

Legal Ethics

Missouri Municipal Attorneys Association

2018 Summer Seminar

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Requesting an Informal Advisory Opinion

Oral Informal Advisory Opinions

- Call Legal Ethics Counsel at **573-638-2263.**
- Inform the person who answers that you are a Missouri attorney and you are calling for an informal opinion.
- You will need to provide your name and bar number.
- The LEC does not issue advisory opinions to nonattorneys.

Requesting an Informal Advisory Opinion

Written Informal Advisory Opinions

- ▶ Allow one month to receive an answer. If urgent, explain the urgency in the opening paragraph.
- ▶ The request should contain specific facts.
- ▶ Be concise but include all facts upon which the opinion will be based.
- ▶ Indicate that this is about your conduct.
- ▶ No opinions regarding the conduct of other attorneys.
- ▶ Must relate to future conduct.

Requesting an Informal Advisory Opinion

Won't answer legal questions.

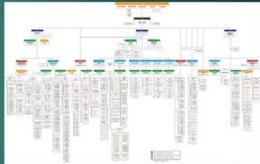
There may be a benefit from having asked.

Document the request and response.

www.molegalethics.org

WHO IS THE CLIENT?

- ▶ Government Entity
- ▶ Board, Commission, etc.
- ▶ Director
- ▶ Employees
- ▶ Agency as an entity
- ▶ Other



Clear communication is the best

Rule 4-1.14 COMMENT [6] – Government Agency

Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context

**RULE 4-1.13.
Organization as Client**

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

**RULE 4-1.13.
Organization as Client**

(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 4-1.7.

(e) If the organization's consent to the dual representation is required by Rule 4-1.7,

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.

COMMENT – The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders, and other constituents.

Officers, directors, employees, and shareholders are the constituents of the corporate organizational client

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.

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.

Duties of lawyers employed by the government ... **may be defined by statutes and regulation.**

This Rule 4-1.13 does not limit that authority.

**COMMENT –
Clarifying the Lawyer's Role**

[7] There are times when the organization's interest may be or become adverse to those of one or more of its constituents.

In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization,

- of the conflict or potential conflict of interest,
- that the lawyer cannot represent such constituent, and
- that such person may wish to obtain independent representation

Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual and that discussions between the lawyer for the organization and the individual may not be privileged.

SCOPE

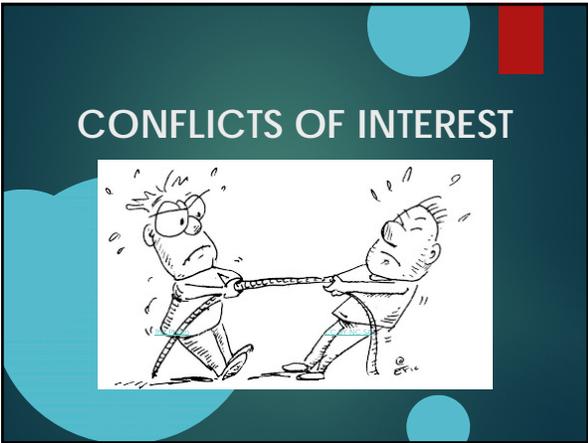
[18] Under various legal provisions, including constitutional, statutory, and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships.

A lawyer for a government agency **may have authority** on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment.

Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and **the same may be true of other government law officers.**

Lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients.

These Rules do not abrogate any such authority.





- The law (statutes, charter, ordinances, etc.) should govern your representation.
- Don't take sides with people.
- You may not be able to represent anyone, including the municipality.

**Rule 4-1.7. Conflict of Interest:
Current Clients**

(a) Except as provided in Rule 4-1.7(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.

COMMENTS

General Principles

[2] Resolution of a conflict of interest problem under this Rule 4-1.7 requires the lawyer to:

- (1) clearly identify the client or clients;
- (2) determine whether a conflict of interest exists;

(3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and

(4) if so, consult with the clients affected under Rule 4-1.7(a) and obtain their informed consent, confirmed in writing.

Comment

Identifying Conflicts of Interest: Material Limitation.

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests.

COMMENT

Prohibited Representations

[14] **Ordinarily, clients may consent** to representation notwithstanding a conflict.

Some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.

When the lawyer is representing more than one client, the question of consentability **must be resolved as to each client.**

COMMENT
Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client.

See Rule 4-1.0(e) (informed consent). The **information required depends** on the nature of the conflict and the nature of the risks involved.

“Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

My synopsis of *Informed Consent*:

- ✓ All of the facts
- ✓ All of the pros
- ✓ All of the cons
- ✓ All of the options

Then, consent.

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent.

When the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs.

These **costs**, along with the **benefits of separate representation**, are factors that **may be considered** by the affected client in determining whether common representation is in the client's interests.

COMMENT

Consent
Confirmed in Writing

[20] Rule 4-1.7(b) requires the lawyer to obtain the **informed consent** of the client, **confirmed in writing**.

Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent.

Rule 4-1.0(n)

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording, and electronic communications.

A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

The requirement of a writing does not supplant the need for the lawyer to talk with the client,

to explain

- the risks and advantages
- as well as reasonably available alternatives,

and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns.

Waiver of Conflict of Interest by Government



Opinion Number: 20040059

QUESTION: The governmental entity is seeking to retain private attorneys on a contract basis for court proceedings. The attorneys would not be considered employees of the governmental entity.

