

MUNICIPAL ATTORNEYS AND THE MICHIGAN RULES OF PROFESSIONAL CONDUCT

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Gregory Stremers
Touma, Watson, Whaling, Coury,
Stremers & Thomas, P.C.

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e-mail: gtstremers@twwcc.com

WHO IS THE CLIENT?

I. Michigan Rules of Professional Conduct Rule: 1.13: Organization as the Client

(a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders, or other constituents.

(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 which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, 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 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.

(c) When the organization's highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by Rule 1.6 only if the lawyer reasonably believes that (1) the highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and (2) revealing the information is necessary in the best interest of the organization.

(d) 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 believes that such explanation is necessary to avoid misunderstandings on their part.

(e) 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.

II. MRPC 1.13 RELATIONSHIP TO OTHER RULES:

1. **Relation to other Rules:** The responsibilities in Rule 1.13 are concurrent with the responsibility provided in other Rules. This Rule does not limit the lawyer's responsibilities under other Rules such as:

- (a) Rule 1.4 (communication);
- (b) Rule 1.6 (confidentiality);
- (c) Rules 1.8, 1.9, 1.10 (conflicts of interest);
- (d) Rule 1.11 (successive government and private employment);
- (e) Rule 1.16 (declining representation);
- (f) Rule 3.3 (candor); and

(g) Rule 4.1 (truthfulness to others).

2. **Unlawful Acts:** If the lawyer's services are being used by an organization to further an illegal act or fraud by the organization, Rule 1.2(c)(scope of representation) can be applicable.

3. **Discretion:** In connection with complying with Rules 1.2(c), 3.3 or 4.1, or exercising the discretion conferred by Rule 1.6(c), a lawyer for an organization may be in doubt whether the conduct will actually be carried out by the organization. To guide conduct in such circumstances, the lawyer ordinarily should make inquiry within the organization as indicated in Rule 1.13(b). In other words, use some diligence.

4. **Firm Subordinates:** When in a firm, the firm's procedures may require referral of difficult questions to a superior in the firm. In that event, Rule 5.2 (responsibility of a subordinate lawyer) may be applicable.

III. GOVERNMENTAL AGENCY

The duty defined in Rule 1.13 applies to governmental organizations. The political body speaks for the organization as a whole. This Rule makes clear that the lawyer retained to represent an organization represents the organization as distinct from individuals and imposes upon the lawyer a duty to reasonably protect the best interest of the organization.

1. State Bar of Michigan Formal Ethics Opinions: RI-254. April 3, 1996

(a) A city attorney owes an ethical obligation to follow the directives of the majority of the city council in drafting ordinances, as long as the directives do not involve the lawyer in furthering fraud or illegal activity of the client.

(b) A city attorney may not, at the request of a dissenting member of the city council acting in a personal capacity, draft an opinion on the constitutionality of action taken by the city council. References: MRPC 1.1, 1.2(c), 1.4(b), 1.7(b), 1.13(a), (d) and (e).

IV. CLARIFYING THE LAWYER'S ROLE

The fact that the organization is the client is often unclear. Individual employees are accustomed to working with their municipal lawyer. The lawyer must take reasonable care to advise individuals that the organization is the client. See also Rule 4.3. The Rule also adopts a reasonableness

standard. The Rule therefore, can be problematic, and is not always a bright line test.

V. ROUND TABLE AND SOME PRACTICE TIPS:

1. Who is the Client? The typical scenario is a council person appears at your office and asks you look into a problem. What do you do?

- a. The first step is to identify the client.

RI-254. The organization is the client. MRPC 1.13.

- b. The second step is to identify the conflict-Does the form of government matter?
 - i. Appointed by council.
 - ii. Appointed by city manager, village president.
 - iii. Review the underlying statutory guidance
 - iv. Review State Bar Formal Opinions-see <https://www.michbar.org/opinions/ethicsopinions>. Appendix attached.
 - v. Review AG opinions for incompatibility etc, which often overlap MRPC 1.13.
 - vi. Call the Ethics hotline....nonbinding, but helpful.
- c. The third step is to inform the client.

MRPC: 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information. A lawyer shall notify the client promptly of all settlement offers, mediation evaluations, and proposed plea bargains.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

2. What are effective ways to work with individual council persons with opposing views? What about the “walk in council” person?

- a. Responding to individual requests for legal consultation and opinions-open discussion, who has experiences and advice to share?
- b. Informal Opinion RI-254, the State Bar stated that a dissenting council members request for an opinion on the unconstitutionality of an ordinance which had been passed was contrary to the expressed goals of the organization and should not be granted.
- c. Two person approach at mediations, litigation-with permission of council.
- d. Other?

