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South Carolina Municipal Attorneys Association Ethics Seminar

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Part One . . .Who is the client?

There is only one client, right?

It's the Town/City/County? Right?

Easily stated, but difficult to apply?

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SC Rule 1.13: Organization as Client

Comment 9: "The duty defined in this Rule applies to governmental organizations. 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."

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SC Rule 1.13: Organization as Client

- "1.13(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."
- Comment 5 to Rule 1.13 states that a lawyer's ethical duties run to the "highest authority that can act on behalf of the organization." For the local government lawyer, this is the municipal council, acting as a body.
  - Ordinance: The city attorney shall be the chief legal counsel to the city, the mayor and members of the council and the city manager and to the officers and department heads of the city. The city attorney shall prosecute and defend the city in all actions and appear on behalf of the city and its officers in legal proceedings and at all times take appropriate actions to protect the interests of the city.

  OR:
  - The town attorney shall be directly responsible to the town council. The town attorney will serve as legal advisor to the town and perform other legal duties as required by town council.

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Constituent?

- Constituent does not have the political meaning of those who elect the governing officials.
- Refers to those who, in the structure of the organization, are entitled to act for it.
- "When the corporation is a county, these 'constituents' include the county commissioners, appointed officials, and employees and agents of the county." 82 Op. Att'y Gen. 15 (Md. 1997).

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The Restatement of the Law Governing Lawyers

- The interests of the organization are defined by the organization's "responsible agents acting pursuant to the organization's decision-making procedures." Thus, lawyer must follow instructions as given by persons authorized to act on behalf of organization.
- Do those who speak for the organization differ from one representation to another?
- "The responsibility of an agency attorney is to represent the interests of the officer who has legitimate power to decide upon the course of action."

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SC Rule 1.13: Organization as Client

- 1.13(b): If a lawyer for an organization knows that an officer, employee . . .is engaged in action, intends to act or refuses to act in a matter . . . that is a violation of a legal obligation, **or** a violation of law, **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."
  - Unless the lawyer believes it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority, including the highest authority if warranted.
  - However: public disclosure of misdeeds is a violation of the lawyer's duty to act in the best interest of the organization. See In re Harding, 223 P.3d 303 (Kan. 2010).

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Situation: Town attorney learns of serious and credible allegations of misappropriation against supervisory employees

- What are the attorney's obligations? What are the attorney's duties when his office has previously represented the wrongdoer's in their official capacity?
- Result: if the attorney reaches the conclusions in 1.13(b), and lacks authority to act on his own without violating the duty of confidentiality, the Rule permits referring the matter to a higher authority.
  - What if the higher authorities don't act on the information?
  - Absent circumstances where town attorney has acquired personal confidential information from the employee, Rule 1.9 is not a barrier to representing the entity

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- 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."

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Other Guidance

- There are only a handful of ethics advisory opinions that reference Rule 1.13 for local government attorneys, and mostly they address fringe issues.
- For example, EAO 90-24 addresses whether a County Attorney may seek out a plaintiff for a test case against the County; EAO 90-35 addresses whether a county councilman who is also a lawyer may represent a person in an action against an official of the same county.
- But see EAO 91-05: "(1) It is a conflict of interest for a county attorney or other members of his firm to represent a party whose interests are adverse to those of the town or county represented by a member of that firm in abuse and neglect cases … to represent criminal defendants arrested by any law enforcement agency of the county or town represented … to represent criminal defendants who appear before a magistrate, municipal judge or probate court within the county or town represented…. It is impermissible for any member of the firm to appear before any boards or agencies of the town or county represented."

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Part Two: Representing Boards and Commissions

- Can the municipal attorney also represent related boards and commissions, whether established by state law (e.g., planning commission or board of zoning appeals) or by local action (e.g., advisory boards or commissions)?

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Rules 1.7, 1.9, 1.11: Conflicts of Interest

A conflict of interest exists when:

- Simultaneous representation of clients with adverse interests; simultaneous representation as to the same matter is prohibited per se.
- Successive representation of clients with adverse interests; successive representation is prohibited if there is a substantial relationship between the current matter and the prior representation.

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On the One Hand …

- If the related board or commission is considered a "client," and the interests of the municipal council are or may become adverse to the board or commission, then the conflict rules would seem to apply.
- The Office of Disciplinary Council, presenting to this meeting in 2021, implied that the municipal attorney should not represent bodies from which appeal may be taken to, or from which an appeal may be taken by, the municipal council.
- So, for example, a decision of the planning commission will go to the council, and the council might appeal a decision of the board of zoning appeals to the circuit court.

