



LEGAL ETHICS PROBLEMS FOR WATER
LAW PRACTITIONERS

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Legal Ethics Problems for Water Law Practitioners

Goal: To provide examples of ethical problems a lawyer in the water law field may face and show how the Rules of Professional Conduct provide guidance.

Hypothetical #1: Duty of Confidentiality vs. Duty of Disclosure within an Organization

Facts

You are general counsel of XYZ Corporation, which produces chemical fertilizers. These fertilizers are composed of highly toxic materials. If even a small quantity of these materials seeps into a region's drinking water, deaths from cancer over a ten-year period can be predicted to rise by 5%. Because of the serious risk of toxic spills, the corporation must file detailed quarterly reports with the EPA regarding disposition of the materials. To knowingly file an inaccurate report is a federal crime and can subject your client to significant civil fines.

You have just been told by an XYZ plant manager that, when she recently reported to corporate management that she could not account for 10,000 pounds of toxic material, the company's management began preparing to falsely report that the missing material was sold to another company at a substantial profit.

Source: THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY PROBLEMS AND MATERIALS (10TH ED.), pgs. 148-149

Hypothetical #1: Duty of Confidentiality vs. Duty of Disclosure within an Organization

Issues

- What is your responsibility?
- To whom do you owe your loyalty?
- Is the information you have learned protected by the lawyer's ethical duty of confidentiality?
- What actions should the lawyer take?
- Can/should you report the situation to the EPA?



Rules and Comments that Provide Guidance (abridged)

Rule 8.4

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

Rule 8.4 Cont'd

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Scope: Comment [21]

The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The comments are intended as guides to interpretation, but the text of each Rule is authoritative.

Rule 1.13(a) and Comments

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

Rule 1.13 Comment [1]

An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

Rule 1.2(a)

Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation.

Rule 1.2 Comment [2]

A lawyer is not required to pursue objectives simply because a client may wish that the lawyer do so. Conversely, lawyers usually defer to the client regarding concern for third persons who might be adversely affected. Other law may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. Conversely, the client may resolve the disagreement by discharging the lawyer.

Rule 1.6(a)

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

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, intends to act or refuses 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 that reasonably might be imputed to the organization, and that 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.

Rule 1.13 (b) Cont'd

Unless the lawyer reasonably believes that it is not necessary in the best interests of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

Rule 1.13(b) Comment [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. Paragraph (b) makes clear, however that when the lawyer knows that the organization is likely to be substantially injured by the 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. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

Rule 1.13 Comment [4]

In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, 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. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter or advise that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization.

Rule 1.13 Comment [4] Cont'd

If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent.

Rule 1.13 Comment [4] Cont'd

Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

Rule 13(b) Comment 5

Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body.

Rule 1.13(c)

Except as provided in paragraph (d), if:

- (1) despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and**
- (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,**

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

Rule 1.6(b)

A lawyer may reveal information relating to representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;**
- (2) to prevent the client from committing:**
 - (i) a crime; or**
 - (ii) a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;**

Rule 1.6(b) Cont'd

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services, provided that the lawyer has first made reasonable efforts to contact the client so that the client can rectify such criminal or fraudulent act, but the lawyer has been unable to do so, or the lawyer has contacted the client and called upon the client to rectify such criminal or fraudulent act and the client has refused or has been unable to do so.

(6) as permitted or required to comply with these Rules, other law or a court order.

Rule 1.6 Comment [6]

Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions.

Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat.

Rule 1.6 Comment [6] Cont'd

Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening disease or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

Rule 2.1

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Rule 2.1 Comment [1]

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

Rule 2.1 Comment [2]

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

Rule 1.13(f)

In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Rule 1.4(a)

A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional conduct or other law.

Rule 1.2(d)

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Rule 1.2 Comment [10]

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent.

Rule 1.2 Comment [10] Cont'd

The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like.

Rule 1.2 Comment [13]

If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct.

Hypothetical #2: Conflict of Interests and the Government Lawyer

The Revolving Door Facts

The law firm of Firm & Firmer represents a consumer group that is using the firm to conduct a private investigation to determine whether grounds exist to sue a manufacturing company, Toys Almighty, for violation of product safety laws.

After the investigation was in progress, the firm hired an associate who recently spent three years with the Consumer Product Safety Commission working on safety guidelines for the industry in which Toys Almighty operates. In particular, he represented the CPSC in an administrative hearing inquiring into the safety practices of twelve toy manufacturers, including Toys Almighty.

Source: GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING (3RD ED.)
pgs. 15-24, 25

Hypothetical #2: Conflict of Interest and the Government Lawyer

The Revolving Door Issues

- Can the law firm continue the investigation?
- If so, under what circumstances?

Hypothetical #2 Analysis

CPSC
L

v.

TOYS ALMIGHTY

PRIVATE GROUP
FIRM + L

v.

TOYS ALMIGHTY

U.S.
L

v.

General Motors

NYC
FIRM + L

v.

General Motors

See 501 F.2d 639 (2d Cir. 1974).

Rule 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees

- (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:**
- (1) is subject to Rule 1.9(c); and**
 - (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.**

Rule 1.9(c)

A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

- (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has been generally known; or**
- (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.**

Rule 1.9 Comment [8]

Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

Rule 1.11(e)

As used in this Rule, the term "matter" includes:

- (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and**
- (2) any other matter covered by the conflict of interest rules of the appropriate government agency.**

Rule 1.11 Comment [10]

For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

Rule 1.9 Comment [2]

The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

Rule 1.11(b)

When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

- (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and**
- (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.**

Rule 1.11 Comment [3]

Paragraph (a)(2) applies regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a).

Rule 1.11 Comment [4]

The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer has participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

Rule 1.11 Comment [7]

Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

Rule 1.11(c)

Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person.

Rule 1.11(c) Cont'd

As used in this Rule, the term "confidential government information" means information that has been obtained under the governmental authority and which, at the time this Rule applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public.

Rule 1.11(c) Cont'd

A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

Rule 1.11 Comment [8]

Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

Rule 1.11 Comment [6]

Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k)(requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

Rule 1.0(k)

"Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

Rule 1.11(d)

Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially.

Rule 1.11 Comment [5]

When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [9].

Rule 1.13 Comment [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. 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.

Rule 1.13 Comment [9] Cont'd

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 purpose 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.

Rule 1.13 Comment [9] Cont'd

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 the 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.

QUESTIONS