

# ETHICAL CONSIDERATIONS FOR GOVERNMENT ATTORNEYS

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## WHO IS THE CLIENT?

When an attorney is employed or retained by an organization, in this case a municipal corporation, and you have to deal with the stakeholders in the organization whether it be a Mayor, Supervisor, Board, agency, employees, etc., to whom does the attorney owe any loyalty from an ethical standpoint? Government lawyers must inform their clients about the nature of their relationship and clearly advise them about who is the client and the scope of any representation.





**“(A) A LAWYER EMPLOYED OR RETAINED BY AN ORGANIZATION REPRESENTS THE ORGANIZATION ACTING THROUGH ITS DULY AUTHORIZED CONSTITUENTS.”**

RULE 1.13 ORGANIZATION AS CLIENT



The Commentary to Rule 1.13 expressly states that this applies to governmental organizations. The client may be the government as a whole, simply a branch (legislative, executive), or a specific agency. **Remember that the government lawyer may have a greater responsibility and authority to question conduct than would a lawyer in a private organization in similar circumstances.**



## RULE 1.2 CLIENT/LAWYER RELATIONSHIP

The lawyer must abide by a client's decisions regarding the objectives of any representation

### (A)

Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter . . . .

### (B)

A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.



## RULE 1.2 (CONTINUED)

The lawyer must abide by a client's decisions regarding the objectives of any representation

(C)

A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(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.



## **THE PARTS DO NOT EQUAL THE WHOLE: ADVISE THE CONSTITUENTS**

If the interests of the organization differ from that of constituents, the lawyer must advise the latter that the lawyer does not represent the constituent with regard to the matter unless the specific representation has been approved.



## THEN WHAT?

Advise the constituents that they may wish to retain separate, independent counsel. The constituent must be advised that any discussions with the lawyer may not be privileged and that no attorney/client relationship exists. The attorney/client privilege belongs to the organization and may be waived only by the organization as a whole.

What does that mean? A single board member does not have the right to waive the privilege for the entire organization.



## REPORT UP

“(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 is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and 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. Unless the lawyer reasonably believes that it is not necessary in the best interest 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.”

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.



# AFTER REPORTING UP, WHAT CAN A LAWYER DO?



- 1 **ask** for reconsideration of the matter;
- 2 **advise** that a separate legal opinion on the matter be sought for presentation to an appropriate authority in the organization; or
- 3 **refer** 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.



# AND IF THEY DO NOT LISTEN...

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“(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 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:**

### **CONFIDENTIALITY OF INFORMATION -- DUTY**

“(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:

- 1** the client gives informed consent, as defined in Rule 1.0(j);
- 2** the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
- 3** the disclosure is permitted by paragraph (b).”

# WHAT IS CONFIDENTIAL?

“(a) . . . ”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. “Confidential information” does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.”

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**If it was discussed in an open session, it is not confidential versus an executive session where confidentiality automatically applies. If you are going to err, err on keeping the information confidential.**





## BUT WHEN IS CONFIDENTIAL NOT REALLY CONFIDENTIAL?

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

1. to prevent reasonably certain death or substantial bodily harm;
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. to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer’s firm or the law firm;(i) to defend the lawyer or the lawyer’s employees and associates against an accusation of wrongful conduct; or (ii) to establish or collect a fee; or
5. when permitted or required under these Rules or to comply with other law or court order.”

# MAY A LAWYER SECRETLY TAPE CONVERSATIONS?

ABA Formal Op. 01-422

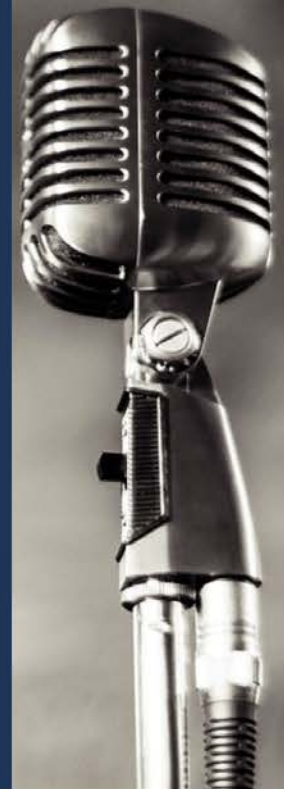
“A lawyer who electronically records a conversation without the knowledge of the other party or parties to the conversation does not necessarily violate the Model Rules. A lawyer may not, however, record conversations in violation of the law in a jurisdiction that forbids such conduct without the consent of all parties, nor falsely represent that a conversation is not being recorded.”

NYSBA, Committee on Professional Ethics Opinion 515 (1979)

“Except in special situations it is improper for a lawyer engaged in private practice to record electronically a conversation with another attorney or any other person without first advising the other party. We said that even if secret electronic recording of a conversation with one party’s consent is not illegal, it offends the traditional standards of fairness and candor that should characterize the practice of law.”

