempt to lease the railcar owned by Tallgrass Railcars to KCT, and the appropriation of KCT assets for the renovation and improvement of the railcar owned by Tallgrass Railcars. Under subsection (d), the respondent failed to explain to the board of directors that KCT’s interests were adverse to its constituents, Mr. Somervell and Mr. Mader.
- Conduct resulted in indefinite suspension.

Have Questions? CALL US!

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