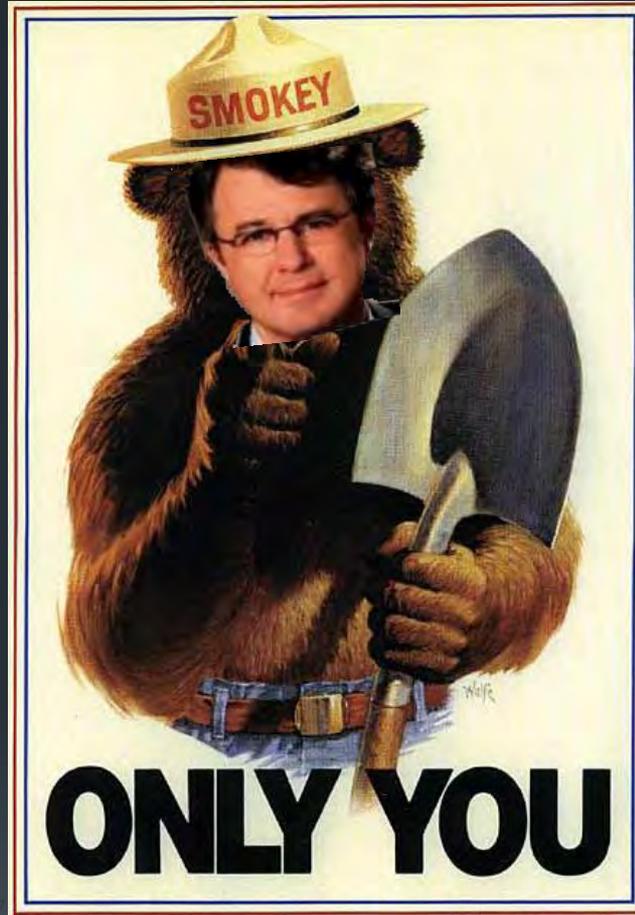


Session 16:
Ethics: Representing a Client
in a Fishbowl
(or The Saga of Loo S. Morales)

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REMEMBER:



Can Prevent Ethical Violations!

Our Hero

Loo S. Morales

- Longtime County Attorney
- Now Represents Airport Authority
- County Pays Salary
- Close Friends with Airport Director, Ops Manager, and County Supervisor



Our Story

- Airport Director and County Supervisor tell Loo that County has bought a drone to monitor activities on a nearby competing airport
- Two weeks later, Loo saw the Ops Manager “testing” the drone on the Airport, just as it was ingested into an arriving jet, causing a fatal crash
- Later, the Airport Director walks into Loo’s office, closes the door, and says he authorized the test.



Preserving Confidences

- The Daily Tribune calls Loo. Is it unethical for Loo to say:
 - Who was operating the drone?
 - Why the Airport has a drone?
 - That the County owns the drone?
 - That the Airport planned to spy on competitor?
 - That the Director authorized the test?



Preserving Confidences

Rule 1.6 Confidentiality Of Information:

(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).



What is confidential?



Who is the Client?

- Lawsuits are filed against the Airport Authority, the County, the Airport Director, and the Ops Manager. The County Supervisor, Ops Manager, and Airport Director are each deposed.
- Each ask Loo to defend their deposition. Can he?



Who is the Client?

Rule 1.13 Organization as a Client:

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

- Montana Bar Ethics Committee: “The attorney must proceed as is reasonably necessary in the best interest of the organization and owes a duty of confidentiality to the agency as a whole, not to its individual members.”

Who is the Client?

Rule 1.13 Organization as a Client:

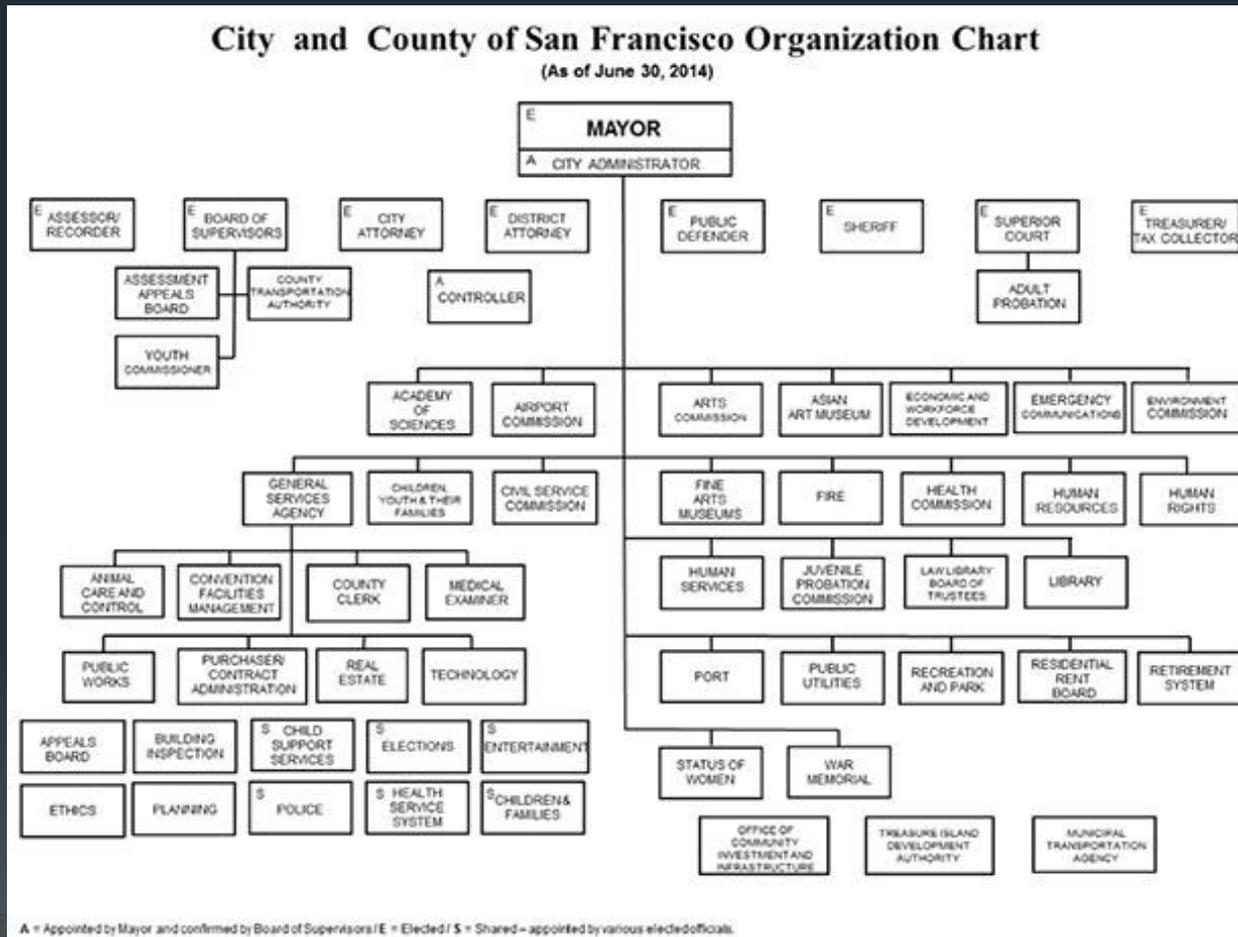
(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7.

Who is the Client?

ABA Model Rule 1.13, Comment 9:

- ...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.

Who is the Client?



Source: <http://sf.gov/org/citys-organizational-chart>

Who is the Client?

- Most states define the client as the specific agency that employs the lawyer:

DC Code of Ethics 1.6(k): The client of the government lawyer is **the agency that employs the lawyer** unless expressly provided to the contrary by appropriate law, regulation, or order.

Who is the Client?

District of Columbia Bar, Opinion No. 268:

- “We do not regard the definition of the government client contained in Rule 1.6[(k)] as dispositive for conflict of interest purposes.”
- “[T]he identity of the City government client depends upon a number of discrete considerations and must be decided on a case-by-case basis.”

Who Does Loo Represent?

- A week before the depositions, FBI files criminal charges against the Ops Manager.
- Can Loo still defend the deposition?

Who Does Loo Represent?

ABA Model 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.

Cal. Ethics Op. 2001-156:

[A] city attorney must not mislead constituent sub-entities or officials who ... are seeking advice in their individual capacity into believing that they may communicate confidential information to the city attorney in such a way that it will not be used in the city's interest if that interest is or becomes adverse to the constituent or official.

Who Does Loo Represent?

- Corporate Miranda Warning:
 - Explain who the client is.
 - Be explicit about confidentiality and privilege.
 - Make it clear who the client is not.

So, Who Is Your Client?