3. How do we deal with multiple commissions and boards?

- a. As city and village attorneys, we represent the municipality and its multiple subdivisions of government (Zoning, Planning, EDA, DDA, Housing Commissions) All are ripe for conflicts.
- b. Use independent council and referring conflicts.
- c. Document the conflict referral date by e-mail, letter or other writing.

4. What if the council asks for a policy opinion or your personal opinion?

- a. Avoid commenting on policy decisions-we provide legal opinions.
- b. Avoid personal opinions.

5. What about Media contacts? How does that affect the client as the Organization?

- a. Chain of control of information.
- b. Consistency of message.
- c. FOIA, OPEN MEETING ACT

6. Civility, criminal activities, recalls, and politics, how do we handle these?

a. The decline of in civility in public affairs reflects the overall decline in American Civility-William Stuede

b. *Hypersensitive* situations create litigation and a greater potential for ethics violation.

c. Recognize the signs early of problems, trust your gut.

d. Avoid becoming the investigating body-use outside sources MSP, Sherriff, AG.

e. Duty to report other Bar Members Rule 8.3.

7. Incompatible public offices, Public Act 566 of 1978

a. Attorney General Opinions. Attorneys are officers of the municipal entity.

b. Most State Bar Ethics Advisory Opinions (RI) involve, conflicts, dual role and Incompatible Office Act issues.

APPENDIX

State Bar Formal Ethics Opinions: Rule 1.13 Organization as Client

(a) Rule 1.13(a)

RI-13, RI-47, RI-94, RI-95, RI-96, RI-126, RI-157, RI-183, RI-252, RI-254, RI-259, RI-266, RI-300, RI-345,

(b) Rule 1.13(b)

RI-13, RI-94, RI-112, RI-183, RI-252, RI-266, RI-300, RI-345,

(c) Rule 1.13(c)

RI-13, RI-252, RI-266, RI-299,

(d) Rule 1.13(d)

RI-47, RI-183, RI-252, RI-254, RI-259, RI-266, RI-300,

(e) Rule 1.13(e)

RI-47, RI-183, RI-252, RI-254, RI-259, RI-266,
RI-300

STATE BAR FORMAL ETHICS OPINIONS: RULE 1.13
ORGANIZATION AS CLIENT

RI-47 April 11, 1990 SYLLABUS-Dual Role-Conflict

An assistant city attorney who serves as the entity client's legal advisor for Labor Relations/Personnel may not serve as the management representative on a two-person supervisory grievance board.

RI-94 July 29, 1991 SYLLABUS-Siblings and Spouses

A lawyer may represent a municipality when the mayor of the municipality is a sibling of the lawyer, as long as the interests of the client municipality and the mayor do not differ and the client municipality consents. In the event the interests of the municipality and the mayor differ, the lawyer is disqualified from the representation. The disqualification of the lawyer is imputed to the other members of the lawyer's firm.

RI-96 August 16, 1991 SYLLABUS-Dual Role-Conflict

A county attorney may perform legal services for the county sheriff's office, even when those duties conflict with the interests of the client county, if a disinterested lawyer would reasonably believe the representation will not be adversely affected and the clients consent after consultation.

RI-126 April 17, 1992 SYLLABUS-Dual Role-Conflict

A lawyer who also serves as an elected member of a city council, which employs the city attorney and approves the budget and policies of the city housing authority, may not represent clients adverse to the city housing authority in the state courts when the city housing authority is represented in those matters by the city attorney.

RI-254 April 3, 1996 SYLLABUS-Duty to Organization

A city attorney owes an ethical obligation to follow the directives of the majority of the city council in drafting ordinances, as long as the directives do not involve the lawyer in furthering fraud or illegal activity of the client.

RI-259 April 9, 1996 SYLLABUS-Duty to Organization-not individuals

A city attorney may meet individually with a member of the city council, the chief of police or the city manager regarding the consequences of the city manager's arrest, but may not deliver legal services to them individually

unless the proper conflict screening is performed and confidences and secrets preserved.

RI-266 May 21, 1996 SYLLABUS-Confidentially of Organization

Provided that no client confidences are revealed, a lawyer for the county may discuss generally with a citizen the reasons why the county retained separate counsel in a particular matter.

A county lawyer who is disqualified from representing a county board on a matter due to prior participation in the matter when in private practice should not participate in the matter on behalf of the county board in any capacity.

MUNICIPAL ETHICS RESOURCES

- (a) Ethics Handbook For Michigan Municipalities Presented by the Ethics Roundtable of the Michigan Association of Municipal Attorneys
- (b) How to Identify and Avoid Conflicts of Interest by Dawn M. Evans, February 2011