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Ethical Considerations When Representing Organizations

John M. Burman

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ETHICAL CONSIDERATIONS WHEN REPRESENTING ORGANIZATIONS

*John M. Burman*¹

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1. John M. Burman is Professor of Law at the University of Wyoming College of Law. He thanks Chris Jorgensen, University of Wyoming College of Law class of 2004, for his valuable research assistance, without which this article could not have been written.

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Whether by choice or otherwise, many of today's lawyers' clients are organizations of some sort, not individuals.² Unfortunately, the Rules of Professional Conduct refer primarily to individuals, leaving unanswered many ethical questions which inevitably arise when a lawyer represents an organization. The relative dearth of ethical guidance is likely a product of the historical development of rules of ethics. The rules grew out of the traditional lawyer-client relationship.³ A single lawyer, or perhaps a lawyer in a small firm, represented an individual. With one notable exception, Rule

2. Unlike individuals, organizations generally may not represent themselves; they may not appear through a non-lawyer, such as a member of the organization's governing body or an officer. UNIFORM RULES FOR THE DISTRICT COURTS OF THE STATE OF WYOMING R. 101(b) (LexisNexis 2002).

3. For a history of the development of rules of ethics, see C.W. WOLFRAM, MODERN LEGAL ETHICS §2.6 (West 1986).

1.13, the rules do not directly address how a lawyer's duties and responsibilities change when the client is an organization.

Organizations come in all shapes and sizes. Some are private, others are governmental. Among private organizations, some are for profit, ranging from family or small businesses to multi-national ones. Others are not-for-profit; they too may be small or large. Government organizations have proliferated. Thousands of them now play a role, and often a dominant one, in regulating virtually every aspect of modern life. A person living in Wyoming, for example, is subject to the federal government and its myriad agencies and boards, the state government and its myriad agencies and boards, county governments, town or city governments, and scores of boards, commissions, and authorities. As a result, even a lawyer who wishes to avoid government agencies simply cannot do so. The lawyer will either represent the government, in some form,⁴ or the lawyer will represent clients who either want to or must interact with the government. A lawyer must, therefore, know either how to ethically represent the government, or how to ethically represent clients with interests adverse to it.

Not surprisingly, the development and proliferation of organizational clients has significantly altered lawyers' ethical and legal obligations in several important ways. First, questions which are simple when a client is an individual, become complex when the client is an organization. When a client is an individual, for example, the lawyer knows who the client is and with whom the lawyer should interact – the individual. But that question becomes difficult when the client is an organization, which is a legal entity that can act only through individuals. Second, a lawyer's duties of confidentiality and the application of the attorney-client privilege are relatively simple when the client is an individual. They are not when the client is an organization. Third, when the client is an organization, a lawyer's duties run primarily to it, meaning that the lawyer must take action to protect the organization's interests, even when doing so is contrary to the interests of the individuals within the organization with whom the lawyer interacts. Fourth, potential and actual conflicts of interest increase substantially when the client is an organization, meaning that a lawyer must be even more sensitive to discovering and properly handling such conflicts. Finally, while government lawyers are generally held to the same ethical standards as private lawyers, their duties may vary in some circumstances.

Attorneys for organizations may be outside counsel or they may work directly for the organization as in-house counsel. Attorneys in the former role face numerous challenges in determining who is the client and with whom the lawyer should interact. The first question, who is the client,

4. The special ethical duties of government lawyers are discussed in Part V of this article, *see supra*, notes 349-445 and accompanying text.

is not an issue for in-house counsel; it is the employer. While that issue is simple, in-house counsel faces the additional issues which arise from the dual role of representing a client who is also one's employer. Since the rules generally do not distinguish between outside and in-house counsel, the latter are "subject to the full array of ethical rules and considerations governing the practice of law . . . and the concomitant fiduciary obligations of a faithful and loyal employee."⁵

This article is intended to provide a general overview of a lawyer's ethical duties when the lawyer represents an organizational client. Part I addresses the threshold questions of: (1) who is the client; and (2) with whom should the lawyer interact when representing the client? Part II is devoted to explaining how a lawyer's duty of confidentiality and the attorney-client privilege apply when the client is an organization. Part III addresses a lawyer's obligation to blow the whistle to protect an organization, including a brief description of the additional requirements imposed on certain organizational lawyers by Congress through the Sarbanes-Oxley Act, and the regulations promulgated pursuant to that act by the Securities and Exchange Commission. Part IV discusses the unique conflicts of interest issues which arise when the client is an organization. Finally, Part V considers the different standards which apply to government lawyers.

PART I: WHO IS THE CLIENT, AND WITH WHOM SHOULD THE LAWYER INTERACT?

When a client is an individual, the questions of who is the client and with whom should the lawyer interact are usually easily answered. The client is the individual, and generally that individual is the person with whom the lawyer should interact.⁶ The same cannot be true when the client is an organization because by definition, an organization is a legal entity made up of individuals, referred to in the rules as "constituents,"⁷ who are supposed to act on its behalf. A corporation's constituents generally include, for example, directors, officers, shareholders, and employees; others, such as pensioners, customers, creditors, and government regulators, may also be inter-

5. Carole Basri, *The Client-Ethical Considerations*, 126 N.Y. PRAC. LAW INST. 17, 19 (October 2002).

6. In some circumstances, that question is not quite so simple. When a client is a minor, for example, or an insured, the role of the payer may confuse the issue. It should not. Two separate rules make it clear that a lawyer ethically cannot allow a third party payer to intrude into the attorney's relationship with the client. WYOMING RULES OF PROF'L CONDUCT R. 1.8(f), 5.4(c) (LexisNexis 2002). A lawyer who represents a client who is impaired by reason of youth, age, mental disability, or for any other reason, has special obligations. *Id.* at R. 1.14. Finally, a lawyer who is appointed as an attorney for the best interests of an individual or as a guardian ad litem for a person has special obligations. *See id.*, pmb1. 2; R. 1.2(a), (f); R. 1.4(b); R. 1.6(b)(3); R. 1.14(c), and the comments thereto.