New York City Ethics Opinion 2003-02

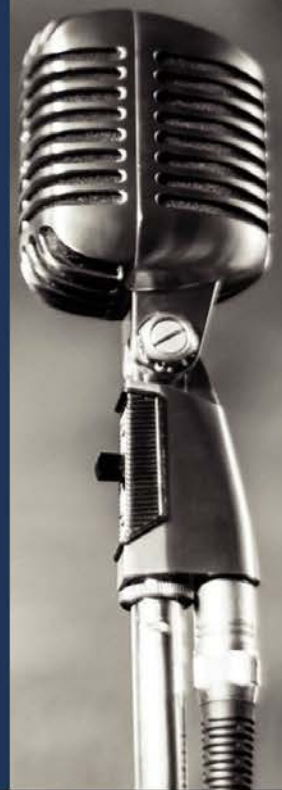
“A lawyer may not, as a matter of routine practice, tape record conversations without disclosing that the conversation is being taped. A lawyer may, however, engage in the undisclosed taping of a conversation if the lawyer has a reasonable basis for believing that disclosure of the taping would impair pursuit of a generally accepted societal good. The Committee is divided as to whether a lawyer may record a client-lawyer conversation with the knowledge of the client, but agrees that it is inadvisable to do so.”



# MAY A LAWYER SECRETLY TAPE CONVERSATIONS?

## New York City Ethics Opinion 2003-02 (Continued)

“[W]hile this Committee concludes that there are circumstances other than those addressed in our prior opinions in which an attorney may tape a conversation without disclosure to all participants, we adhere to the view that undisclosed taping as a routine practice is ethically impermissible. We further believe that attorneys should be extremely reluctant to engage in undisclosed taping and that, in assessing the need for it, attorneys should carefully consider whether their conduct, if it became known, would be considered by the general public to be fair and honorable.”



# RULE 1.7 CLIENT-LAWYER RELATIONSHIP

“(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

1. the representation of one client will be directly adverse to another client; or
2. there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.





## RULE 1.7 (CONTINUED)

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
2. the representation is not prohibited by law;
3. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
4. each affected client gives informed consent, confirmed in writing.”



## ATTORNEY CLIENT PRIVILEGE

See also, CPLR 4503

### **RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 ATTORNEY-CLIENT PRIVILEGE**

“Except as otherwise provided in this Restatement, the attorney-client privilege may be invoked as provided in § 86 with respect to: (1) a communication; (2) made between privileged persons; (3) in confidence; (4) for the purpose of obtaining or providing legal assistance for the client.”

# HOW DO YOU DETERMINE THE DEPTH OF THE PRIVILEGE?

There are two tests.

## CONTROL GROUP TEST

Privilege extends only to employees in a position to control or take a substantial part in a decision about action which the corporation may take upon the advice of the attorney, or authorized members of a body or board which has that authority.

## SUBJECT MATTER TEST

Privilege extends to confidential communications between attorney and any employee, provided the subject matter of the communication concerns the employee's corporate duties and the purpose of the communication involves the determining the depth of the privilege.

# **RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS**

## **§ 74 (2011-2012 EDITION)**

“Unless applicable law otherwise provides, the attorney-client privilege extends to a communication of a governmental organization as stated in § 73 and of an individual employee or other agent of a governmental organization as a client with respect to his or her personal interest as stated in §§ 68-72.”

See [law.uh.edu/faculty/adjunct/dstevenson/2019/Restatement](http://law.uh.edu/faculty/adjunct/dstevenson/2019/Restatement)

**NOW THAT YOU ARE THERE,  
HOW DO YOU GET OUT?**

## **RULE 1.16 DECLINING OR TERMINATING REPRESENTATION**

**(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:**

- (1) the representation will result in violation of the rules of professional conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

**(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:**

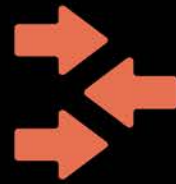
- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

## **RULE 1.16 (CONTINUED)**

**(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation.**

**When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.**

**(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.**



# CONFLICTS OF INTEREST



# GENERAL MUNICIPAL LAW ARTICLE 18

Governs conflicts of interest involving municipal employees, including government attorneys.

**SECTION 800(3) DEFINES "INTEREST" AS A "DIRECT OR INDIRECT PECUNIARY OR MATERIAL BENEFIT ACCRUING TO A MUNICIPAL OFFICER OR EMPLOYEE AS THE RESULT OF A CONTRACT WITH THE MUNICIPALITY WHICH SUCH OFFICER OR EMPLOYEE SERVES. FOR THE PURPOSES OF THIS ARTICLE A MUNICIPAL OFFICER OR EMPLOYEE SHALL BE DEEMED TO HAVE AN INTEREST IN THE CONTRACT OF (A) HIS SPOUSE, MINOR CHILDREN AND DEPENDENTS, EXCEPT A CONTRACT OF EMPLOYMENT WITH THE MUNICIPALITY WHICH SUCH OFFICER OR EMPLOYEE SERVES, (B) A FIRM, PARTNERSHIP OR ASSOCIATION OF WHICH SUCH OFFICER OR EMPLOYEE IS A MEMBER OR EMPLOYEE, (C) A CORPORATION OF WHICH SUCH OFFICER OR EMPLOYEE IS AN OFFICER, DIRECTOR OR EMPLOYEE AND (D) A CORPORATION ANY STOCK OF WHICH IS OWNED OR CONTROLLED DIRECTLY OR INDIRECTLY BY SUCH OFFICER OR EMPLOYEE."**

A willing or knowing violation of Article 18 is a misdemeanor. GML section 805.

