

The
INTERNATIONAL MUNICIPAL
LAWYERS' ASSOCIATION

Presents

ETHICS JEOPARDY

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The Organization?	Who's the Client	"Not so Fast"	Potpurri	Scope of Representation	Government Lawyers
<u>10</u>	<u>10</u>	<u>10</u>	<u>10</u>	<u>10</u>	<u>10</u>
<u>20</u>	<u>20</u>	<u>20</u>	<u>20</u>	<u>20</u>	<u>20</u>
<u>30</u>	<u>30</u>	<u>30</u>	<u>30</u>	<u>30</u>	<u>30</u>
<u>40</u>	<u>40</u>	<u>40</u>	<u>40</u>	<u>40</u>	<u>40</u>
<u>50</u>	<u>50</u>	<u>50</u>	<u>50</u>	<u>50</u>	<u>50</u>

2

**The Organization?
10 Points**

Is a governmental organization such as a city, town or state government an organizational client for purposes of Rule 1.13?

3

The Organization?
10 Points

“The duty defined in this Rule applies to governmental organizations.”

“A different balance between maintaining confidentiality and preventing a wrongful act may apply.

ABA Rule 1.13—Comment 9

Categories

4

The Organization?
20 Points

The zoning director proposes legislation to establish a zoning district for medical marijuana sales but asks you to keep this quiet. A council member wants to discuss your conversation with the zoning director

How do you respond?

5

The Organization?
20 Points

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 and may not be disclosed outside the organization, but may be disclosed internally when appropriate to do so.

This does not mean that constituents of an organizational client are the clients of the lawyer.

ABA Rule 1.13---Comment 2
ABA Rule 1.13. Comment 9

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The Organization?
20 Points

Under these circumstances you might represent the zoning department as opposed to or in addition to the council as a whole. The structure of the specific organization might make a difference

ABA Rule 1.13. Comment 9

Categories

7

The Organization?
30 Points

You conclude that the Mayor and Chief of Police are violating the law, what are your obligations under Rule 1.13?

8

The Organization?
30 Points

The lawyer shall proceed as is reasonably necessary in the best interest of the organization.

Refer the matter to higher authority in the organization unless this action is deemed not to be in the best interest of the organization.

A government lawyer may have authority under applicable law to question conduct more extensively than that of a lawyer for a private organization in similar circumstances.

9

**The Organization?
30 Points**

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.

ABA Rule 1.13—Comment 4

Categories

10

**The Organization?
40 Points**

You are the City Attorney in a small town and one of the town councilmembers is also a lawyer. You have been contacted to represent the spouse in a heated divorce in which the councilmember represents the other spouse. What should you do?

11

**The Organization?
40 Points**

Unless you have developed an attorney client relationship with the councilmember, you only represent the town, so no direct conflict. However, Rule 1.7(a)(2) prohibits representation when the conflict involves “a personal interest of the lawyer.” The lawyer must determine if the relationship with the councilmember while representing the town involves such a conflict; if not, the lawyer should still advise the client and gain consent.

Rule 1.7

Categories

12

The Organization? 50 Points

As City Attorney, you have been asked to represent the city in a discrimination claim filed with the EEOC. You are about to interview the director of the agency where the discrimination has allegedly taken place.

What should you tell the director, prior to the interview?

13

The Organization? 50 Points

In dealing with an organization's directors, officers, employees, . . . 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.

ABA Rule 1.13 (f); Upjohn Warning

Categories

14

Who's the Client? 10 Points

A resident calls you on the phone and describes a conflict that has arisen with an adjoining neighbor over an overhanging and perhaps diseased tree. The resident seeks your advice – how do you respond?

15

Who's the Client?
10 Points

In representing the city, your office represents the city, not the resident. Sometimes you can point to some FAQ's such as rights of neighbors regarding overhanging trees, but need to advise caller to speak with a lawyer.

