

Ethical Landmines in Representing School Districts

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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.

Settlement Negotiations

RPC 1.2(a): “A lawyer shall abide by a client's decisions concerning the scope and objectives of representation, . . . and as required by RPC 1.4 shall consult with the client about the means to pursue them. . . . A lawyer shall abide by a client's decision whether to settle a matter.”

RPC 1.4

(b) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(c) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(d) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall advise the client of the relevant limitations on the lawyer's conduct.

Communications with Individual Board Members

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

ACPE Op. 327 (1976)

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

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 disclosures that are impliedly authorized in order to carry out the 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 . . .

Proposed Amendment to RPC 1.6(a)

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

What's “impliedly authorized”?

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

Conflicts of Interest

- Concurrent conflicts
- Duty to former clients
- Positional conflicts

RPC 1.7

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists 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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if

each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, *provided, however, that a public entity cannot consent to any such representation.*

RPC 1.8(k)

A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client.

- ACPE Op. 707 – Member of Elected School Board/Municipal Attorney
- *Gallagher v. Atlantic City BOE*, 2010 WL 57216 (D.N.J. 2010)
- 34 N.J. Practice, Local Government Law § 9:23

Frequent Scenarios

- Simultaneous representation of multiple districts with competing interests (residency disputes, send-receive issues)
- Disciplinary proceedings against high-ranking staff

Disciplinary Proceedings

- *Tobia v. Board of Education of Lakewood Township*, 2018 WL 1247426 (App. Div. 2018)
- Was the employee a “client?” Even if not, is there a “material limitation?”

Duties to Former Clients

RPC 1.9

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

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

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

RPC 1.8(g)

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, . . . unless each client gives informed consent after a consultation that shall include disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Positional Conflicts

- Representing districts and parents in special education matters
- Representing districts and charter schools

Positional Conflicts

Comment [24] to ABA Model Rule 1.7:

“Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients.

The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. . . .

... A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client.”

Thanks for Coming!

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