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… and on the Other Hand

- See EAO 1995-95-08: "Does any provision of the Rules of Professional Conduct (SCACR 407) prohibit Attorney A, in his capacity as municipal attorney, from advising the Zoning Board of Adjustment during its review of the zoning matter? … [T]he attorney is permitted to communicate with duly authorized constituents of the municipality and to render advice to them in their capacities as agents of the municipality. In communicating with municipal agents in their official capacities, the attorney must insure that the individual agent is aware that the attorney does not represent that agent in his individual capacity."
- Note that this opinion addresses work for the staff of the BZA during the review and does not directly address appearance at the public meeting.

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Is there a definitive test to determine if and when a constituent of a main governmental entity ought to be characterized a client of the attorney for the main entity?

1. The attorney only has one client, the entity itself, which acts through constituent sub-entities and officials;
2. A constituent sub-entity or official may become an independent client of the entity's attorney only if it possesses authority to act independently of the main entity.

Thus, if each agency is a separate client, a conflict might exist.

Ex. State sought to disqualify law firm in high profile tobacco litigation that represented other State agencies. State argued that firm represented State as a unit and not its individual agencies.

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Practical Advice & Discussion

- The first question is whether the entities are separate "clients." Good arguments may be made both ways. Coates' Canons suggests that in most cases there will be only one client.
- The second question is, even if there is only one client, 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." See Rule 1.7(a)(2).
- For municipalities with sufficient resources, the most prudent approach would seem to be to retain separate counsel for the related boards and commissions.
- When that is not an option, declare and document the identity of the client and advise of the possibility of conflicts.
- For discussion: Might it be useful to go a step further and have a formal conflict waiver? Would that help, if the council were to appeal a decision of the BZA?

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Related Topic: Communication Between Council and Appointed Bodies

- Often, members of council will individually communicate with members of the planning commission or board of zoning appeals on active matters, or even appear and speak at public meetings. Is this appropriate? Is it legal?
- For appearances, see State Ethics Commission Decision and Order, May 29, 2019, finding a councilmember violated SC Code § 8-13-740(A)(5) by speaking on behalf of an applicant before an appointed board. "During the hearing, Respondent testified he was not friends with [applicant] and had not communicated with her prior to the CBA meeting. However, there is no requirement in the Ethics Act that a public official maintain a particular type of relationship with a person prior to representation, nor is it relevant that the two did not communicate prior to the meeting. It is enough that Respondent represented [applicant's] position to a Board for which he, and his Council, had official responsibility."

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Related Topic: Communication Between Council and Appointed Bodies

- For communications outside of board meetings, the rules are more complicated.
- Most matters before a board of zoning appeals are quasi-judicial, meaning the rules against *ex parte* communications apply: "It is well settled that *ex parte* communications are inherently improper and are anathema to quasi-judicial proceedings. Thus, quasi-judicial officers should avoid all such contacts where they are identifiable. In addition, rudimentary administrative law clearly prohibits the use of information by a municipal agency that has been supplied by a party to a contested hearing on an ex parte basis." 1997 WL 568829, at *2 (S.C.A.G. July 9, 1997).
- But the South Carolina courts have found that planning commissions act in a legislative capacity, even in rezonings. *See Hampton v. Richland Cnty.*, 292 S.C. 500, 357 S.E.2d 463 (Ct. App. 1987).

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Part Three: Managing Individuals within the Client

- The municipal attorney often receives contrary direction from members of council and staff. Moreover, in some cases the municipal attorney will be asked to provide legal advice to an individual elected official or staff person. What considerations should be in mind?

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Basic Rules

- Because the local government lawyer will likely develop close personal and professional relationships with individuals within the municipality, it is important to have a clear understanding of the identity of the client.
- If the local government lawyer leads an individual employee to believe that the lawyer represents the individual, it will imperil the local government's control over confidential attorney-client information.
- Rule 1.13(f) requires the lawyer to warn a constituent that the lawyer represents the organization, not the individual constituent.

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Reporting of Questionable Behavior

- 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 which 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."

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Part Four: Confidentiality

- What special risks confront the municipal attorney in managing confidentiality while representing a large, (often) disorganized, and (almost always) divided local government?
- I wish you hadn't told me that!

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Confidentiality Overview

There are three related (and often confused) sources of guidance here:

- Duty of Confidentiality
- Attorney-Client Privilege
- Work Product Doctrine

And don't forget a fourth source of guidance, in S.C. Code § 30-4-40(a)(7), exempting from FOIA disclosure "[c]orrespondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships."