May attorneys hired on a contract basis represent other clients whose interests are adverse to any part of the governmental entity?

May a governmental entity waive a conflict of interest?

ANSWER:

The Supreme Court of Missouri has recognized the ability of state government to waive conflicts in *State ex rel. Nixon v. American Tobacco Company, Inc.*,

In ABA Formal Op. 97-405, the American Bar Association clearly contemplates that governmental entities may waive conflicts.

This informal advisory opinion represents a departure from the previous position.

However, the issue is a legal question beyond the purview of an informal advisory opinion.

An attorney would be well advised to be certain that the person who purports to waive a conflict has the legal authority to do so.

This opinion maintains the position that an attorney who represents any part of a government has a conflict that prevents representation adverse to any part of the same government, except that now waiver of the conflict is recognized as a possibility.

The government has the ability to determine at what levels government should be divided for conflict purposes

CONFIDENTIALITY

RULE 4-1.6: 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 Rule 4-1.6(b).

EXCERPTS FROM:
IN RE GRAND JURY
SUBPOENA DUCES TECUM

We believe the strong public interest in honest government and in exposing wrongdoing by public officials would be **ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings** inquiring into the actions of public officials.

Because agencies and entities of the government are not themselves subject to criminal liability, a government attorney is free to discuss anything with a government official –
except for potential criminal wrongdoing by that official –
without fearing later revelation of the conversation.

An official who fears he or she may have violated the criminal law and wishes to speak with an attorney in confidence should speak with a private attorney, not a government attorney.

In some aspects of the law of attorney-client privilege, the client's reasonable beliefs may be relevant.

All these situations involve, in essence, reasonable mistakes of fact, none of which is applicable here.

COMMUNICATION

COMMUNICATION
Rule 4-1.4. Communication

(a) A lawyer shall:

(1) keep the client reasonably informed about the status of the matter;

(2) promptly comply with reasonable requests for information; and

(3) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows the client expects assistance not permitted by the Rules of Professional Conduct or other law.

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

Comment

[1] Reasonable communication between the client and the lawyer is necessary for the client effectively to participate in the representation.

Rule 4-1.4(a)(1) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

Communicating with a Client

[2] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.

Even when a client delegates authority to the lawyer, the client should be advised of the status of the matter.

The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of representation.

A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation.

A lawyer shall promptly respond to or acknowledge client communications to the lawyer.

When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization.

Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Rule 4-4.2 Topics

How does Rule 4-4.2 relate to former employees of an organization?

If you are dealing with a likely opposing party in pre-litigation matters and you know that the party was represented by counsel in unrelated matters, is the party considered to be represented by that counsel in this matter, for purposes of Rule 4.2?

▶ When can opposing counsel have contact with present government employees and officials without going through the attorney for the government agency or office?

▶ If I represent a state employee, but not the agency, may I insist that the opposing lawyer go through me to contact other employees of the agency where the client works?

RULE 4-4.2:

COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

COMMENT

[4] Rule 4-4.2 does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation

E.g. the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government.

RULE 4-4.3: DEALING WITH UNREPRESENTED PERSON

If a person is not represented by counsel, you should be reasonably sure that the person understands your role in the matter. You should not give any advice other than to consult an attorney.

If a person (such as a government employee) is seeking your assistance as a government attorney, but the government agency or office is not directly representing that person, you should only advise that person of the things they need to do to obtain your assistance.

You may advise them of what may be accomplished through your assistance.

You should not advise them about steps they should or should not take to address other legal aspects of their situation.

It is fine to provide general information but not specifics related to that person's circumstances.

UNDERCOVER INVESTIGATIONS



Rule 4-8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

It shall not be professional misconduct for a **lawyer for a criminal law enforcement agency**, regulatory agency, or state attorney general to **advise others** about or to **supervise** another in an undercover investigation if the entity is authorized by law to conduct undercover investigations

It shall not be professional misconduct for a **lawyer employed in a capacity other than as a lawyer** by a criminal law enforcement agency, regulatory agency, or state attorney general to participate in an undercover investigation, if the entity is authorized by law to conduct undercover investigations.

COMMENT
[3] Rule 4-8.4(c) recognizes instances where lawyers for criminal law enforcement agencies, regulatory agencies, or the state attorney general advise others about or supervise others in undercover investigations and provides an exception to allow the activity without the lawyer engaging in professional misconduct.

The exception acknowledges current, acceptable practice of these entities.

This exception is not intended to state or imply that an entity has the authority to conduct undercover investigations unless that authority is separately granted to the entity by law. Although the exception appears in this rule, it is also applicable to Rules 4-4.1 and 4-4.3.

This exception does not authorize conduct otherwise prohibited by Rule 4-4.2.

Nothing in the rule **allows** the lawyer to advise others about or supervise others in undercover investigations unless the criminal law enforcement agency, regulatory agency, or state attorney general is **authorized by law to engage in such conduct**.

If the agency has authority to conduct an undercover investigation, an attorney, who is in an attorney position, may advise or supervise nonlawyers in undercover activities.

An attorney who is not in an attorney position may engage in undercover activities. The permission to engage in dishonest type conduct does not extend beyond what is needed for the undercover activity.

Got it?

