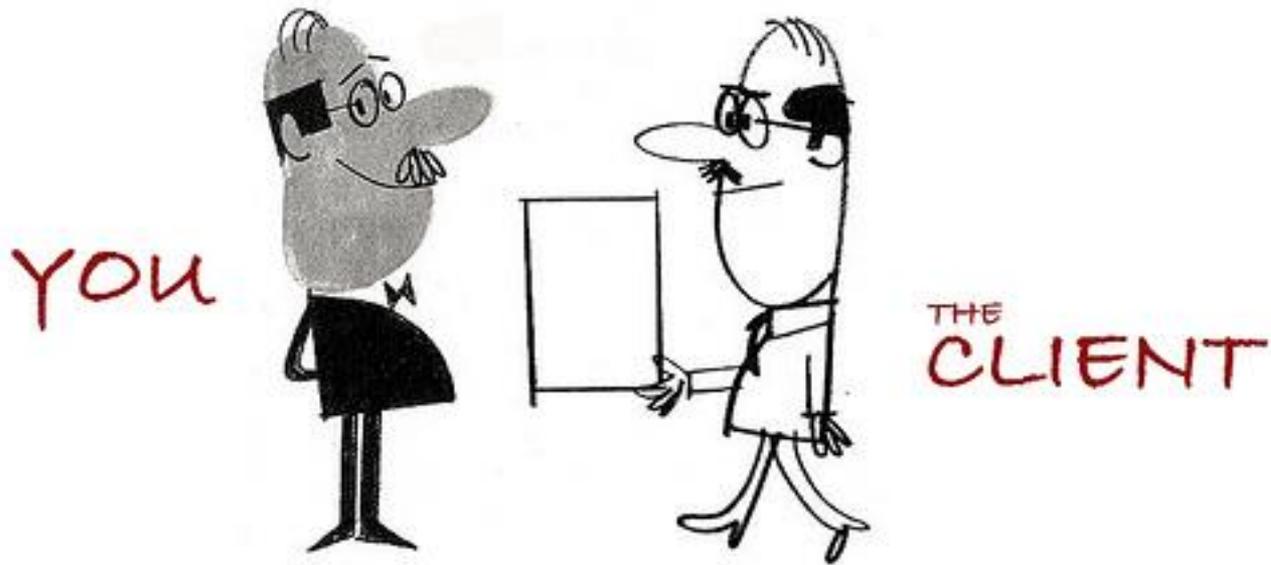


Ethics of Representing Governmental Entities

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Know Your Client



Who Is Your Client?

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

Oregon RPC 1.13(a)

Duly Authorized Constituents

- Who has authority to bind the organization
- Look to the enabling documents and substantive law
- Typically:
 - Officers
 - Majority of board members
 - Executive director/CEO

The Accidental Client

If a lawyer acts in a way that leads a person to reasonably believe that a lawyer-client relationship exists between them, and the person relies on this conduct, then the lawyer will likely have created a lawyer-client relationship, even though there is no express agreement or mutual consent.

In re Weidner, 310 Or 757, 770 (1990)

Reasonable Expectations Test

Lawyer-client relationship exists when:

- client's **subjective belief** that relationship exists
is supported by
- **objective facts** upon which a reasonable person would rely.

Why it Matters

- Breach of duty of confidentiality
- Breach of duty of loyalty
- Losing control over disclosure of privileged communications
- Disqualification or discipline for conflict of interest.

Example

You represent Agency and are advising a Director on various Agency legal matters when Director asks whether the health insurance benefits provided to spouses of Directors are also available to “common law” spouses. You say no. Director then asks what to do about the fact that he has been claiming his common law spouse as eligible for the health insurance benefits for the last 5 years.

What do you do?

- Identify your client.
- Tell the Director who your client is. *RPC 1.13(f)*
- Don't give Director legal advice. *RPC 4.3*
- Do recommend Director seek legal advice of independent counsel. *RPC 4.3*
- Ask Director to make Agency whole.
- Report to higher authority, if necessary. *RPC 1.13(b)*

Practice Tips

- Never pass up an opportunity to let constituents know what your role is and whose interests you are looking out for.
- Be on alert whenever someone closes your door and asks if they can tell you something confidential and get your advice.

Keep Client Confidences



Confidentiality

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).

RPC 1.6(a)

Information Relating to Representation

- Attorney-client privileged communications
- Information gained during the representation that:
 - Client has asked you to keep secret
 - Disclosure would be embarrassing to the client
 - Disclosure would be likely to be detrimental to the client

RPC 1.0(f)

Exceptions

- To prevent client who intends to commit a crime
- To prevent reasonably certain death or substantial bodily harm
- To establish or claim or defense on behalf of lawyer in controversy with client
- To comply with other law, court order or as permitted by the RPCs.

