

COLORADO MUNICIPAL LEAGUE
ANNUAL SEMINAR ON MUNICIPAL LAW

Legal Ethics in Practice

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Court Confusion

- Small in-house legal department (including prosecution)
- Standing order requires discovery on request; defendant requests criminal history
- Town/court clerk:
 - provides criminal histories to prosecutor and judge
 - believes CBI prohibits disclosure to defense
- Lawyer assigned to clerk advises disclosure is required and not prohibited
- Clerk reports prosecutor

Court Confusion – Question #1

- *Is there a conflict of interest in the town attorney's office?*

Rule 1.7(a)...a lawyer shall not represent a client ... 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

Court Confusion – Question #1

- *Is there a conflict of interest in the town attorney's office?*

Rule 1.13(a)...A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

Court Confusion – Question #2

- *What are the prosecutor's obligations?*

Rule 3.4...A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

Court Confusion – Question #2

- *What are the prosecutor's obligations?*

Rule 4.1...In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client...

Court Confusion – Question #2

- *What are the prosecutor's obligations?*

Rule 8.4...It is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation...; (d) engage in conduct that is prejudicial to the administration of justice;

Court Confusion – Question #3

- *What is the obligation of the attorney advising the clerk?*

Rule 1.13(a)...A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

Court Confusion – Question #3

- *What is the obligation of the attorney advising the clerk?*

Rule 1.13(b)... If a lawyer for an organization knows that a [constituent] is engaged in action, intends to act or refuses to act in a matter related to the representation that is ... a violation of law that reasonably might be imputed to the organization, and 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 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 ...

Court Confusion – Question #3

- *What is the obligation of the attorney advising the clerk?*

Rule 2.1...a lawyer shall exercise independent professional judgment and render candid advice

Court Confusion – Question #4

- *What is the obligation of the supervising attorney?*

Rule 5.1(b)...A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

Court Confusion – Question #4

- *What is the obligation of the supervising attorney?*

Rule 5.1(c)... A lawyer shall be responsible for another lawyer's violation ... if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) ...has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Collusion Profusion – Step 1

- March '21: city hires outside counsel (Oscar) on contingency in dispute with provider for faulty software that overcharged water customers
 - Counsel also represented resident in potential claim against city relating to overcharging
- April '21: Oscar refers resident to another lawyer (Nancy) with city attorneys' knowledge (but receives undisclosed \$1M referral fee)
- May '21: Nancy files class action suit (drafted by Oscar)

Collusion Profusion – Step 2

- June '21: Senior Assistant City Attorney (Pringle) informed that:
 - Class-action was intended as a vehicle to settle on the city's terms
 - Oscar referred the case to Nancy for that purpose
 - A different official from the city attorney's office directed and authorized the strategy
- July '23: city agrees to \$10M attorney fee award over defense counsel's objection to amount stated in internal email, given amount of work performed by Nancy
- September '23: the court approves a \$60M settlement

Collusion Profusion – Step 3

- November '23:
 - Oscar's employee Athena threatens to release documents showing collusion unless she's paid \$1M (that Oscar doesn't want to pay)
 - Pringle threatens to fire Oscar unless he pays Athena
 - Oscar has incurred thousands of hours of uncompensated labor and fees

Collusion Profusion – Step 4

- December '23:
 - Oscar and Athena can't reach agreement on her demand
 - Athena offers information to billing software provider defendant
 - Pringle repeats his threat to fire Oscar
- January '24:
 - Oscar reaches a settlement with Athena
 - Pringle agrees to conceal payment to Athena and collusion about class action from the city attorney

Transmission Omission

- Municipal attorney working on a large contract with local company for several years
 - Outside counsel assigned for company when in-house counsel goes on leave
 - In-house counsel returns and continues work, excluding outside counsel
 - In-house counsel copies company executives on e-mails
- A year later, municipal attorney receives “out of office” from in-house counsel:
 - 1-month absence
 - Paralegal and administrator information
- Municipal attorney e-mails paralegal and others on e-mail chains
- Outside counsel threatens grievance for communicating with represented party

Transmission Omission - Questions

- *Was the municipal attorney violating CRPC 4.2?*

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 or LLP in the matter, unless the lawyer has the consent of the other lawyer or LLP or is authorized to do so by law or a court order.

- *What should the municipal attorney have done after getting the “out of office” email?*

Thank You!



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