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Duty of Confidentiality

- The ethical duty of confidentiality has been formalized in the Rules of Professional Conduct. It is broader than the evidentiary attorney-client privilege.
- "The ethical duty applies to any information that relates to the representation regardless of form (electronic, documentary, or oral) and regardless of source (client, third party, independent investigation by lawyer)." Nathan Crystal, *Ethics Watch*, SOUTH CAROLINA LAWYER, July 2013.
- The duty may even apply to information that is publicly known; South Carolina has not definitively answered this question. Some jurisdictions apply the duty even to public information, but the Restatement provides that generally known information is not subject to the duty.
- The attorney owes the duty of confidentiality to the agency as a whole, not its individual members.

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Miranda-type warning

- My attorney-client relationship is with the town, so any information you give me belongs to the town. The a-c relationship that exists between you and me only exists by virtue of our relationships with the town, so I do not represent you personally in any way. As to any potential personal liability you have, you must consult your own attorney. If you understand and still want to tell me anything, you may do so but understand that any town official who needs to know it will be entitled to know it.

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- Don't mislead your sub-entities or officials who have no right to act independently of the governing body and who are seeking advice in their individual capacity into believing that they may communicate confidential information to the town 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.

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Attorney-Client Privilege

- The evidentiary attorney-client privilege is a common-law privilege that is recognized by the South Carolina Rules of Evidence, see Rule 501. The privilege may be waived by the client.
- Standard: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." State v. Doster, 276 S.C. 647, 651, 284 S.E.2d 218, 219–20 (1981) (cleaned up).
- A critical point is that, for the privilege to attach, there must be an attorney-client relationship.

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Work Product

- SCRCP 26(b)(3): "[A] party may obtain discovery … prepared in anticipation of litigation … only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means."
- SC FOIA muddies the issue by exempting from public record disclosure "[c]orrespondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships."
- Note that the FOIA exemption does not incorporate the formal elements of the evidentiary standards for attorney-client privilege or work product. And it says "attorney-client relationships" rather than using the specific privilege language.

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Related Topic: Executive Session

- It seems obvious that information shared in executive session is "confidential" in the ordinary meaning of the word.
- But nothing in state law penalizes council members for sharing information learned in executive session.
- What tools are there to prevent disclosure of information shared in executive session?

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From the News: Executive Session Confidentiality


Councilwoman [redacted] Accused of Helping [redacted] Win $1M Payout: 'Go Big'

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From the News: Executive Session Confidentiality

From the Post & Courier article:

- "A lawsuit seeking to cancel a $1 million payout to an ousted county administrator has led to the discovery of text messages showing the administrator and a county councilwoman privately communicating during settlement negotiations."
- "In text messages obtained through discovery for the lawsuit, [administrator] and [councilwoman] appear to communicate about the settlement before and during a County Council executive session. Several comments are redacted. On May 2, [councilwoman] told [administrator], 'Don't counter small or reasonable. Go big,' and 'Make sure you give descriptive info. Do this ASAP while you're an employee before anything changes.' Then, during a May 14 executive session, [councilmember] texted [administrator], 'DO NOT REVEAL YOU KNOW THIS... choose how much you'd take if you got your job back and IF you are willing to move slightly off 1.4.'"

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From the News: Executive Session Confidentiality

Questions for discussion:

- Does this conduct violate the State Ethics Act, as applicable to public officials?
- What if the county attorney learned of the text messages before the council as a whole, or even its presiding officer, knew? See Rule 1.13(b).
- What steps can be taken to prevent disclosure of information shared in executive session?
- Can a third-party (e.g., an IT vendor or a professional services firm) require that councilmembers sign a nondisclosure agreement in order to participate in executive session?

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Privilege: Who Can Waive It?

- Hypothetical: Legal advice in executive session that would otherwise qualify for protection under SC FOIA is voluntarily disclosed by one or more councilmembers who were present. Has the protection been waived?
- 2019 WL 5669043 (S.C.A.G. Oct. 21, 2019): "[SC FOIA] does not create a special duty of confidentiality for items which a public body may exempt from disclosure … or for information that is discussed in a meeting closed to the public in executive session…. this conclusion does not encourage any breach of confidentiality of an executive session particularly where longstanding privileges such as that of attorney-client are involved. The South Carolina Supreme Court has held that only the public body, as a whole, can authorize the waiver of attorney-client privilege. *Wilson v. Preston*, 378 S.C. 348, 359, 662 S.E.2d 580, 585 (2008) ('[T]he Council, as a whole, is authorized to release that information and has to waive the privilege before an individual council member can review privileged documents.')."

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The End.

- Questions?

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