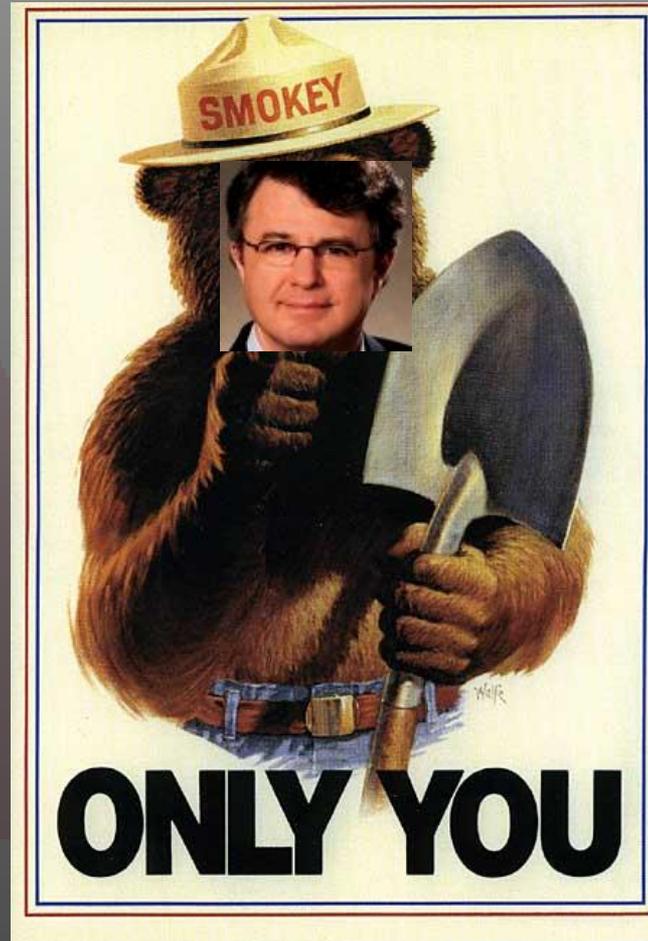


ETHICS FOR LAWYERS REPRESENTING PUBLIC ENTITIES: MAINTAINING CONFIDENTIALITY IN A HIGHLY PUBLIC ENVIRONMENT

Kaplan Kirsch & Rockwell CLE Presentation
February 19, 2016

REMEMBER:



Can Prevent Ethical Violations!

