



# LAWYER ETHICS: COMMUNICATIONS BETWEEN PRIVATE AND GOVERNMENT ACTORS

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# Who Can Talk to Who? Ethical Questions

- Communicating with government regulators/officials
- Civil investigations
- Open records requests
- Government press releases
- Government attorneys and confidential information



# ABA Model Rule 1.3 - Diligence

“A lawyer shall act with reasonable diligence and promptness in representing a client.”



# Comment to ABA Model Rule 1.3 - Diligence

“A lawyer should . . .

A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.



# Ethics vs Smart Practice



- Zealous advocacy is required, but extreme measures may not be in your client's interests
- Just because you can do something, does not mean you should or that it is the best course of action



## ABA Model Rule 1.2 - Allocation of Authority Between Client And Lawyer

“Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.”



# **Hypo #1**

# **Contacting the Regulator**

# Hypo 1: Contacting the Regulator

You represent a client's interests related to a small contaminated site in the State of Middle Dakota. Counsel for the Middle Dakota Department of Natural Resources has been unwilling to accept your client's proposal to use a certain remedy at the Site. Frustrated, you contact the Secretary of the NR Department, without asking permission from opposing counsel, to see if they will support your client's proposal.





# Questions for Hypo 1



- Have you violated the no contact rule by contacting the secretary?
- Does your client have a constitutional right to petition the secretary?
- Does it matter what you said?
- Should you have given notice to opposing counsel?



# ABA Model Rule 4.2 - Communication with Person Represented by Counsel

“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 in the matter, unless the lawyer has the consent of the other lawyer . . . .”

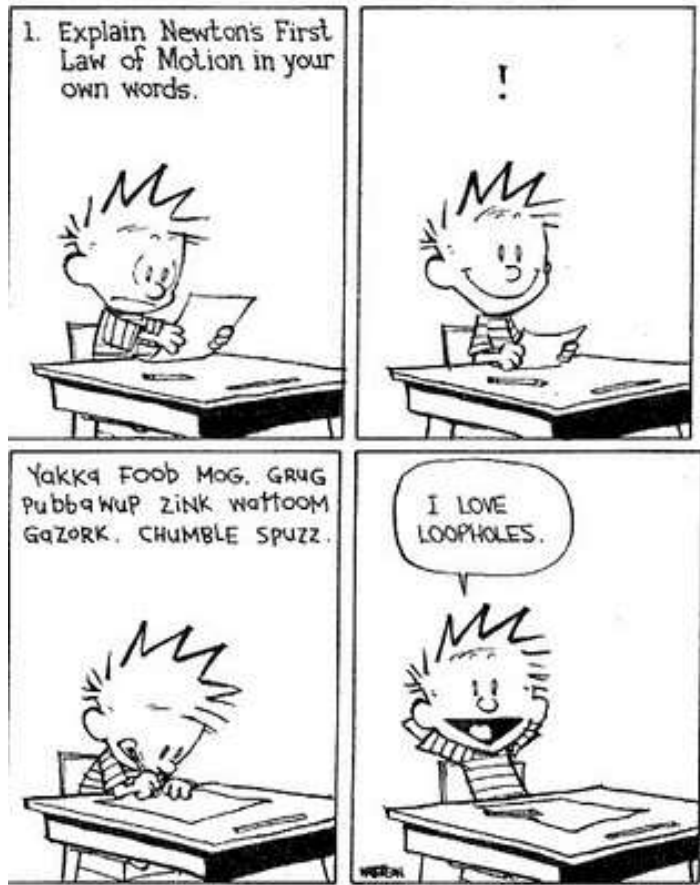


# Comment to ABA Model Rule 4.2

“This Rule does not prohibit communication . . . concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party. . . does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter.”



# Comment to ABA Model Rule 4.2



“Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.”



# Comment to ABA Model Rule 4.2

“Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government.”



# ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 97-408 (1997)

“Thus Rule 4.2 permits a lawyer representing a private party in a controversy with the government to communicate about the matter with government officials who have authority to take or to recommend action in the matter, provided that the sole purpose of the lawyer's communication is to **address a policy issue**, including settling the controversy. In such a situation the lawyer must give government counsel **reasonable advance notice** of his intent to communicate with such officials, to afford an opportunity for consultation between government counsel and the officials on the advisability of their entertaining the communication.”