ABA Rule 1.13(a) Comment 1

Categories

16

Who's the Client?
20 Points

In a council-manager form of government, the city manager hires you to be the city attorney.

Do you represent the manager, the council, the city, the residents, someone else?

17

Who's the Client?
20 Points

May depend on your charter or state law. Generally, you represent the city as an organization.

Identifying the client may be more difficult in the government context. 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.

A government lawyer may have authority under applicable law to question conduct more extensively than that of a lawyer for a private organization in similar circumstances.

**ABA Rule 1.13(a)
Comments 2 and 9**

Categories

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**Who's the Client?
30 Points**

You are defending a City truck driver in a personal injury claim on behalf of the City. It becomes apparent that the driver was actually not performing City business but was running personal errands. Can you represent the truck driver personally as well as on behalf of the City?

19

**Who's the Client?
30 Points**

You should advise the driver that representing him/her might be adverse to that of the organization and that you cannot represent her/him unless both the organization and driver consent to the dual representation in writing.

ABA Rule 1.13 Comment 10
ABA Rule 1.7

Categories

20

**Who's the Client?
40 Points**

You are in private practice. The Town Manager has approached you about representing the town in a high profile sexual harassment case filed against the Mayor. She has provided you with intimate details of the claim and possible defenses. You decline to take the case.

Are those communications protected by the attorney client privilege?

21

**Who's the Client?
40 Points**

A lawyer who has discussions with a prospective client shall not use or reveal information learned in the conversation except as Rule 1.9 (former clients) would permit.

ABA Rule 1.18 (b)

Categories

22

**Who's the Client?
50 Points**

You are the city attorney of a small city with a full time private practice.
Can you represent the city's director of public works in a DUI case brought by a state trooper in a different judicial district?

23

**Who's the Client?
50 Points**

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. Need to check your state's rules and ethics opinions as jurisdictions vary on this issue and it is fact dependent.

Can the "public" consent to a conflict?

ABA Rule 1.13(g)

24

“Not so Fast”
10 Points

One of the Council members asks you privately during a break in a board meeting for your opinion as to whether the member can move to reconsider a motion the member has just voted to approve in a 3-2 favorable vote. A second member (who offered the original motion) saw you speaking and asks what the other member wanted.

Is this communication protected by Rule 1.6?

25

“Not so Fast”
10 Points

Yes and No. It is protected from disclosure outside the organization, as the organization is the client entitled to confidentiality. But no individual confidentiality unless you have established an attorney client relationship with the individual councilmember. The councilmembers should be advised as to the extent of the lawyer’s representation.

Organization may adopt rules to deal with this.

Category: **ABA Rule 1.13**

26

“Not so Fast”
20 Points

You have been the City Attorney for 10 years before “going to the dark side” to represent land developers. What considerations must you address?

27

“Not so Fast”

20 Points

- The nature of your representation of the City in land use issues.
- Is it a matter in which the lawyer participated personally and substantially?
- Are the issues in the matter adverse to your former client?
- Have you obtained written consent?
- Do City ethics laws or rules apply?

ABA Rule 1.9(a) and Rule 1.11

Categories

28

“Not so Fast”

30 Points

During your representation of the City you came to know that the Planning Commission rarely granted variances, but routinely approved re-zone applications. Can you use this information in your new position representing land developers?

29

“Not so Fast”

30 Points

You are prohibited from using information related to the former representation unless that information has become generally known.

ABA Rule 1.9(c)(1) and Rule 1.11

Categories

30

“Not so Fast” 40 Points

You represented the city and its planning and zoning commission during the subdivision and re-zoning phase of the project. Now you want to represent the developer in the specific site plan development that may require obtaining a variance from certain design criteria. Any problems?

31

“Not so Fast” 40 Points

Close call.

If you represented City in the matter personally and substantially, you may need consent from the City.

Matters are “substantially related” if they involve the same transaction or legal dispute or if there is a risk that the lawyer obtained confidential information that could materially advance the client’s claim.