- What was agreement at outset of employment?
(Rule 1.2)
- What conflict issues would representation raise?
(Rule 1.7)
- Whose confidences have you received?
- Who is adverse to who?
- Whose interests are at stake?

Great, now who's the boss?



Source: [bloomberg.com](https://www.bloomberg.com)

Great, now who's the boss?

- As the litigation unfolds, Loo develops a strategy that get the Authority out of the case but throws the Ops Manager under the bus.
- Can Loo implement the strategy?



Great, now who's the boss?

ABA Model Rule 1.4:

- A lawyer shall:
 - reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - keep the client reasonably informed about the status of the matter; and
 - 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.
- A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

We Demand to Know!

When Can You Disclose Client Confidences?



Source: networkdispatches.wordpress.com

Exceptions to the Nondisclosure Rule

- The Airport Director tells Loo to prepare a public briefing on the incident and “not to hold anything back.”
- Can Loo tell all?



Exceptions to the Nondisclosure Rule: Client Consent

Rule 1.6(a):

- Can disclose **IF** “the client gives informed consent, [or] the disclosure is impliedly authorized in order to carry out the representation”
 - Public Statements
 - Public Meetings
- Get Clarity from the Client

Exceptions to the Nondisclosure Rule

- After resisting discovery into the negotiations between the County and the Airport over the Drone, the Court orders Loo to turn over certain of his notes and memoranda of those negotiations. Can Loo produce those documents over his clients' objections?

Exceptions to the Nondisclosure Rule: Other Laws

Rule 1.6(b):

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

...

(7) to comply with other law or a court order

...

Exceptions to the Nondisclosure Rule

- The Airport is flooded with document requests under state disclosure laws seeking Loo's legal memoranda and documents. Must he produce them?

Exceptions to the Nondisclosure Rule: Other Laws

ABA Model Rule 1.6, Comment 12:

- Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (7)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

Exceptions to the Nondisclosure Rule: Other Laws

- Determine state disclosure law requirements and obligations
 - Some state disclosure laws **preserve** attorney-client and related privileges
 - Some state disclosure laws **narrow** attorney-client and related privileges
 - Some state disclosure laws **overrule** attorney-client and related privileges

Exceptions to the Nondisclosure Rule: Client Misconduct



Source: ssa.gov

Client Misconduct

- Over beers one evening, the Ops Manager tells Loo that he is going to prove to the world that he is a real pilot; he'll fly the drone over the airport and then to the homes of the plaintiffs and their lawyers to take pictures so they know who's boss.
- What may Loo do?

Exceptions to the Nondisclosure Rule: Client Misconduct

Model 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. 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.

Exceptions to the Nondisclosure Rule: Client Misconduct

Model Rule 1.13(c):