7. WYOMING RULES OF PROF'L CONDUCT R. 1.13.

ested in the corporation's affairs.⁸ The variety of interested parties and their varied interests makes it more difficult and even more important, for the lawyer to clarify who is the client⁹ and with which individuals may or should the lawyer interact.

A. Who is the Client?

The attorney-client relationship in Wyoming is contractual, arising either by express agreement of the parties or by their conduct.¹⁰ It seems self-evident that everyone who enters into a contract should know with whom he or she is contracting and what he or she is agreeing to do. A lawyer is no different. A lawyer should never be in doubt about whether he or she has a client or about the identity of the client, regardless of whether the client is an organization or an individual. When a lawyer represents a governmental entity, the client is often specified by statute.¹¹ A lawyer in private practice has much more freedom about whom the lawyer will represent. That freedom makes it imperative that the client's identity be addressed in an engagement letter which, *inter alia*: (1) identifies the client; (2) specifies those persons with whom the lawyer should or may interact; (3) clarifies the scope of the lawyer's representation; (4) discusses the rate or rates to be paid the lawyer for the lawyer's services (fees) and which costs and disbursements (costs) will be the responsibility of the client; (5) sets forth how and when fees and costs will be billed; and (6) clarifies who will pay the lawyer's fees and costs.¹² Such a written engagement letter is recommended, but not required by the Wyoming rules.¹³ Lawyers who choose not to use engagement letters, however, are asking for trouble. Without an express agreement about the representation, the agreement between the attorney and the client may be implied.¹⁴ Whenever an implied agreement arises, there

8. Basri, *supra* note 5, at 20.

9. M.C. Daly, *Avoiding the Ethical Pitfall of Misidentifying the Organizational Client*, 1318 N.Y. PRAC. LAW INST. 721, 724 (2002) ("[I]t is critical that the lawyer not lose sight of the client's identity.").

10. *Carlson v. Langdon*, 751 P.2d 344, 347 (Wyo. 1988).

11. *See, e.g.*, WYO. STAT. ANN. § 9-5-103(a)(1) (LexisNexis 2001) ("The attorney general shall [among other things] . . . Prosecute and defend all suits instituted by or against the state of Wyoming, the prosecution and defense of which is not otherwise provided for by law . . .").

12. For a sample engagement letter, *see* R.W. Martin, Jr., *Practicing Law in the 21st Century: Fundamentals for Avoiding Malpractice Liability*, 33 LAND AND WATER L. REV. 191, 238 (1998).

13. WYOMING RULES OF PROF'L CONDUCT R. 1.5(b) ("When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, *preferably in writing*, before or within a reasonable time after commencing the representation.") (emphasis added). As of March 4, 2002, engagement letters are required in New York in most cases. NEW YORK RULES OF COURT R. 1215.1 (McKinney 2002).

14. *Meyer v. Mulligan*, 889 P.2d 509, 513 (Wyo. 1995) (quoting *Chavez v. State*, 604 P.2d 1341, 1346 (Wyo. 1979) (stating an attorney-client relationship "may be implied from the conduct of the parties").

will be at least two versions of the agreement, the client's and the lawyer's. A dispute over the existence of or terms of the agreement is an invitation for a client to file a grievance, a malpractice suit, or both, when the client believes the lawyer did not live up to the agreement as the client understood it. A contest with a client over the existence and/or terms of an implied agreement is always dangerous for a lawyer since the lawyer has the burden of clarifying the existence and terms of the relationship because the attorney-client relationship is not one between equals.¹⁵ The lawyer has a fiduciary relationship with each client,¹⁶ and the benefit of any doubt will go to the client, the subordinate one in the relationship. Accordingly, in a dispute between a client and a lawyer about the existence and/or terms of their implied agreement, the lawyer is likely to lose.¹⁷

Identifying the client(s) is especially important when representing organizations, whether private or public, small or large, profit or not for profit. Unfortunately, too many lawyers do not follow the practice of using engagement letters. That failure gets them into trouble (one simply does not read disciplinary opinions where a lawyer had an engagement letter; virtually all involve implied attorney-client relationships in which the attorney and the client disagree about the terms of the implied agreement).

1. General ethical considerations in representing organizations

Although rule 1.13 is entitled "Organization as Client," it applies only after an attorney-client relationship has been formed between a lawyer and an organization. The rule does not purport to address how that relationship is or should be formed. Accordingly, whether an attorney-client relationship exists is not determined by the rules of professional conduct, whether the client is an individual or an organization. Rather, the rules say that "principles of substantive law external to these Rules determine whether a client-lawyer relationship exists."¹⁸ Substantive law in Wyoming, in turn, says that whether such a relationship exists "depends on the facts and circumstances of each case."¹⁹ Generally, an attorney-client relationship exists if: (1) a prospective client consults a lawyer; (2) for the purpose of obtaining legal advice; (3) the lawyer undertakes to give the advice or fails to clarify

15. See, e.g., WYOMING RULES OF PROF'L CONDUCT R. 1.3 cmt. 3 ("Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so."); *Carlson v. Langdon*, 751 P.2d 344, 348 (Wyo. 1988) ("The burden of proof to show that it was unreasonable for a client to believe that an attorney-client relationship existed . . . has to rest with the attorney.").

16. Wolfram, *supra* note 3, § 4.1.

17. See *Carlson v. Langdon*, 751 P.2d at 347-48 (stating that the lawyer "did not demonstrate any effort to dispel [the former client's] understanding . . .").

