

Creating and Protecting the Attorney-Client Privilege

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Attorney-Client Privilege in Public Sector

- Restatement (Third) of the Law Governing Lawyers § 74
- Suffolk Constr. Co. v. Div. of Capital Asset Mgmt., (Mass. 2007)

Who is the client?

- The Board
- The Superintendent
- The District

RPC 1.13(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. . . .

Chain of Command

- Board has flexibility to delegate “direction-giving” function; provided, ultimate duty of attorney remains unchanged
- Presumptive authority (Board leadership, Superintendent)

Limited Scope of Engagement

- Counsel to Board Committees
- Engagement to represent individual Board members or employees at Board expense

Representation of District Staff

RPC 1.13(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 RPC 1.7.

Communications with Individual Board Members

- Board leadership
- “Rank-and-file” Board members
- Instructions/Confidentiality

Client Confidentiality

- Confidential attorney-client communications
- Dealings with news media and other third parties
- Law firm marketing information

N.J.R.E. 504

Lawyer-Client Privilege

. . . [C]ommunications between lawyer and his client in the course of that relationship and in professional confidence, are privileged . . .

RPC 1.6(a)

A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for (1) disclosures that are impliedly authorized in order to carry out the representation, (2) disclosures of information that is generally known

ABA Comment [3]

The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.

ABA Comment [5]

Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation.

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What's “impliedly authorized”?

- Pleadings and court filings (Yes!)
- Statements to news media (?)
- Publicizing client victories (?)

Legal vs. Business Purpose

- Majority of jurisdictions, including New Jersey, require legal advice as the primary purpose
- *But see In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014) (Legal advice need only be one of the significant purposes of the investigation.)

- Communications remain privileged, even if shared with non-lawyers within the organization, if the predominant purpose is the development or dissemination of legal advice.

ACPE Op. 327 (1976)

- Board Attorney having “confidential” conversations with individual constituents
- No personal attorney-client privilege

Duties to Former Clients

RPC 1.9

- Avoid adverse representation on substantially similar matters
- Preserve confidential information learned in former representation

RPC 1.9(c)(1)

A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter . . . use information relating to the representation to the disadvantage of the former client except when the information has become generally known . . .

Disclosure of Personal “Stuff”

- Not necessarily a duty to disclose if no “material limitation” on attorney’s ability to provide effective representation, *but*
- May present “client relations” issue

Upjohn Co. v. United States, 449 U.S. 383 (1981)

- Attorney-client privilege applicable to corporations under Fed.R.Evid. 501.
- “Vast and complicated array of regulatory legislation . . .”
- Protects advice giving and fact gathering

The “first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.”

The “Upjohn Warning”

- You represent the employer, not the employee.
- The substance of the interview is privileged.
- The employer controls the privilege.
- The employer may disclose statements.

Sandra T.E. v. South Berwyn Sch. Dist. 100 (9th Cir. 2009)

- Upjohn protections available in public school district internal investigations
- Attorneys structured activities to appear lawyer-like

Hedden v. Kean U., 434 N.J. Super. 1 (App. Div. 2013)

- In CEPA case, fired A.D. sought disclosure of e-mail sent by coach to General Counsel seeking advice on legalities of a fundraising solicitation
- Held: protected by U.'s attorney-client privilege, citing *Upjohn*

Multiple Representation

- Simultaneous representation of district and district staff
- Simultaneous representation of more than one district

- Consent to joint representation does not necessarily imply consent to share attorney-client communications
- ABA Formal Opinion 08-450

The Multiple Representation Case from Hell

- United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009)
- Unclear who client was during employee interview due to simultaneous representation

RPC 1.6(b)

Shall reveal confidential information to
“proper authorities” to prevent client:

(1) from committing a *criminal, illegal or fraudulent act* that the lawyer reasonably believes is likely to result in *death or substantial bodily harm* or *substantial injury to the financial interest or property of another*, or

(2) from committing a *criminal, illegal or fraudulent act* that the lawyer reasonably believes is likely to perpetrate *a fraud upon a tribunal*.

RPC 1.13(b)

- Violation of entity's rights/violation of law imputed to entity; and
- Likely to result in substantial injury to the organization, then
- The lawyer shall proceed as is reasonably necessary in the best interest of the entity.

(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.

. 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 RPC 1.6

ABA Comment [2]

[I]f an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6.

ABA Comment [7]

Exemption from whistleblowing provisions are “necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.”

Avoid Inadvertent Lawyer-Client Relationships

- Do not give legal advice.
- When investigation is in response to an employee's sexual harassment complaint, clarify your role to the employee.

RPC 4.3

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. . . .

When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

NLRB Rulings

- Banner Health System v. NLRB, 851 F.3d 35 (D.C. Cir. 2017)
- Unfair practice to muzzle employees
- Adoption by public sector labor boards

The *Faragher/Ellerth* Defense

- Attorney-client privilege likely waived
- Duty to assure the investigation was conducted in a timely, comprehensive and reliable manner
- Attorney-investigator may be a witness