Also must comply with City ethics laws.

Categories

ABA Rule 1.11 and ABA Rule 1.9 Comment 3

32

“Not so Fast” 50 Points

You are an attorney employee of a government and you believe that you have certain rights protected by law that include the right to grieve or otherwise seek relief from a violation of your rights as an employee (for example harassment). Can you exercise your rights to grieve or file a complaint without resigning your position?

33

“Not so Fast”

50 Points

During the “sequester” various bar associations were asked if employees of federal agencies could file to protect their rights under federal law while defending the agency against other or similar claims. Most bar associations reached the conclusion that with the consent of the agency to the conflict that the attorney could do so, but might be prohibited from defending against the same claims as the attorney was pursuing.

MD Op. 2013-09 – It would likely violate public policy to require an attorney to resign to exercise rights protected by law.

Categories

34

Potpourri

10 Points

As often happens, you get an email from opposing counsel that attacks the county, its staff and elected officials for pursuing what the lawyer asserts amounts to a harassing claim against the client. Opposing counsel copies the client. Can you reply all?

35

Potpourri

10 Points

It depends. See SC Opinion 18-04. Generally no because Rule 4.2 prohibits contacting a person represented by counsel about the subject of the representation, but there can be circumstances where there’s an implied consent to contacting the client directly. Prior practice or the nature of the communication may allow for an implication that consent has been given.

What if the email copied your client?

Categories

36

Potpourri
20 Points

The City Clerk has received a public records request for all bills letters and memoranda that were exchanged between the city attorney and the Mayor for the past three months.

How do you respond?

37

Potpourri
20 Points

Most FOIA statutes have an exception that protects matters “as otherwise provided by law” It seems that this provision of the FOIA law could be used to exercise the attorney-client privilege that exists in most states. But may require redaction rather than refusal.

Categories

38

Potpourri
30 Points

You have been denied a permit by a building official may you contact the Mayor or City Manager without getting consent of the city attorney to try to persuade them to intercede and have the permit granted?

39

Potpourri
30 Points

The rule (4.2) prohibits discussing “the matter” with a person the attorney knows to be represented. It prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter . . .

ABA 97-408

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Potpourri
40 Points

Your Mayor is a flamboyant and controversial character. You think it would make for an interesting “novel” and you ask her for permission to write this book based “loosely on her life” Any problem?

41

Potpourri
40 Points

Maybe

Prior to the conclusion of the representation, a lawyer may not negotiate literary or media rights based in substantial part on information relating to the representation.

ABA Rule 1.8(d)

Categories

42

Potpourri
50 Points

Prior to the adoption of Rule 1.8, what ethical standard expressly prohibited sexual relations between lawyers and clients?

43

Potpourri
50 Points

There was none.

Categories

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Scope of Representation
10 Points

The Mayor wants you to represent all the various City departments with the exception of the Public Works Department. Is this permitted?

45

**Scope of Representation
10 Points**

Under the Code of Professional Conduct, the scope of services provided by a lawyer may be limited by agreement with [or direction from] the client. The terms of the representation may exclude certain means[departments?] that might otherwise accomplish the client's objectives.

The charter or statute may limit the Mayor's power in this regard.

ABA Rule 1.2(a)

Categories

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**Scope of Representation
20 Points**

You are defending the City in an inverse condemnation claim involving several "blighted" properties. Must you seek Council approval prior to taking the depositions of each of the claimants?

47

**Scope of Representation
20 Points**

Not unless you have received specific instructions on that topic.

A lawyer may take such action on behalf of a client as is impliedly authorized to carry out the representation.

But...a lawyer is required to keep the client reasonably informed about the status of the matter.

ABA Rule 1.4(a)

Categories

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Scope of Representation 30 Points

You are in the midst of a brutal lawsuit. A group of council members is losing the stomach for continued litigation and are urging settlement. What are your obligations?