# Colorado Bar Association Formal Opinion 93: Ex Parte Contacts with Government Officials (1993)

“[B]ecause of the “authorized by law” exception, the Rule does not prohibit ex parte contacts with any government official or employee **acting in a legislative or rulemaking capacity** (except when specifically prohibited by law).”



# DC Bar Association Ethics Opinion 340 (2007)



“Under D.C. Rule 4.2(d), a lawyer representing a client in a dispute being litigated against a government agency may contact a government official within that agency without the prior consent of the government’s counsel **to discuss substantive legal issues**,. . . . The lawyer cannot, however, contact government officials either within the agency involved in the litigation or elsewhere concerning **routine discovery matters, scheduling issues or the like**, absent the consent of government counsel.”





# DC Bar Association Ethics Opinion 340 (2007)

“[S]o long as the lawyer identifies himself and indicates that he is representing a party adverse to the government. . . .”



**Hypo #2**  
**Civil Investigations:**  
**Contacting Clients Instead of**  
**Attorneys**

# Hypo 2: Civil Investigations

You are an attorney for the United States Department of Justice. You recently sued a company under CERCLA for remediation costs. To get more information before discovery begins, you encourage an attorney with the EPA to send a 104(e) request to the company, instead of the company's attorney.



# Questions for Hypo 2



- Can the government send the information request directly to the company instead of the company's attorney?
- Does it matter that 104(e) requests are used for civil investigations?
- Does it matter that litigation has already started?



# Comment to ABA Model Rule 4.2

“Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings.”



# State v. Maloney (Wisc. Supreme Court 2005)



“There is much authority for the proposition that communication with represented criminal suspects as part of noncustodial interrogations, before formal proceedings are initiated, are not subject to the anticontact rule.”



# **Hypo #3**

## **Open Records Request**

# Hypo 3: Open Records Requests

You represent a small company that was recently sued with a large group of PRPs by a state agency to remediate a contaminated site. Lacking information about the site, you decide to send an open records request to the agency in charge of the site. You send the open records request directly to the state open records officer.





# Questions for Hypo 3

- Does your client have the right to send the Open Records Request even though the state is represented?
- Does it matter that litigation has already started?
- Should you have sent it to opposing counsel instead of the open records officer?



# Comment to ABA Model Rule 4.2



“Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government.”



# North Carolina Bar Association 2011 Formal Opinion 15: Communication with Adverse Party to Request Public Records

“Opinion rules that, pursuant to the North Carolina Public Records Act, a lawyer may communicate with a government official for the purpose of identifying a custodian of public records and with the custodian of public records to make a request to examine public records related to the representation although the custodian is an adverse party, or an employee of an adverse party, **whose lawyer does not consent to the communication.**”



# Beware Substantial Law!

## **Alaska Sec. 40.25.122. Litigation disclosure.**

A public record that is subject to disclosure and copying . . . remains a public record subject to disclosure and copying even if the record is used for, included in, or relevant to litigation, including law enforcement proceedings, involving a public agency, except that with respect to a person involved in litigation, the records sought shall be disclosed in accordance with the rules of procedure applicable in a court or an administrative adjudication. In this section, “involved in litigation” means a party to litigation or representing a party to litigation, including obtaining public records for the party.



# Public Water Supply Dist. No. 3 of Laclede County, Missouri v. City of Lebanon

13. On or about January 31, 2008, Plaintiff, by its attorneys, and pursuant to the Sunshine Law, requested in writing that the City produce copies of all records and other documents contained in the City's files involving or relating to the sale of water and sewer services within certain specified areas which areas are inside the judicially established boundaries of the Plaintiff, for inspection and copying by Plaintiff. A copy of this request is attached as Exhibit "A", and incorporated by reference. At the time of the written request for documents, Plaintiff had initiated a separate suit filed in the United States District Court for the Western District of Missouri which in part, sought to enforce Plaintiff's rights under Section 247.160, 247.165 and 247.170 RSMo<sup>1</sup>. The written request for inspection and copying of documents pursuant to the Sunshine Law were directly related to claims raised in the federal suit for violations of federal law [7 U.S.C. § 1926(b)] and violations of Section 247.160, 247.165 and 247.170 RSMo.