18. WYOMING RULES OF PROF'L CONDUCT, scope ¶ 15.

19. *Chavez v. State*, 604 P.2d 1341, 1346 (Wyo. 1970), *reh. denied*, 446 U.S. 984; see also *Meyer v. Mulligan*, 889 P.2d 599, 513 (Wyo. 1995).

that he or she will not give the requested advice; and (4) the prospective client relies on the advice or the lawyer's inaction.²⁰ Since the first, second, and fourth elements are virtually always present (a prospective client always consults a lawyer to receive legal advice and then nearly always relies on that advice or inaction), the third element should be a lawyer's focus as it is the only element the lawyer can control. That is, a lawyer should know when he or she is undertaking to give legal advice, and a lawyer needs to be especially careful to ensure that prospective clients know that the lawyer is not going to represent them. It is the failure to clarify that a lawyer is not going to give legal advice which most often gets lawyers in trouble.²¹

As noted above, the attorney-client relationship in Wyoming is contractual.²² The contract may, of course, and should be, an express one; it may, however, "be implied from the conduct of the parties . . . [and] the general rules of agency apply to the establishment of the relationship."²³ When the contract is implied, doubt about whether a relationship exists, or doubt about the terms of the contract, will be resolved in favor of the client.²⁴ The question for a court considering whether an attorney-client relationship existed and, if so, what its terms were, will be whether it was reasonable for the client to believe that the relationship existed and/or whether it was reasonable for the client to believe the terms were as the client asserts they were.²⁵ If so, the client wins.

The focus on a client's reasonable belief means that a lawyer needs to use engagement letters when undertaking the representation of a client, especially a new one, and to use non-engagement letters when declining to do so. This is particularly important since the burden will be on the lawyer to show that the asserted attorney-client relationship did not exist, or that if it did, its terms are different than the client alleges. It will be difficult, if not impossible, for a lawyer to carry that burden without having an engagement letter setting forth the scope and terms of the relationship, or a non-engagement letter declining the representation (it is advisable to send non-

20. No Wyoming Supreme Court case lays out the elements of the relationship clearly. The elements of the relationship, however, are consistent throughout the country. *See, e.g., Togstad v. Veseley*, 291 N.W.2d 686, 692-93 (Minn. 1980).

21. *See, e.g., Togstad*, 291 N.W.2d at 693.

22. *Carlson v. Langdon*, 751 P.2d 344, 347 (Wyo. 1988) (quoting *Chavez v. State*, 604 P.2d 1341, 1346 (Wyo. 1979)).

23. *Id.*

24. *See, e.g., WYOMING RULES OF PROF'L CONDUCT R. 1.3 cmt. 3* ("Doubt about whether a client-lawyer relationship still exists *should be clarified by the lawyer, preferably in writing*, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs . . .") (emphasis added).

25. *Carlson v. Langdon*, 751 P.2d at 348.

engagement letters by certified mail, return receipt requested so one can prove mailing and delivery).²⁶

Assuming that an attorney wishes to represent an organization, properly forming the attorney-client relationship involves an additional consideration: Identifying and specifying with which person or persons in the organization the lawyer should or may interact. The reason is simple. "A lawyer employed or retained by an organization represents the organization, acting through its duly authorized constituents."²⁷ The question for the lawyer thus becomes: Who are the organizations' "duly authorized constituents?" It does not matter if the organization is public or private, small or large, profit or not-for-profit.²⁸ The lawyer represents the organization and the lawyer has to know with whom he or she may or must interact.

The importance of identifying the duly authorized constituents is easily demonstrated. Assume that a lawyer represents a corporation. The lawyer receives two telephone calls. One is from the corporation's largest shareholder. He requests that the lawyer initiate termination action against an employee. The other call is from the corporation's vice-president for personnel. She tells the lawyer to expect a call from angry customers or others asking that an employee, the same one identified by the shareholder, be fired. The vice-president tells the lawyer to do nothing, at least for now. Which directive should the lawyer follow? The answer is it depends on who is "duly authorized" to act on personnel matters on behalf of the organization, the corporation, which is the client. It is very unlikely that the shareholder is. It is very likely the vice president for personnel is. Nevertheless, the lawyer better know who it is. That knowledge, in fact, is a threshold issue for the lawyer.

2. Special problems with forming new organizations.

Even more difficult issues arise when a lawyer is asked to perform the legal work necessary to form an organization, such as a corporation, a limited liability company, or a professional corporation. It is common, for example, for friends and/or family members to decide to go into business together. They decide to form a business entity, an organization, to do so, and they ask a lawyer to do the necessary legal work. Such request presents myriad ethical issues which, if not properly resolved, can lead to serious

26. For a sample non-engagement letter, see, R.W. Martin, Jr., *Practicing Law in the 21st Century: Fundamentals for Avoiding Malpractice Liability*, 33 LAND AND WATER L. REV. 191, 241 (1998).

27. WYOMING RULES OF PROF'L CONDUCT R. 1.13(a).

28. P. Scaraglino, *Ethical Problems in Representing Nonprofit Corporations*, 1330 PRAC. LAW INST. 187, 194 ("An attorney retained by a not-for-profit corporation represents the corporation itself, not its employees.").

problems for the lawyer who receives and acts on the request. Such a case reached the Wyoming Supreme Court.

*Meyer v. Mulligan*²⁹ involved a typical scenario. Two married couples asked a lawyer to form a corporation to operate a business. The lawyer agreed to do so and formed the corporation. Problems began when one couple refused to contribute the promised money and the couples become embroiled in a lawsuit. One couple, the Meyers, sued the lawyer who had established the corporation for malpractice, claiming that he had negligently failed to draft documents which accurately reflected the parties' agreement.³⁰ The attorney moved for summary judgment, arguing that he had no attorney-client relationship with the Meyers, and they could not, therefore, sue him; the trial court agreed and granted the motion.³¹ On appeal, the supreme court reversed and said "it is not clear" whom the attorney represented:³²

Since the record is devoid of the specifics of any conversation concerning representation, we cannot discern whether Mulligan disclaimed representation of the Meyers or if the Meyers' claimed reliance is valid. Therefore, we hold that a genuine issue of material fact remains concerning the existence of an attorney-client relationship between the Meyers and Mulligan.³³

Meyer v. Mulligan illustrates plainly the difficulties a lawyer faces when asked to represent a nascent business, and the problems which arise when the lawyer does not use an engagement letter. The lawyer cannot represent the entity to be formed; it does not exist. But the lawyer has to represent somebody, and the lawyer certainly expects that somebody will pay the bill. The threshold question must, therefore, be answered. Who is the client and what should a lawyer do to avoid becoming trapped in the quagmire of friendly or family business ventures gone bad?

