

NYSBA Local & State Government Law Section  
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**Ethical Issues for Public Sector  
Attorneys in NY**

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**Who Is The Client?**

## Rule 1.13: Organization as Client

### -- Entity Rule

(a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

## Rule 1.13: Organization as Client

### -- Reporting Up

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) 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. . . .

## Rule 1.13: Organization as Client

### -- Reporting Up

... In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. . . .

## Rule 1.13: Organization as Client

### -- Reporting Up

... Such measures may include, among others:

- (1) asking reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to an appropriate authority in the organization; and
- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

## Rule 1.13: Organization as Client

### -- Reporting Out

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly in violation of law and is likely to result in a substantial injury to the organization, the lawyer may reveal confidential information only if permitted by Rule 1.6, and may resign in accordance with Rule 1.16.

## Rule 1.6: Confidentiality of Information

### -- Duty

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

- (1) the client gives informed consent, as defined in Rule 1.0(j);
- (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
- (3) the disclosure is permitted by paragraph (b)....

## Rule 1.6: Confidentiality of Information

### -- Scope

(a) ...“Confidential information” consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. “Confidential information” does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

## Rule 1.6: Confidentiality of Information

### -- Exceptions

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime;
- (3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

## Rule 1.6: Confidentiality of Information

### -- Exceptions

- (4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;
- (5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or  
(ii) to establish or collect a fee; or
- (6) when permitted or required under these Rules or to comply with other law or court order.

Matt Apuzzo, Maggie Haberman and Michael S. Schmidt, [Michael Cohen Secretly Taped Trump Discussing Payment to Playboy Model](#), NEW YORK TIMES, July 20, 2018.

"The recording is potential evidence in the campaign finance investigation, but became tied up in a legal fight over what materials are protected by attorney-client privilege and thus off limits to prosecutors. It is not clear whether a federal judge has ruled on whether prosecutors can listen to the recording."

## May a Lawyer Secretly Tape Conversations? ABA Formal Op. 01-422

- A lawyer who electronically records a conversation without the knowledge of the other party or parties to the conversation does not necessarily violate the Model Rules. A lawyer may not, however, record conversations in violation of the law in a jurisdiction that forbids such conduct without the consent of all parties, nor falsely represent that a conversation is not being recorded.
- The Committee is divided as to whether a lawyer may record a client-lawyer conversation without the knowledge of the client, but agrees that it is inadvisable to do so.

## May a Lawyer Secretly Tape Conversations? NYC Eth. Op. 2003-02

A lawyer may not, as a matter of routine practice, tape record conversations without disclosing that the conversation is being taped. A lawyer may, however, engage in the undisclosed taping of a conversation if the lawyer has a reasonable basis for believing that disclosure of the taping would impair pursuit of a generally accepted societal good. The Committee is divided as to whether a lawyer may record a client-lawyer conversation without the knowledge of the client, but agrees that it is inadvisable to do so.

## May a Lawyer Secretly Tape Conversations? NYC Eth. Op. 2003-02

[W]hile this Committee concludes that there are circumstances other than those addressed in our prior opinions in which an attorney may tape a conversation without disclosure to all participants, we adhere to the view that undisclosed taping as a routine practice is ethically impermissible. We further believe that attorneys should be extremely reluctant to engage in undisclosed taping and that, in assessing the need for it, attorneys should carefully consider whether their conduct, if it became known, would be considered by the general public to be fair and honorable.

## Rule 1.16: Declining or Terminating Representation

(c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when: . . .

(1) withdrawal is permitted under Rule 1.13(c) or other law;....

(d) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.



## Rule 1.16: Declining or Terminating Representation

(e) Even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

## Attorney-Client Privilege

## Restatement (Third) of the Law Governing Lawyers § 68 Attorney-Client Privilege

Except as otherwise provided in this Restatement, the attorney-client privilege may be invoked as provided in § 86 with respect to:

- (1) a communication
- (2) made between privileged persons
- (3) in confidence
- (4) for the purpose of obtaining or providing legal assistance for the client.