# LAND USE AND OTHER ISSUES

## Contractual

attorney provides outside services to the municipality without bidding or disclosing an interest in a business

## Personal Financial Gain

representing a developer in a municipality where the lawyer also acts as the attorney for the municipality; representing criminal or traffic cases in the Court in the same municipality.

## Familial relationships

spouse has a business and bids on a contract with the municipality where the attorney will review and approve the contract; son or daughter seeks a zoning change to open a business in the same municipality

# QUESTION

**Same attorney represents the Zoning Board of Appeals or Planning Board while also representing a developer?**

**What if the attorney only acts as the Prosecutor in the municipality?**

New York Ethics Opinion 1130 (2017): A conflict exists for which no consent can overcome when one member of a law firm acts as Town Attorney, on inter alia, planning and zoning matters and another lawyer in the firm seeks to represent an applicant before the Town's planning board.

# QUESTION

The attorney is a member of a homeowners association that is suing a municipal board?

When should the attorney recuse himself or herself from the matter?

When should the attorney disclose a relationship?

# QUESTION

**Can an attorney file a tax assessment challenge against a municipality that is represented by the law firm?**

**What if that law firm also handles the tax certiorari cases for the municipality?**

**Is a wall sufficient?**

New York Ethics Opinion 1065 (2015): The law firm of a part-time prosecutor for Town may represent a client in an Article 78 proceeding against Village, involving actions of Village zoning board or Village planning board, where (i) the Town and Village are separate legal entities and have separate legal departments, (ii) the Town Attorney and his or her staff, including the part-time prosecutor, have no responsibility for prosecuting Village zoning and planning laws, and (iii) the proceeding would not involve Village law enforcement personnel, even though the Town and Village courts have been merged and the Village provides police protection services to both the Village and Town.

# QUESTION

An attorney drafts a local law creating a position as a special hearing officer for a municipality and later is appointed to that position?

Is that just thoughtful retirement planning or improper?



# **CASES/PUBLICATIONS OF INTEREST**

## IN RE GRAND JURY INVESTIGATION, 399 F.3D 527 (2D CIR. 2005)

The Court dealt with the issue of the attorney/client privilege of the Office of the Governor in light of the long standing recognition of the privilege. “There is no dispute in this case that these principles and assumptions apply to government lawyers and their clients under certain circumstances. The Government concedes, for instance, both that a governmental attorney-client privilege exists generally, and that it may be invoked in the civil context. (Gov't Brief at 33); see also *In Re: A Witness Before the Special Grand Jury*, 288 F.3d 289, 291 (7th Cir. 2002) (“[B]oth parties here concede that, at least in the civil and regulatory context, the government is entitled to the same attorney-client privilege as any other client.”). Ample authority supports both propositions.” *In re Grand Jury Investigation*, 399 F.3d 527, 532 (2d Cir. 2005). At issue was the extent of the privilege in the context of a federal grand jury investigation dealing with governmental corruption.



## IN RE GRAND JURY INVESTIGATION (CONTINUED)

“We believe that, if anything, the traditional rationale for the privilege applies with special force in the government context. It is crucial that government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice. Upholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business. Abrogating the privilege undermines that culture and thereby impairs the public interest.” *In re Grand Jury Investigation*, 399 F.3d 527, 534 (2d Cir. 2005)

# NEW YORK ETHICS OPINION 603 (1989)

A part-time assistant city attorney, or any other member or associate of his private law firm, may not represent clients before city agencies with which the attorney is associated; but the attorney or his law firm may represent private clients before other agencies, if the proposed representation and the agency are unrelated to the attorney's public function.

# ATTORNEY-CLIENT PRIVILEGE ARTICLES

- Jeffrey L. Goodman & Jason Zabokrtsky, The Attorney-Client Privilege and the Municipal Lawyer, 48 DRAKE L. REV. 655 (2000).
- Nancy Leong, Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys, 20 GEO. J. LEGAL ETHICS 163 (2007).
- Marion J. Radson & Elizabeth A. Waratuke, The Attorney-Client and Work Product Privileges of Government Entities, 30 STETSON L. REV. 799 (2001).
- Patricia E. Salkin, Beware: What You Say to Your [Government] Lawyer May Be Held Against You—The Erosion of Government Attorney-Client Confidentiality, 35 URB. LAWYER 283 (2003).

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