ETHICAL OBLIGATION TO PRESERVE CLIENT CONFIDENCES

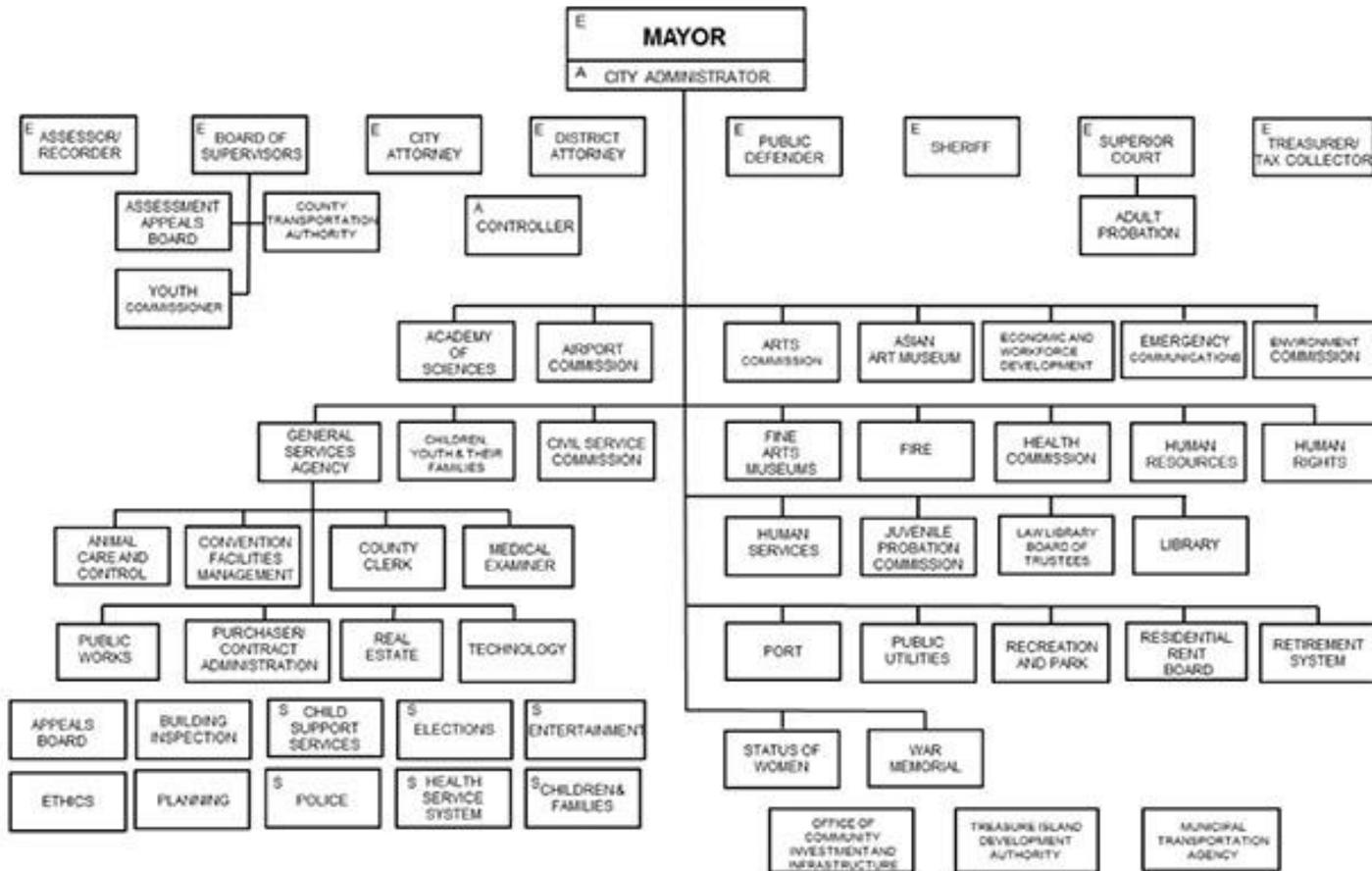
Rule 1.6 Confidentiality Of Information

(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).

Who is the Client?

City and County of San Francisco Organization Chart

(As of June 30, 2014)



A = Appointed by Mayor and confirmed by Board of Supervisors / E = Elected / S = Shared - appointed by various elected officials.

Who is the Client?

Rule 1.13 Organization as a Client:

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?

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?

- Colorado Does Not Define “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(i) 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.”

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?

We Demand to Know!

When Can You Disclose Client Confidences?



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: 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; or

* *
.

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
 - CORA **preserves** attorney-client privilege, work product, and deliberative process Colo. Rev. Stat. § 24-72-204(3)(a)(IV)
 - 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



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, or public business is involved.

Don't Be the Fall Gal or Guy



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.

Duty to Prevent Disclosures

- “I think most don't think about [disclosure] until after the fact, and they say, wow, I wish I hadn't said that.”
- “I've sent something on email responding to an email from an agency employee and they forward it to all the managers, and then those people forward it to someone. So I don't know how many people it went out to - it could be in the hands of a hundred people! People think, 'it's just email.’”

Inadvertent Disclosure

- Three approaches

- “Cat out of the bag”
- Inadvertent = No Waiver
- Colorado: *Ad Hoc* Approach

- Balancing Analysis

Among the factors considered by these courts are: (1) **the extent to which reasonable precautions were taken to prevent the disclosure of privileged information**; (2) the number of inadvertent disclosures made in relation to the total number of documents produced; (3) the extent to which the disclosure, albeit inadvertent, has, nevertheless, caused such a lack of confidentiality that no meaningful confidentiality can be restored; (4) the extent to which the disclosing party has sought remedial measures in a timely fashion; and (5) considerations of fairness to both parties under the circumstances.”

Floyd v. Coors Brewing Co., 952 P.2d 797, 808-9 (Colo. App. 1997), *overruled on other grounds*, *Coors Brewing Co. v. Floyd*, 978 P.2d 663 (Colo. 1999); see also *In re Marriage of Amich*, 192 P.3d 422, 424 (Colo. App. 2007).

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

Best Practices

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

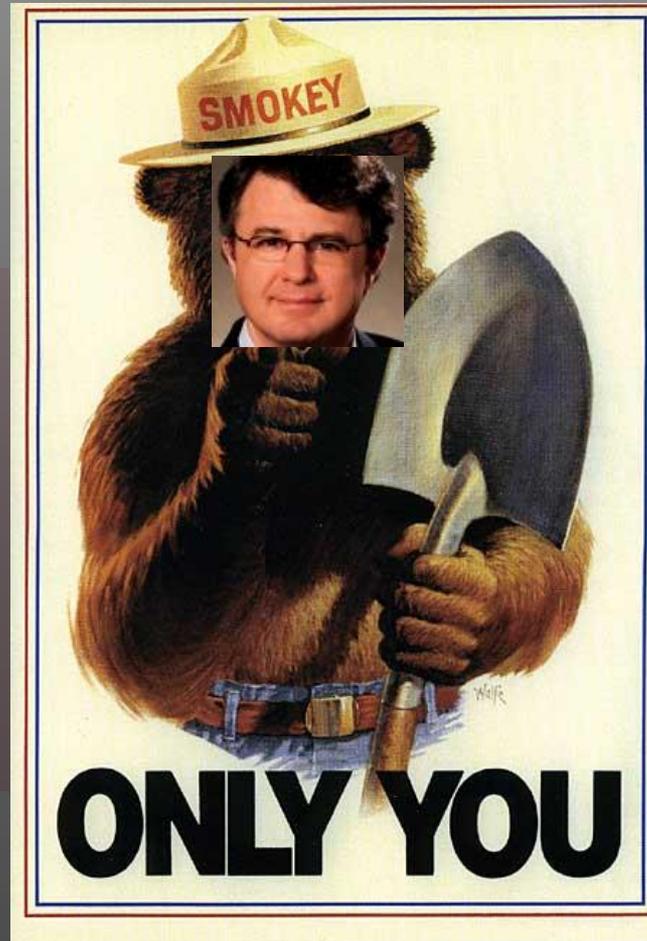
Other Laws May Impose Confidentiality Obligations

- 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

Where to Turn for Advice

- Senior Attorneys in Your Firm, Agency, or Government
- 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.”
- State Bar ethics hotlines

REMEMBER:



Can Prevent Ethical Violations!