A lawyer asked to form a business entity has some options as to whom to represent; and the lawyer *must* select one, or the lawyer will be deemed to have chosen anyway. First, the question of the existence or terms of an attorney-client relationship can be solved simply by having an engagement letter which clarifies the existence and terms of the relationship. Second, it may not always be easy, but a lawyer asked to form an organization must identify the client(s). In the case of two couples who want to form a corporation, at least three options exist: The lawyer may agree to represent

29. 889 P.2d 509 (Wyo. 1995).

30. *Id.* at 511-13.

31. *Id.* at 513.

32. *Id.* at 515.

33. *Id.* at 515.

both couples, one couple, or the other couple.³⁴ Whatever the choice, the lawyer should then enter into a written agreement, usually in the form of an engagement letter, with the selected client(s). That agreement should, *inter alia*, identify the client(s), define the scope of the representation (e.g., form a corporation), specify who will be responsible for the lawyer's bills, and state which person or persons with which the lawyer may or must interact. If the lawyer has multiple clients, e.g., the lawyer has agreed to represent more than one of the individuals who wish to form an entity, the lawyer must also advise them of the potential conflicts of interest, which abound in all joint representation situations, and obtain proper waivers.³⁵

After the legal entity is formed, the parties often expect that the lawyer who formed the entity will become its lawyer. That is generally permissible, so long as it is done properly. The first consideration is that assuming the agreement with the entity's founders specified the scope of the representation as forming the entity, the completion of that task should conclude that representation and end the attorney-client relationship with the founders. (Even if the agreement defines the end of the relationship, the lawyer should send a closing letter, clarifying the status of the relationship and setting forth the lawyer's document retention schedule.³⁶ It is the lawyer's obligation, by the way, to clarify the status of the relationship.³⁷) If the new entity then wishes to hire the lawyer as its lawyer, that may be done, so long as their representation does not involve an impermissible conflict of interest with any current or former clients – and the entity's founders are now former clients.³⁸ (It is important to conclude attorney-client relationships because the standards for conflicts of interest are more stringent for current clients than for former clients,³⁹ and a lawyer is much

34. There are actually several other options. The lawyer may represent any one or some other combination of the four individuals involved.

35. While potential conflicts exist, they are often conflicts which may be waived under Rule 1.7(b). Waiver of a conflict is improper "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances." WYOMING RULES OF PROF'L CONDUCT R. 1.7 cmt. 4.

36. For a sample closing letter, see, R.W. Martin, Jr., *Practicing Law in the 21st Century: Fundamentals for Avoiding Malpractice Liability*, 33 LAND AND WATER L. REV. 191, 242 (1998).

37. WYOMING RULES OF PROF'L CONDUCT R. 1.3 cmt. 3.

38. Rule 1.9 regulates former client conflicts of interest. For a discussion of such conflicts, see J.M. Burman, *Conflicts of Interest in Wyoming*, 35 LAND AND WATER L. REV. 79, 86-89 (2000).

for former clients,³⁹ and a lawyer is much more likely to have on-going, affirmative obligations to a current client than to a former one.⁴⁰)

When a lawyer who formed an entity becomes the lawyer for that entity, the lawyer has a new client – the entity. As with any new client, the lawyer ethically must consider the possibility of conflicts of interest, including those with former clients, and the lawyer should enter a written agreement with the new client. The agreement should, of course, specify the identity of the client, the scope of the representation, and, a critical term when representing any organization, who is authorized to act on behalf of the organization.⁴¹ This may sound like much ado about nothing, and preparing engagement and closing letters will be a bit of work. It will be time well spent as preparing such letters is far less work than defending a lawsuit, a grievance, or both. If a deal goes bad, the time spent documenting the existence and terms of the relationship will provide valuable protection for the lawyer, and a court will not be able to find, as the Wyoming Supreme Court did in *Meyer v. Mulligan*, that there is a genuine issue of material fact about whether and on what terms a lawyer represented a client. In the absence of such an issue, the lawyer may be entitled to summary judgment.

B. With Whom Should the Lawyer Interact?

It seems self-evident, but it bears repeating: “An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents.”⁴² Since an organization can act only through its “constituents,” the question for a lawyer after an attorney-client relationship with the organization has been formed, is who within that organization is “duly authorized” to act on behalf of the organization.⁴³ The answer will vary, both by the type of organization, and the precise issue(s) involved.

39. Cf. Rule 1.7, which applies to current clients, with Rule 1.8, which applies to conflicts involving former clients. Perhaps the most significant difference is that a lawyer generally may not represent one client against another in litigation, even if the matters are not related. WYOMING RULES OF PROF'L CONDUCT R. 1.7 cmt. 7. By contrast, a lawyer may represent a client against a former client unless the matters are “substantially similar.” *Id.* at Rule 1.9(a).

40. See, e.g., *id.* at Rule 2.1 cmt. 5 (“[W]hen a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 [Communication] may require that the lawyer act if the client’s course of action is related to the representation.”). The duty, when it exists, applies to “clients,” not former clients.

41. *Id.* at Rule 1.4 cmt. 3 (“When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13.”).

42. *Id.* at Rule 1.13 cmt. 1.

43. *Id.* at Rule 1.13(a) (“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”).

The governing body of a legal entity is generally specified by law. In Wyoming, for example, "All corporate powers shall be exercised by or under the authority of . . . its board of directors . . ." ⁴⁴ By contrast, the management of a limited liability company is "vested in its members, which . . . shall be in proportion to their contribution to the capital of the limited liability company . . ." ⁴⁵ In addition, most governing bodies have the authority to delegate various functions, such as interacting with the entity's lawyer, by some form of resolution. ⁴⁶ The keys for the organization's lawyer are to know: (1) the law governing the organization; and (2) how and to whom the organization may have delegated authority. Ultimately, the lawyer must know who is authorized by law or the governing body of the organization to act on its behalf, and what that individual is authorized to do.