## CPLR § 4503

**“confidential communication**

made **between the attorney or his or her employee and the client**

in the **course of professional employment”**

## How Deep Does the Privilege Go?

- Control Group test:
  - Privilege extends only to employees in a position to control or take a substantial part in a decision about action which the corporation may take upon the advice of the attorney, or authorized members of a body or board which has that authority.
- Subject Matter test:
  - Privilege extends to confidential communications between attorney and any employee, provided the subject matter of the communication concerns the employee's corporate duties and the purpose of the communication involves the providing of legal advice to the corporation.

## How Deep Does the Privilege Go?

- “The NY Court of Appeals . . . reveals an expansive attitude toward the attorney-client privilege in the corporate context,” even extending to attorney's communications with a former employee of the City of New York.
  - 5 N.Y. Prac., Evidence in New York State and Federal Courts § 5:8 (citing *Radovic v. City of New York*, 168 Misc. 2d 58, 642 N.Y.S.2d 1015 (N.Y. 1996))

## Attorney-Client Privilege

- Jeffrey L. Goodman & Jason Zabokrtsky, *The Attorney-Client Privilege and the Municipal Lawyer*, 48 DRAKE L. REV. 655 (2000).
- Nancy Leong, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys*, 20 GEO. J. LEGAL ETHICS 163 (2007).
- Marion J. Radson & Elizabeth A. Waratuke, *The Attorney-Client and Work Product Privileges of Government Entities*, 30 STETSON L. REV. 799 (2001).
- Patricia E. Salkin, *Beware: What You Say to Your [Government] Lawyer May Be Held Against You—The Erosion of Government Attorney-Client Confidentiality*, 35 URB. LAWYER 283 (2003).

Martin London, [Why President Trump Couldn't Have Stopped the White House Counsel From Talking to the Mueller Investigation](#), TIME, Aug. 20, 2018.

- “To begin with: There is no executive privilege in a criminal investigation except for military or diplomatic matters. The Supreme Court made that clear by its unanimous decision requiring Richard Nixon to give a grand jury the White House tapes that ultimately led to his resignation.”
- “And second, the D.C. Circuit . . . has definitively held there was no attorney-client privilege between White House Counsel and President Bill Clinton that would protect advice or documents in Ken Starr’s criminal investigation, because White House counsel are not personal lawyers to the President.”

# Conflicts of Interest

- Organization as Client: Special Considerations for a Government Lawyer, NYC Eth. Op. 2004-03
  - What are the ethical obligations of a government lawyer in dealing with potential conflicts of interest (a) among government agency clients; (b) between a government agency and its constituents represented by the government lawyer; and (c) between an agency and unrepresented constituents?
- Part-Time Public Official Or Employee; Assistant City Attorney; Conflict Of Interest, NY Eth. Op. 603 (1989)
  - A part-time assistant city attorney, or any member or associate of his private law firm, may not represent clients before city agencies with which the attorney is associated; but the attorney or his law firm may represent private clients before other agencies, if the proposed representation and the agency are unrelated to the attorney's public function.

- **Conflicts: Town Attorney, NY Eth. Op. 1130 (2017)**
  - A nonconsentable conflict exists when one member of a law firm acts as Town Attorney on, among other things, planning and zoning matters and another lawyer in the firm seeks to represent an applicant before the Town's planning board.
- **Imputed Conflicts Of Interest; Part-Time Prosecutor, NY Eth. Op. 1065 (2015)**
  - The law firm of a part-time prosecutor for Town may represent a client in an Article 78 proceeding against Village, involving actions of Village zoning board or Village planning board, where (i) the Town and Village are separate legal entities and have separate legal departments, (ii) the Town Attorney and his or her staff, including the part-time prosecutor, have no responsibility for prosecuting Village zoning and planning laws, and (iii) the proceeding would not involve Village law enforcement personnel, even though the Town and Village courts have been merged and the Village provides police protection services to both the Village and Town.