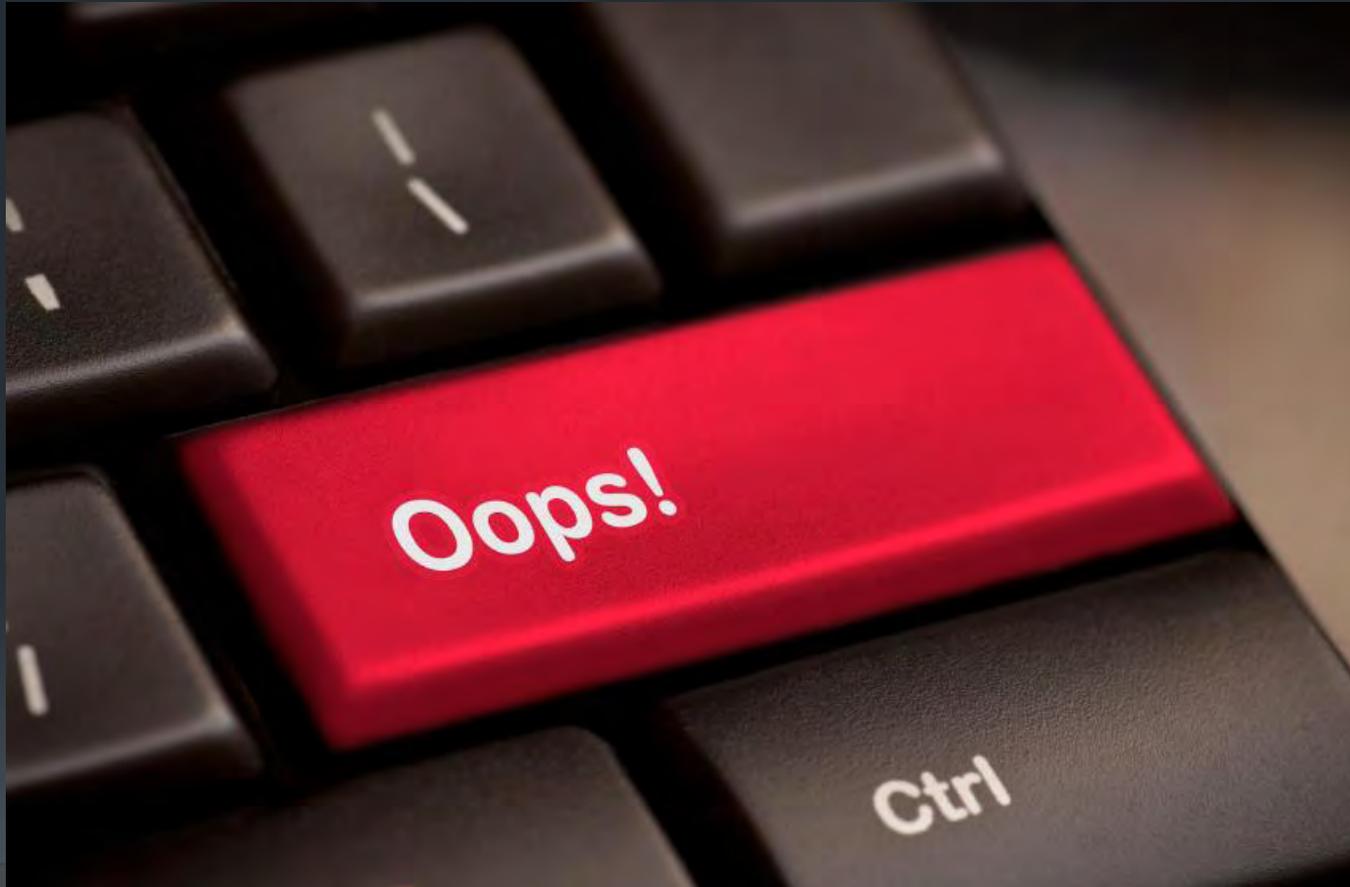
- Except as provided in paragraph (d), if:
 - (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, **that is clearly a violation 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.**

Exceptions to the Nondisclosure Rule: Client Misconduct

ABA Model Rule 1.13, Comment 9:

- 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. 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 public business is involved.**

Unauthorized and Inadvertent Disclosure



Source: presnellonprivileges.com

Inadvertent Disclosures

- Loo discovers that one of the plaintiff's 15-year old children has hacked into his computer and stolen his emails and legal memoranda files and provided them to the press.
- Has Loo violated his ethical duty to preserve client confidences?

Duty to Prevent Disclosures

- **Rule 1.6(c)**: A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
- Inform Client of legal risks of disclosure (Rule 1.4) and ways to mitigate.

Best Practices

- Establish Document Retention and Distribution Rules
- Establish Practices for Privileged Material to Limit Risk of Disclosure
 - Limit Use of Written Memoranda
 - Use Executive Sessions and One-on-One Consultations (as permitted by law)
 - Use PRIVILEGED Headings
 - Strong Authentication, Firewalls, Intrusion Detection

Best Practices

- Limit Use of Email to Communicate with Attorneys
- Adapt Rule to Special Circumstances and Individuals
- **ALWAYS: INFORM THE CLIENT OF RISKS**

Other Laws on Confidential Information

- Having obtained client consent to release documents about the Airport's pilot program with the U.S. Government to assure the public that the Airport is now safe from rogue drones, Loo is surprised to get a threatening call from the FBI. Did Loo miss something?

Others Laws May Impose Confidentiality Obligations

- Government Ethics Rules
- Sensitive Security Information (49 C.F.R. Part 1520)
- Health Insurance Portability and Accountability Act of 1996 (HIPAA)
- Personally Identifiable Information (5 U.S.C. §552a)
- Proprietary Commercial/Business Information

Help Me!

- Totally confused and distraught, Loo finally wonders if he should have sought help earlier. But who could he have turned to for help?



Where to Turn for Advice

- Senior Attorneys in Your Agency
 - A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty (Rule 5.2).
- State Bar ethics hotlines
- ETHICSearch
 - Rule 1.6(b)(5) permits disclosure “to secure legal advice about the lawyer's compliance with these Rules, other law or a court order.”

Questions?

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