The "duly authorized constituents" are the individuals, of course, with whom the organization's lawyer will normally communicate about the representation. Having a specified individual or individuals with whom to communicate is not simply an ethical imperative. As the commentary to Rule 1.4 (Communication) notes, it is a practical necessity because it "is often impossible or inappropriate to inform every one of [the organization's] members about its legal affairs; ordinarily, [therefore,] the lawyer should address communications to the appropriate officials of the organization." ⁴⁷

Even after identifying the individuals with whom the organization's lawyer should interact, a lawyer has the ethical obligation to make sure that those individuals have an accurate understanding of the lawyer's role. This may be a tall task as the majority of an organization's constituents will likely have incorrect and potentially dangerous expectations. The common misunderstanding involves the question just discussed. Whom does the lawyer for an organization represent? Many, if not most, of an organization's constituents will assume the lawyer represents them and the organization, and not just the organization. ⁴⁸

Because many constituents will misunderstand the lawyer's role, a lawyer who represents an organization must ensure that the constituents with whom he or she interacts understand that the organization's lawyer does not generally represent the organization's constituents, even those "duly authorized" to speak for it. Similarly, the lawyer must take care to avoid implying that he or she represents the duly authorized constituents individually. The

44. WYO. STAT. ANN. § 17-16-801(b) (LexisNexis 2001).

45. *Id.* § 17-15-116.

46. *See, e.g., id.* § 17-16-841 (A corporate officer shall have "the duties prescribed by the board of directors or by direction of an officer authorized by the board of directors to prescribe the duties of other officers").

47. WYOMING RULES OF PROF'L CONDUCT R. 1.4 cmt. 3.

48. ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 91:2007 ("Many corporate executives apparently do not realize that corporate counsel represents the corporation only, and not them as individuals.").

failure to do so may result in the inadvertent creation of an attorney-client relationship with such individuals arising by implication.⁴⁹ While it is ethically permissible to represent both an organization and some of its constituents under some circumstances, a lawyer should never allow an attorney-client relationship to arise inadvertently. It will be ethically permissible to represent both an organization and some of its constituents only when no impermissible conflicts of interest exist between the interests of the organization and those of the individual constituents.⁵⁰ If representation of both the organization and a constituent is ethically permissible and the attorney intends to have an attorney-client relationship with each, those relationships should both be explicit. A lawyer simply should never allow an attorney-client relationship to arise by implication; to do so is to invite problems.

Furthermore, whenever a lawyer represents an organization, the lawyer must be aware of the possible divergence of interest between the client (the organization) and the constituents of the organization with whom the lawyer is dealing. The reason is that when it becomes "apparent" that their interests are adverse, the lawyer has an ethical duty to "explain the identity of the client . . . [and] that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."⁵¹ Where the interests of the organization and constituents diverge, and the constituents do not have separate counsel, the lawyer for the organization is essentially dealing with an unrepresented person. Accordingly, the only advice the lawyer may ethically give the constituent, which the lawyer should give, is that the individual should obtain counsel.⁵² As an example, when an organization is being sued for the actions or inactions of one of its constituents, the interests of the organization and those of that individual whose actions led to the suit, are potentially adverse. The organization may have an interest, for example, in trying to avoid liability by asserting that the individual was acting beyond the scope of his or her employment. The individual's interest, by contrast, is to make sure that the organization is responsible for the individual's actions or inactions, and will, therefore, likely assert that the actions in question were within the scope of employment. In such circumstances, the divergence of interests is obvious, and direct. Because of that divergence of interests, the organization's lawyer must be careful to notify the individual of

49. *Id.*

50. WYOMING RULES OF PROF'L CONDUCT R. 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 Rule 1.7."). Rule 1.7 regulates concurrent conflicts of interest.

51. *Id.* at Rule 1.13(d).

52. *Id.* at Rule 4.3 cmts. ("An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, *the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.*") (emphasis added).

the identity of the lawyer's client (the organization), and that the lawyer is looking after the client's interests, not the individual's.⁵³

As with any attorney-client relationship, the information the lawyer learns in the course of the representation is confidential so long as it relates "to the representation," regardless of when or how the information was learned.⁵⁴ Accordingly, the information a lawyer learns from constituents of the organization is confidential. The lawyer may not, therefore, generally disclose the information to anyone other than the client without the consent of the client.⁵⁵ The lawyer must be careful, however, not to disclose information learned from one constituent to another unless the individual to whom the disclosure is made is authorized to have the information. The reason is simple. The mere fact that a lawyer has obtained information from a constituent "does not mean . . . that constituents of an organizational client are the clients of the lawyer."⁵⁶ The lawyer must be careful, therefore, not to create the impression that the lawyer represents the constituent by disclosing confidential information to unauthorized constituents.

With small businesses, the same individuals often fill multiple roles. The same persons are often a corporation's shareholders, directors, officers, and its only employees. A lawyer's obligations do not, however, change because of the relative size of an organization. The organization's lawyer still represents the organization and does not automatically represent the constituents.⁵⁷ In such circumstances, however, the possibility of confusion about the lawyer's role is significantly increased, and the lawyer needs to be especially careful to clarify his or her role. The question of whether the lawyer represents only the organization or the individuals within the organization, too, should be expressly addressed. The reason is simple. The individuals will probably assume that the lawyer represents the organization and themselves, as well, particularly when the lawyer has extensive interactions with one or more of the organization's constituents.⁵⁸ Failing to clarify the lawyer's role may mean just that. If the lawyer has done nothing to defeat the client's expectation that the lawyer represents the organization and the individuals who constitute it, and if that expectation is reasonable, then the lawyer has probably allowed an attorney-client relationship to arise by implication.⁵⁹ Once again, the clarification should be done in an engagement letter with the organization which clarifies the identity of the client and that the lawyer does not represent the constituents individually.

53. *Id.* at R. 1.13(d).