# The City's Response

The records you requested are closed pursuant to RSMo § 610.021(1). Because the Rule 26/16 conference has taken place in the federal case filed by the District and discovery is now permitted in that case, the City will respond appropriately to any request for production of documents served in accordance with the Federal Rules of Civil Procedure. In addition, the records sought may contain information protected by RSMo § 610.021(21), making the Federal Rules of Civil Procedure the appropriate means to request such records.



# Modified Hypo 3



While investigating the same superfund site, you learn that a local city was involved in the oversight of the site at one time. You decide to send an open records request to the city clerk. The city clerk provides their entire file including, some materials that are arguably attorney-client privilege, in response.



# ABA Model Rule 4.3 - Dealing with Unrepresented Person

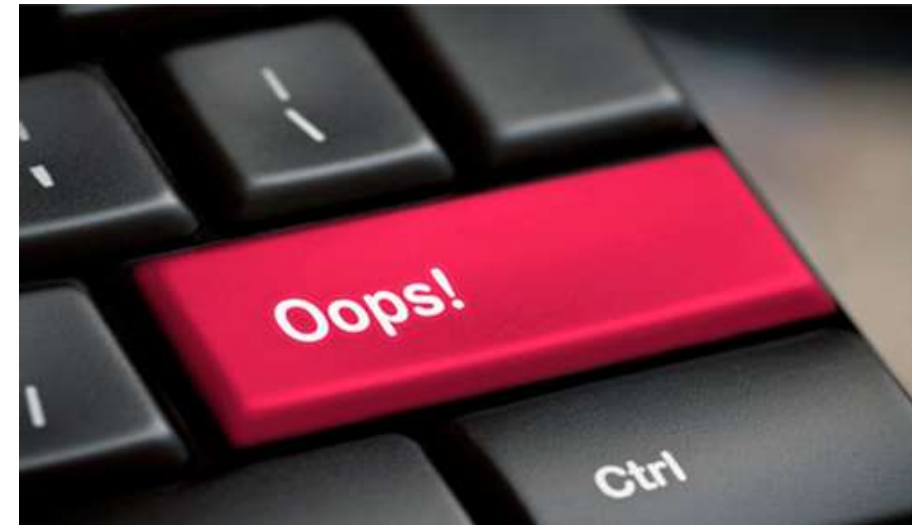
“In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.





## ABA Model Rule 4.4(b) - Respect for Rights of Third Persons

“A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.”

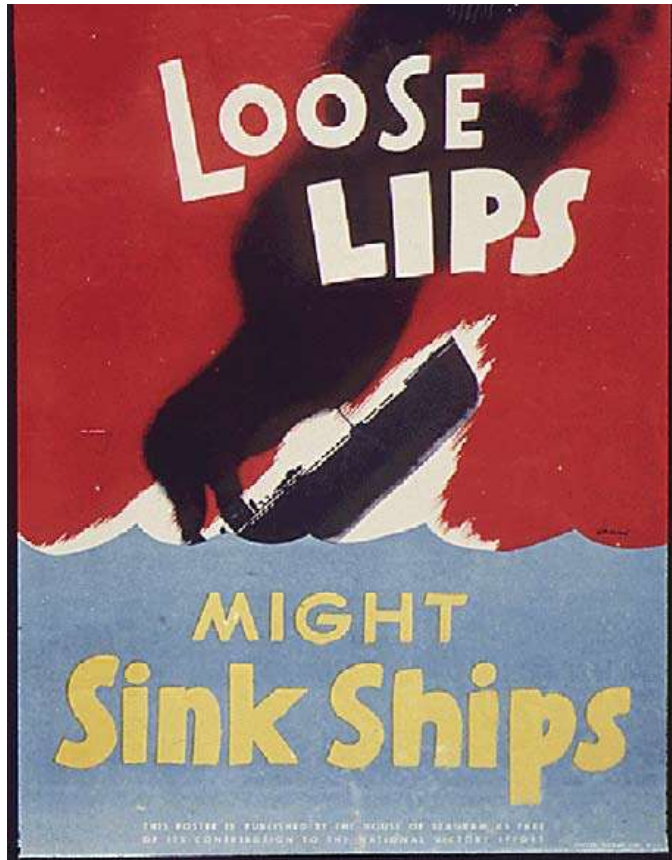


## Comment to ABA Model Rule 4.4(b) - Respect for Rights of Third Persons

“Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law **beyond the scope of these Rules**, as is the question of whether the privileged status of a document or electronically stored information has been waived.”