49

Scope of Representation 30 Points

- (1) Keep the client reasonably informed about the status of the matter. ABA Rule 1.4(a)
- (2) Abide by the client's ultimate decision as to settle or not.

ABA Rule 1.2

Categories

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Scope of Representation 40 Points

Your client is working on an economic development project that requires county support. The economic development director advises that a grant is forthcoming but won't be in hand before an appropriation is needed to consummate the deal. The director suggests telling the council that everything is in place and that the council can appropriate money for the project. How do you proceed?

51

Scope of Representation
40 Points

A lawyer may not assist a client in activity the lawyer knows to be criminal or fraudulent
Rule 1.2(d).

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Scope of Representation
40 Points

A County Attorney was recently indicted along with the full board of supervisors involving fraud in the Economic Development agency.

On September 24, 2019, a special grand jury indicted 14 officials in Warren County Virginia as a result of corrupt practices involving its Economic Development Authority. The former County Attorney was one of the 14. The Economic Development Director had previously been arrested and the County Sheriff committed suicide shortly thereafter having himself been immersed in the scandal.

According to the attorney for the former county attorney "He was instrumental in initiating the investigation into McDonald's conduct and vigorously pursuing the matter, doing what he could to protect the interests of the county and the EDA."

Categories

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Scope of Representation
50 Points

Your client wants you to aggressively go after one of the plaintiff's during her deposition as she has filed to run against one of the incumbent council members. The client wants you to ask questions the answer to which her opponent can use in the campaign. The client insists that this is an opportunity that must not be lost.

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Scope of Representation 50 Points

Rule 4.4 prohibits using means that have no substantial purpose other than to embarrass or burden a third party.

- (1) Consult with the client attempting to arrive at a mutually acceptable solution.
- (2) If the dispute is irreconcilable—withdraw **Rule 1.16(a)(3)**
- (3) Remind client of **Rule 4.4** prohibiting the use of means that have no substantial purpose other than to embarrass, delay or burden a third party.

Categories

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Government Lawyers 10 Points

Can a former councilmember represent clients in challenging the constitutionality of a city ordinance that the councilmember voted to adopt? Or voted against adoption? Or to challenge the council's authority to adopt the ordinance?

56

Government Lawyers 10 Points

Rule 1.11 provides (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.

Categories

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**Government Lawyers
20 Points**

May a government or organization's lawyer send a litigation hold request to all employees where one or more employees may be the Plaintiff in the case requiring the hold?

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**Government Lawyers
20 Points**

Not according to Utah Ethics Opinion No. 13-01. Even though a blanket request to all employees, the request violates Rule 4.2. The lawyer may provide forms for departments to send to all employees so long as the lawyer does so without violating Rule 8.4 – having a third party act on the lawyer's behalf in a way the lawyer is prohibited from acting.

Categories

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**Government Lawyers
30 Points**

Can a government lawyer participate in a statewide opioid task force and upon leaving government service represent a pharmaceutical company in a suit by states and cities involving the opioid crisis?

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Government Lawyers

30 Points

(Reuters) - U.S. District Judge Dan Polster ruled ... that former Cleveland U.S. Attorney Carole Rendon, now in private practice at Baker & Hostetler, may not represent the pharmaceutical company Endo in two cases in the multidistrict litigation accusing opioids defendants of sparking the opioid crisis by misrepresenting the addictiveness of prescription painkillers.

... The ethics rule on related matters, he said, is supposed to preclude government lawyers from switching sides in the same case. That's not what Rendon did, according to Polster, because the opioids task force she headed did not investigate Endo or bring claims against the company.

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Government Lawyers

30 Points

□ Instead, Polster disqualified Rendon and Baker Hostetler *under the ethics rule barring ex-government lawyers from using confidential information obtained in their service* – and the judge only did so because the Justice Department confirmed Rendon's receipt of such information.