54. *Id.* at R. 1.6(a).

55. *Id.*

56. *Id.* at R. 1.13 cmt. 3.

57. ABA/BNA LAWYER'S MANUAL, *supra* note 48, at 91:2015.

58. *Id.*

59. *Id.* at 91:2001.

Sometimes, the legal distinction between the individuals who comprise an entity and the entity itself is not clear. A partnership is the classic example; it has attributes of a legal entity, as well as attributes of a sole proprietorship. Legally, a partnership “is an entity.”⁶⁰ But each member of the partnership is an agent of the partnership.⁶¹ Each partner is “liable jointly and severally for all obligations of the partnership.”⁶² So when asked to represent a partnership, which does a lawyer represent, the partnership, the partners, or both?

According to the ABA’s Standing Committee on Ethics and Professional Responsibility, a partnership is an “organization” within the meaning of rule 1.13 (ABA Model Rule 1.13 in effect at the time of the opinion was identical to Wyoming’s current Rule 1.13. ABA Model Rule 1.13 has now been changed slightly).⁶³ According to the ABA, therefore, the lawyer represents the partnership.⁶⁴ That view is supported by “[t]he weight of authority . . . that the lawyer’s client is the entity itself, not the individual partners.”⁶⁵ Saying that an attorney for a partnership represents the entity, and not the individual partners, answers one question, but it simply raises two others: (1) When, if ever, does the partnership’s lawyer also have an attorney-client relationship with the individual partners; and (2) with whom in the partnership may the partnership’s lawyer share otherwise confidential information?

Although a lawyer who represents a partnership generally does not represent the individual partners, the lawyer must take care “to avoid the creation of an attorney-client relationship with individual partners unless the lawyer is satisfied that it is ethical to do so and intends to create such a relationship”⁶⁶ If those conditions are met, the same standard applies, i.e., a lawyer for an organization may ethically represent one or more of its constituents so long as the joint representation does not create an impermissible conflict of interest.⁶⁷

As noted above, information received by a lawyer in the course of representing a partnership “relates to the representation” pursuant to Rule 1.6. Such information is confidential, but ethically it may not be withheld

60. WYO. STAT. ANN. § 17-21-201 (LexisNexis 2001).

61. *Id.* § 17-21-301(a)(i).

62. *Id.* § 17-21-306(a).

63. J.S. DZIENKOWSKA, PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 60-70 (West abridged ed. 2002-03).

64. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 91-361 (1991) (Representation of a Partnership).

65. ABA/BNA LAWYER’S MANUAL, *supra* note 48, at 91:2017.

66. ABA, Formal Op. 91-361.

67. WYOMING RULES OF PROF’L CONDUCT R. 1.13(e).

from any of the partners because each is a co-owner, and each has a right to it as a partner in the organization.⁶⁸

The inherent uncertainties and potential misunderstandings which inevitably arise when a lawyer represents a partnership make it critically important to have a written agreement which identifies the client and specifies the scope of the representation. Since confusion is more likely when the client is a partnership than when representing many other entities, it is especially important for the lawyer to keep clear who is the client and who is not. If the lawyer undertakes representation of individual partners, as well, written disclosures of the potential conflicts of interest and waiver of those conflicts will be critical.

A lawyer's task is even more difficult when he or she is asked to represent a group of individuals that has never formed a legal entity. Consider, for example, a lawyer who is asked to represent a group of cabin owners, each of whom owns property in the same area, and who routinely work together on all types of issues, legal and otherwise, but who have never formed a legal entity. Instead of representing a legal entity, with clear lines of governance and persons who are or may be authorized to act on behalf of the organization, the lawyer is faced with representing a group of individuals who have banded together to pursue a common interest, an "unincorporated association" in the words of the rules.⁶⁹

Since no individual can legally speak for an unincorporated association, and since no individual or individuals are "duly authorized" constituents, the lawyer is generally considered to have an attorney-client relationship with the unincorporated association and with each member of the association. The lawyer has, in short, obligations to many clients, and cannot rely on the directives of any individual or individuals. Accordingly, the lawyer needs the concurrence of all of the lawyer's clients before acting. If that is not forthcoming, the lawyer has a conflict of interest and will likely have to withdraw from representing any of the individuals and the unincorporated association.

The ethical standards governing lawyers for organizations generally "appl[y] to governmental organizations," as well as private ones.⁷⁰ Although the same ethical standards generally apply, there are important differences. First, when defining a government lawyer's duty of confidentiality, discussed in detail below,⁷¹ "a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is pre-

68. ABA, Formal Op. 91-361.

69. See, WYOMING RULES OF PROF'L CONDUCT R. 1.13 cmt. 1 ("the duties defined in this Comment *apply equally to unincorporated associations.*") (emphasis added).

70. *Id.* at Rule 1.13 cmt. 7.

71. See *infra* notes 349-445 and accompanying text.

vented or rectified, for public business is involved.”⁷² Second, the role a government lawyer plays often changes the lawyer’s ethical obligations.⁷³ A prosecutor, for example, has special duties; he or she is not simply an advocate for a client, but rather “has the responsibility of a minister of justice.”⁷⁴ Third, the general division of responsibility between lawyer and client may shift. “[T]he responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships.”⁷⁵ Finally, it is not possible to define government lawyers’ duties, in general, because the ethical and legal duties of a government lawyer “may be defined by statutes and regulation.”⁷⁶ “Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context.”⁷⁷

The duties and obligations of the Wyoming Attorney General, for example, are specified by statute. Among other things, he or she is to “[p]rosecute or defend all suits instituted by or against the state of Wyoming”⁷⁸ While that duty may appear to be reasonably clear, the issue of with whom should a member of the office interact will obviously arise often. When the state is sued, for example, the attorney involved does not typically call the governor and ask for direction in establishing the objectives of the representation or to consult about the means to be used to achieve them.⁷⁹ That direction generally comes from and the consultation generally will be with someone else. And who is that? The powers and duties of agency heads are usually specified by statute.⁸⁰ Agency heads, in turn, may delegate authority to others within their agencies. The key questions for the lawyer are always the same. Who is authorized, and how has that authorization been done? The issue is trickier for a private attorney who represents a governmental entity, a common practice with school districts, hospital districts, towns or cities, and many other governmental entities in Wyoming. The

72. WYOMING RULES OF PROF’L CONDUCT R. 1.13 cmt. 7.

73. See generally John M. Burman, *Special Ethical Duties of Government Lawyers*, WYO. LAW. (Oct. 2000).

74. WYOMING RULES OF PROF’L CONDUCT R. 3.8 cmt. 1.

75. *Id.*, scope ¶ 4 (“For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state’s attorney in state government, and their federal counterparts . . .”).