# Missouri Informal Advisory Opinion 2014-02



“According to Comment [3] to Rule 4-4.4, where applicable law does not require Attorney to return a document inadvertently sent, the decision as to whether to do so is governed by Attorney’s independent professional judgment.”



# DC Bar Association Ethics Opinion 256 (1995)

“Where a lawyer has inadvertently included documents containing client secrets or confidences in material delivered to an adversary lawyer, and the receiving lawyer in good faith reviews the documents **before the inadvertence** of the disclosure is brought to that lawyer’s attention, the receiving lawyer engages in no ethical violation by retaining and using those documents. Where, on the other hand, the receiving lawyer **knows of the inadvertence of the disclosure** before the documents are examined, Rule 1.15(a) requires the receiving lawyer to return the documents to the sending lawyer; the receiving lawyer also violates Rule 8.4(c) if the lawyer reads and/or uses the material.”



# **Hypo #4**

# **Press Releases**

## Hypo 4: Press Releases

You are counsel for the Middle Dakota Department of Natural Resources. Recently the Mid. Dakota Attorney General filed a lawsuit against a company for their failure to remediate a contaminated site. The assistant attorney general handling the case asks you to have the N.R. Department issue a scolding press release that says the company is putting Middle Dakotans lives at risk.



# Questions for Hypo 4

- Should you agree to have the Department issue the press release?
- Is the press release a violation of the rules on trial publicity?
- Does it matter that you are not involved in the litigation directly?



# ABA Model Rule 3.6(a) – Trial Publicity

“A lawyer who is participating or has participated in the **investigation or litigation** of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”





# ABA Model Rule 3.6(a) – cont'd

“(b) Notwithstanding paragraph (a), a lawyer may state . . .

(2) information contained in a public record;”



# Comment to ABA Model Rule 3.6



“There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil **matter triable to a jury**, a criminal matter, or any other proceeding that could result in incarceration.”



# ABA Model Rule 3.6(d)



*"Your Honor, we feel the trial failed to deliver on its pretrial publicity."*

“No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a)”



# Comment to ABA Model Rule 3.6

“It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. . . . The public has a right to know about threats to its safety and measures aimed at assuring its security. . . . Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.”



# North Carolina Bar Association 98 Formal Opinion 4: Publicity in a Civil Trial (2011)

“Revised Rule 3.6 does not impinge upon the constitutional right of clients to make extrajudicial statements concerning their case. The rule, however, does place restrictions on attorneys' extrajudicial speech and that of their agents. If the above press release had a reasonable likelihood of materially prejudicing an adjudicative proceeding, and the Board **was merely used as conduit by the attorney** to make prejudicial statements the attorney could not, then the attorney violated Revised Rule 3.6.”



**Hypo #5**  
**Attorney-Client Privilege –**  
**Government Attorneys and**  
**Officials**

# Hypo 5: Attorney-Client Privilege and Governments

You are an attorney in the Middle Dakota Attorney General's Office and are assigned to handle matters from the Department of Natural Resources. An official from the Department shares confidential information with you about how the Department is dealing with a water law issue. The Attorney General, a hardliner on water law, asks that you share that information with him and the governor.



# Questions for Hypo 5

- Who is your client and does it matter?
- Can you share the confidential information with the Attorney General? The Governor?
- If we altered the hypo and a decision about whether to settle a water law case needed to be made, who would you turn to make that decision?