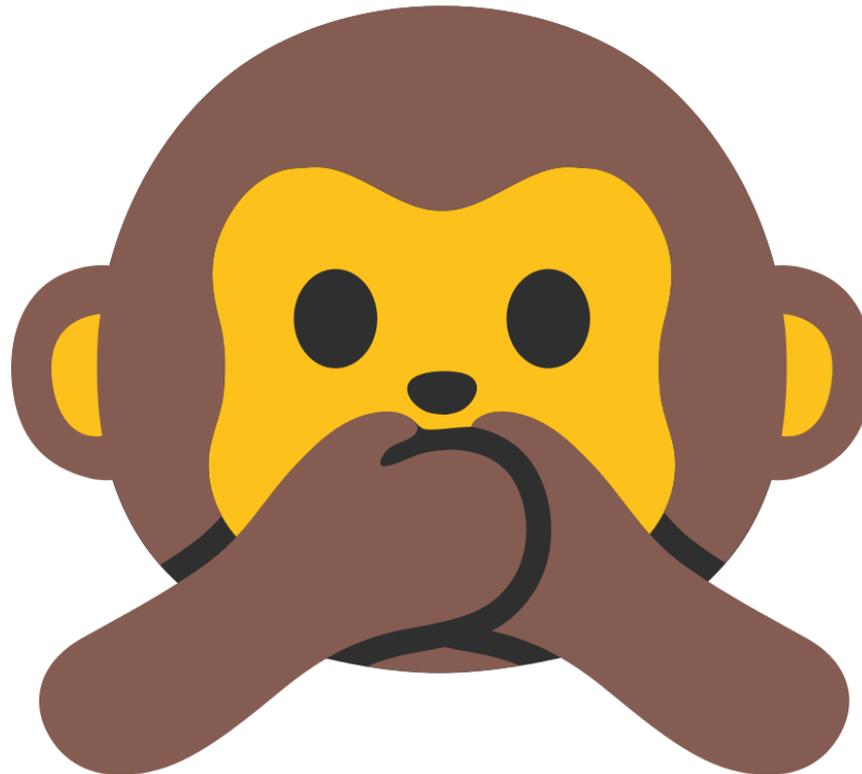
RPC 1.6(b)

Entity Exception

- If highest authority refuses to comply with clearly established law and
- Lawyer reasonably believes violation of law is reasonably certain to result in substantial injury to the entity,
- Then, Lawyer may reveal confidences to extent reasonably necessary to prevent substantial injury to the entity.

RPC 1.13(c)

Don't Communicate with Represented Persons



The Rule

In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject...

RPC 4.2

Client Not Required

- Applies when lawyer representing himself
 - In re Knappenberger, 338 OR 341 (2005)
- Applies when lawyer is inactive
 - In re Smith, 318 Or 47 (1993)

“Communicate”

- Defined broadly
- Cannot communicate through another
- Clients may negotiate with each other
 - OSB Formal Op No 2005-147

“Subject of Representation”

- Matters outside scope of representation okay
- Providing second opinion okay
 - OSB Formal Op No 2005-81
- Subject ≠ Matter
 - *In re Newell*, 348 Or 396 (2010)

“Knowledge”

- Defined by RPC 1.0(h)
 - Actual knowledge
 - May be inferred from circumstances
- *In re Schwabe*, 242 Or 169 (1965)

Exceptions

- Prior consent of the person's lawyer
- Authorized by law
 - Narrowly construed. In re Schenck, 320 Or 94 (1994)
 - Service of process okay. In re Carroll, 15 DB Rptr 48 (2001)
 - Sending the original of a letter to a person represented by counsel with a copy to attorney is not okay. In re Hedrick, 312 Or 442 (1991).