76. *Id.* at Rule 1.13 cmt. 7.

77. *Id.*

78. WYO. STAT. ANN. § 9-1-603(a)(i) (LexisNexis 2001).

79. According to the rules of professional conduct, a Wyoming lawyer “shall abide by a client’s decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued.” WYOMING RULES OF PROF’L CONDUCT R. 1.2(a).

80. See, e.g., WYO. STAT. ANN. § 9-2-106 (specifying the duties and powers of the director of the department of health); *id.* § 9-2-1003(c) (listing the duties and powers of the director of the department of administration and information); *id.* § 9-2-1104 (identifying powers of the law enforcement communications commission).

lawyer will have to be familiar with the controlling law, as well as the official actions of the governmental entity's governing body by which authority may have been delegated.

For example, a school district in Wyoming is a "body corporate."⁸¹ The "governing body" is a 'board of trustees;' no action of the board is binding, however, unless it is approved by "a majority of the members elected to the board of trustees."⁸² Once again, the key for the school district's lawyer is to know who speaks for the board and on what issues, and what action of the board has been approved by a majority of the members..

C. Summary

Organizational clients present special ethical challenges for a lawyer. Those challenges are not, however, insurmountable. First, the lawyer must identify the client. In the case of an organization, it is the organization, whether small or large, private or government, profit or not-for-profit. Second, the lawyer must identify the individuals (the "constituents") who are authorized to act on behalf of the organization and with respect to which issues. Third, when it is apparent that the interests of the organization and those of the constituent(s) with whom the lawyer is dealing are adverse, the lawyer has a duty to notify the constituent of the identity of the client (the organization), that the lawyer is representing the organization, not the constituent, and that the constituent may want to seek legal counsel.

The first two issues, the identity of the client and the individuals authorized to act on behalf of the client, should be clarified in a written agreement between the client and the lawyer, usually an engagement letter. Such an agreement will eliminate the possibility of the lawyer, of a court, wondering who the client is or was. The third issue, advising constituents about the lawyer's role, is critical to avoid an attorney-client relationship arising by implication, which will put the lawyer in a conflict which is likely non-waivable, and which will likely require the lawyer to withdraw from the representation of both the organization and the individual.

PART II: CONFIDENTIALITY AND THE ATTORNEY-CLIENT PRIVILEGE

A. Introduction

A lawyer has both a legal and an ethical obligation to maintain client confidences. The legal obligation arises out of the law of agency,⁸³ the law

81. *Id.* § 21-3-101.

82. *Id.* § 21-3-105.

83. *See, e.g.,* RESTATEMENT (SECOND) OF THE LAW OF AGENCY § 395 (1958) ("[A]n agen[t] is subject to a duty to the principal not to use or communicate information confidentially given him by the principal . . .").

of evidence (through the attorney-client privilege),⁸⁴ and the rules of civil procedure (which embody the work-product privilege).⁸⁵ Each requires a lawyer to preserve client confidences, information regarding a client or the client's case; or both, and each survives the termination of the attorney-client relationship.⁸⁶

A lawyer's ethical obligation of confidentiality is based on Rule 1.6 of the Wyoming Rules of Professional Conduct, or similar rules in other states. The rule says that a lawyer "shall not reveal information relating to representation of a client." The information is learned regardless of the source.⁸⁷ This ethical duty is much broader than either the attorney-client privilege or the work-product doctrine since it applies to all information "relating to the representation."⁸⁸ The attorney-client privilege, by contrast, protects only communications between a lawyer and a client.⁸⁹ The work-product doctrine protects only "trial preparation materials."⁹⁰ Accordingly, everything which is subject to the attorney-client privilege or the work-product doctrine is confidential under Rule 1.6, but information which is covered by Rule 1.6 may not be protected by either the attorney-client privilege or the work-product doctrine. A communication from a third person, for example, is subject to Rule 1.6 if it relates to the representation. That communication is not protected by the attorney-client privilege because it is not a communication to or from a client, and it is not subject to the work-product doctrine as it was not prepared in anticipation of litigation. The ethical duty of confidentiality is, however, similar to the legal duty in one

84. The attorney-client privilege is part of the law in every American jurisdiction, either by statute, court rule, or common-law. WOLFRAM, *supra* note 3, § 6.3.1. Generally, it prevents an attorney from testifying about communications to or from a client and the lawyer regarding the representation. *Id.* Furthermore, an attorney has both a legal duty to assert the privilege in at least some circumstances and an ethical obligation to assert the attorney-client privilege to prevent the disclosure of client confidences. *See* WYO.R.CIV.P. 26(b)(5) (LexisNexis 2002); WYOMING RULES OF PROF'L CONDUCT R. 1.6 cmt. 20.

85. *See, e.g.*, WYO.R.CIV.P. 26(b)(3). A lawyer must assert the privilege or it disappears. *See id.* at Rule 26(b)(5).

86. After the end of an agency relationship, the agent may not use or disclose "trade, secrets, written lists of names, or other, similar confidential matters The agent is entitled to use general information concerning the method of business of the principal" RESTATEMENT (SECOND) OF AGENCY § 396(b) (1958). And while many statutes or rules which establish the attorney-client privilege are silent on the question of whether the privilege continues after the end of the attorney-client relationship, courts generally hold that the privilege continues, along with the attorney's obligation to assert it. WOLFRAM, *supra* note 3, § 6.3.4. The privilege generally extends after the death of a client. *See, e.g.*, Swidler & Berlin v. United States, 524 U.S. 399, 407 (1998).