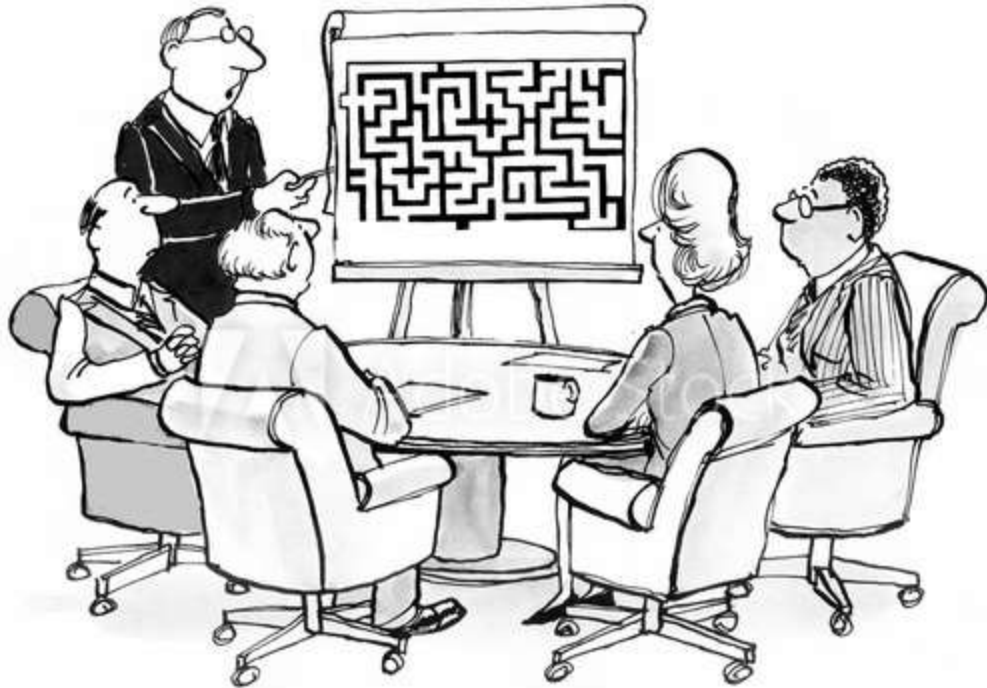


# ABA Model Rule 1.6 - Confidentiality of Information

“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).”



# ABA Model Rule 1.13 - Organization as Client



“What we’ve done is make it dramatically easier to navigate the corporate hierarchy.”

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



# Who is the client?

- The Department of Natural Resources?
- The Attorney's General's Office?
- The State of Middle Dakota?
- The People of Middle Dakota?



# ABA Model Rule 1.13 – Comment 9

“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. . . . Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. . . . In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation.”



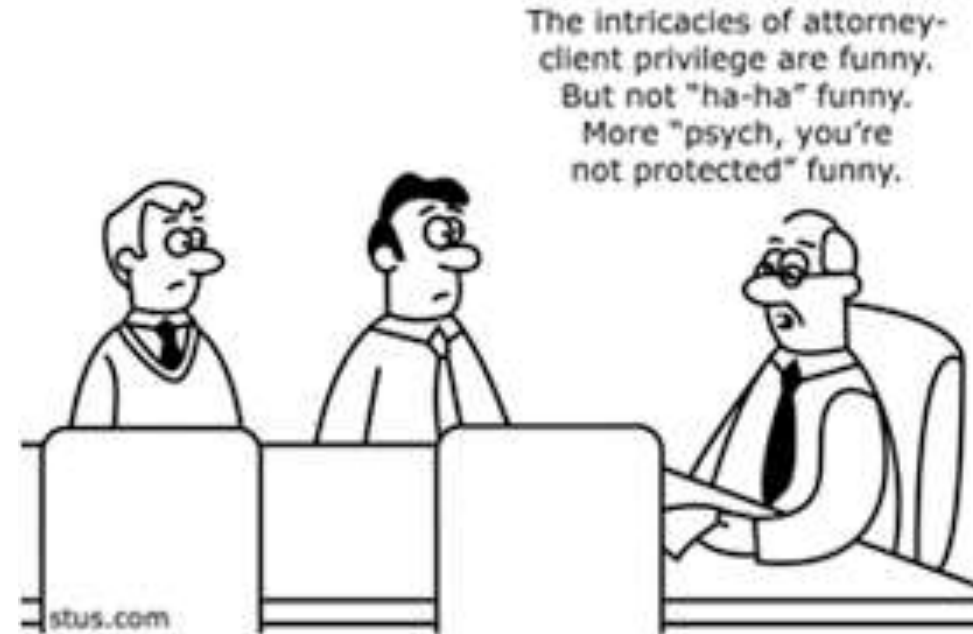
# DC Rule of Professional Conduct 1.6

“(k) The client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order.”



# Why Does It Matter?

- Who can you share information with?
- Who is the decision maker?





# QUESTIONS?

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