Categories

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Government Lawyers

40 Points

Your practice has been able to hire a law student to act as a law clerk. The law clerk advises that a legal research service that the clerk uses at school may yield better results than the service the firm uses. Can you get the clerk to use access through the school to conduct a research for the firm?

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**Government Lawyers
40 Points**

No. See Utah Opinion 11-03.

Categories

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**Government Lawyers
50 Points**

Can a private attorney enter into an engagement to represent a client against the city's police department while the attorney's firm is representing the city's planning department?

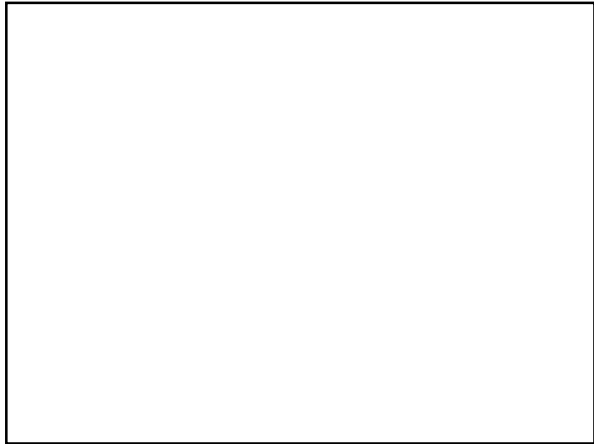
65

**Government Lawyers
50 Points**

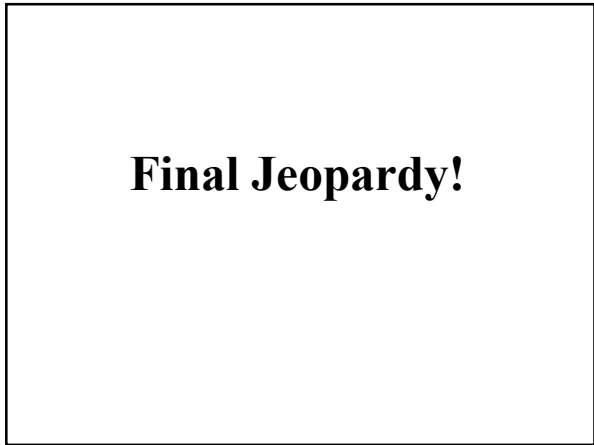
It depends.
Who is the client? If the city is the client, then probably not.
However, if the engagement recognizes that each department of the city is a separate client, then yes.
The critical question is always "who is the client?"

Categories

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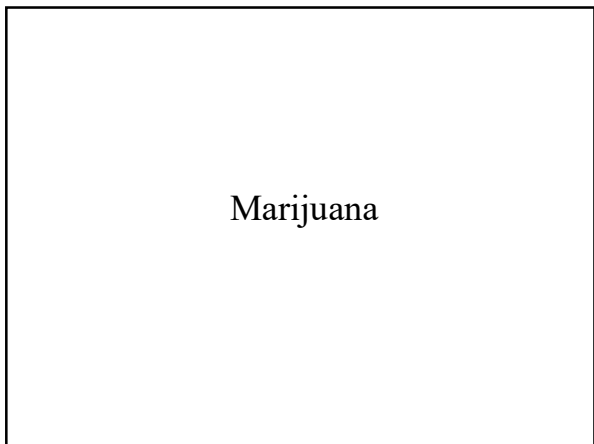


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Final Jeopardy!



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Marijuana

Can lawyers own an interest in marijuana companies?

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SC Opinion 19-03
Summary: While we do not express opinions on questions of law, the Committee cautions South Carolina licensed attorneys from participating in activities that are illegal under state or federal law, as criminal activity may constitute a violation of Rule 8.4, RPC, Rule 407, SCACR.

71

What about counselling client on marijuana?
 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.

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Maryland and other states have concluded that where the state has adopted legislation legalizing marijuana that counseling clients consistent with the laws of that state are permitted under Rule 1.2 despite the federal law.

Maryland 2016-10

Source ABA