Exceptions Re: Government Entities

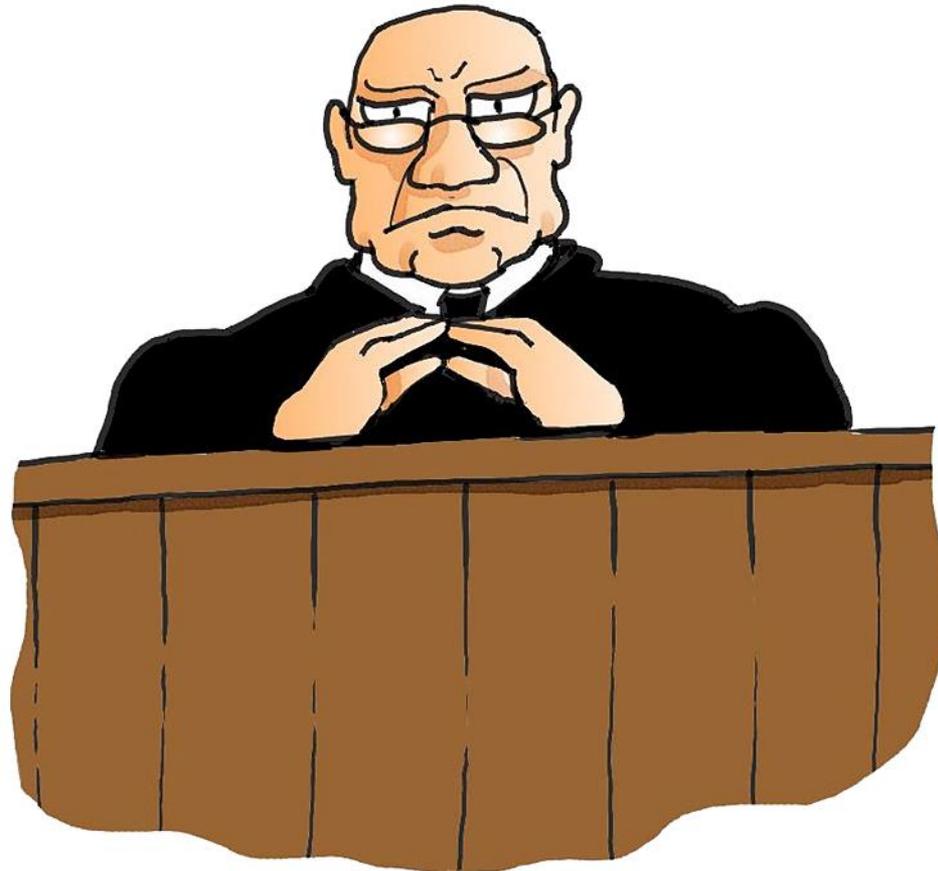
- Seeking redress from the government
 - ABA Formal Op No 97-408
- Obtaining public records from the government
 - OSB Formal Op No 2005-144
- Investigative activities
 - OSB Formal Op No 2005-161
 - In re Mettler, 305 Or 12 (1988)

Who is Deemed Represented?

- Off-limits
 - Officers and directors
 - Management employees
 - Employees whose conduct is at issue
- OK
 - Current employees not in the categories above
 - Former employees
 - BUT...Beware of invading privilege

Example

Avoid Ex Parte Contact



The Rule

Lawyers shall not:

- Communicate ex parte
- On the merits of a cause
- With a judge, juror, prospective juror or other official of a tribunal
- Unless authorized to do so by law

RPC 3.5(b)

Definitions

- Tribunal defined by RPC 1.0(p)
- “Ex parte” communication
 - On behalf of or involving only one party to a legal matter and in the absence of or without notice to the other party
Merriam Webster’s Dictionary of Law
- On the merits
 - The legal rights and duties of the parties as disclosed by the pleadings and evidence

“Authorized by Law”

- Advice by legal counsel to decision-maker
 - State Agencies: ORS 180.060 and 180.220
 - County: ORS 215.422
 - City: ORS 227.180
- OSB Formal Op No 2005-134
- OSB Formal Op No 2005-83

Example

What If It's Not Clear?

In re Gillis, 297 Or 493 (1984)(ex parte contact did not violate former DR 7-110(B) where the lawyer had a good faith belief that the contact was authorized by law and the law was unsettled.)

In re Dugger, 334 Or 602 (2002)(lawyer's mistaken belief that he was not required to provide notice to the opposing party when he applied ex parte for a TRO and injunction, was not a defense to his violation of former DR 7-110(B) because a culpable mental state is not an element under the rule.)

Avoid Conflicts



Government Lawyer Conflicts

Lawyer who is currently serving as a public officer or employee may not participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the lawyer's former client and the appropriate government agency give informed consent, confirmed in writing.

RPC 1.11(d)(2)(v)

Negotiating for Private Employment

Lawyer who is currently serving as a public officer or employee may not negotiate for private employment with any person who is involved as a party or as a lawyer for a party in a matter in which the lawyer is participating personally and substantially....

RPC 1.11(d)(2)(vi)

What Does It Mean?

- **Personal & Substantial Participation**
 - OSB Formal Op No 2005-120
 - Close, personal, direct relationship
 - Involved to important, material degree
- **Matter**
 - RPC 1.0(i)
 - Not legislation, rule-making, etc.

Other Government Lawyer No-Nos

- Using the lawyer's public position to obtain, or attempt to obtain, special advantage in legislative matters for the lawyer or for a client
- Using the lawyer's public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client.
- Accepting anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official
- Either while in office or after leaving, using information the lawyer knows is confidential government information obtained while a public official to represent a private client.

RPC 1.11(d)(2)

Questions?

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