87. WYOMING RULES OF PROF'L CONDUCT R. 1.6(a).

88. *Id.*

89. WYO. STAT. ANN. § 1-12-101(a)(i) (LexisNexis 2001).

90. WYO.R.CIV.P. 26(b)(3) (LexisNexis 2002).

important way. It never never ends.⁹¹ Not only is the scope of the duties different, they apply at different times, too.

The attorney-client privilege applies when communications between a lawyer and a client are sought from the attorney or the client through judicial or other legal processes, including discovery.⁹² The work product doctrine applies in similar situations.⁹³ A lawyer's ethical duty of confidentiality applies in all other situations, meaning that a lawyer may not disclose confidential information unless an exception applies or unless consent has been given.⁹⁴ In addition, the ethical duty of confidentiality is much broader than the attorney-client privilege as the privilege applies only to communications between a lawyer and a client, not to other information the lawyer learns during the representation.⁹⁵

Applying the confidentiality concept, the attorney-client privilege, or the work product doctrine, become significantly more difficult when the client is an organization. The identity of the client is clear; it is the organization. A lawyer cannot communicate, however, with a legal entity. The lawyer must communicate with one or more constituents of the entity.

B. Which Information is Subject to the Confidentiality Obligation of Rule 1.6?

The language of Rule 1.6 is clear: "A lawyer shall not reveal information relating to representation of a client . . ."⁹⁶ The rule's commentary discusses the application of the confidentiality principle to an organizational client. When a lawyer communicates with a constituent of an organizational client "in that person's organizational capacity, the communication is protected by Rule 1.6."⁹⁷ It does not matter, in short, if the client is an individual or an organization. The rule applies. Since the rule applies, a lawyer may not reveal information about the representation of a client, regardless of

91. WYOMING RULES OF PROF'L CONDUCT R. 1.9(c), 1.6 cmt. 23.

92. *Id.* at Rule 1.6 cmt. 3. The attorney-client privilege is not a part of the rules of ethics. *Id.*; *id.* at Rule 1.6 cmt. 4. It is part of the law of evidence and is differently defined in different jurisdictions. The privilege generally exists when four features are present: (1) There is a communication; (2) between privileged persons (an attorney or the attorney's staff and a client); (3) made in confidence; and (4) for the purpose of obtaining or providing legal advice. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000).

93. WYOMING RULES OF PROF'L CONDUCT R. 1.6 cmt. 5.

94. *Id.*

95. *See, e.g.*, ABA/BNA LAWYER'S MANUAL, *supra* note 48, at 55:304 ("[T]he ethical duty of confidentiality is much broader in scope and covers communications that would not be protected under the [attorney-client privilege].").

96. WYOMING RULES OF PROF'L CONDUCT R. 1.6(a).

97. *Id.* at Rule 1.13cmt. 3.

how it is learned, unless the client gives informed consent or unless one of the rule's narrow exceptions applies.⁹⁸

Although it is easy to say that all information which relates to representation of an organizational client is confidential, the more difficult question is: To whom within the organization may a lawyer ethically disclose such information? Assume, for example, that a lawyer conducts an investigation for a corporation at the request of the corporation's board of directors. The lawyer receives information from a variety of sources, including many "constituents" of the organization. Some are high level management such as corporate officers. Others are lower level employees or other constituents such as stockholders. As noted above, the information communicated to the lawyer by any constituent in that individual's organizational capacity is confidential. The question becomes, therefore, which confidential information may be shared with which constituents? The commentary to the rule provides important guidance. Information learned from organizational constituents is confidential. The lawyer may not, however, necessarily disclose such information learned from one constituent to another: "The lawyer may not disclose to such constituents information relating to the representation *except for disclosures explicitly or impliedly authorized by the organizational client* in order to carry out the representation or as otherwise permitted by Rule 1.6."⁹⁹

The answer should have a familiar ring. A lawyer may disclose confidential information only to duly authorized constituents. The question comes back, in short, to the second question addressed above. With whom should a lawyer interact when representing an organization? The answer is disclosure may be made to the persons duly authorized by the organization to interact with the lawyer.

An attorney's ethical duty of confidentiality may, of course, be waived by the client. That waiver may be explicit or implicit. An attorney may reveal confidential information if "the client consents after consultation," or if "impliedly authorized in order to carry out the representation."¹⁰⁰ The questions which arise when the client is an organization are: (1) Who may consent to waiver; and (2) with whom must the lawyer consult before that waiver is valid? The answers follow from the concept that the client is the organization. Therefore, the organization may waive confidentiality. As with other decisions by an organization, this one must be made by the organization's governing body or someone duly authorized by that body to act

98. A lawyer may disclose otherwise confidential information if the lawyer "reasonably believes" disclosure is necessary to prevent a client "from committing a criminal act," "to establish a claim or defense" in a dispute with a client, or "to protect the best interests" of an individual for whom the attorney is acting as guardian ad litem. *Id.* at Rule 1.6(b)(1), (2), (3).

99. *Id.* at Rule 1.13 cmt. 3 (emphasis added).

100. *Id.* at Rule 1.6(a).

in its stead. This means that information imparted to the attorney by an individual is controlled by the organization, not by the individual from whom it was received.

C. Applying the Attorney – Client Privilege to Organizational Clients.

The attorney-client privilege is “the oldest of the privileges of the common law”¹⁰¹ The privilege is not only recognized by federal law,¹⁰² it is a part of the law of evidence in every state.¹⁰³ Since it is part of the law of evidence, the starting point in analyzing the applicability of the privilege is the rules of evidence. Rule 501 of the Wyoming Rules of Evidence says: “Except as otherwise required by . . . statute . . . the privilege of a witness . . . shall be governed by the principles of the common law”¹⁰⁴ Rule 501 of the Federal Rules of Evidence contains identical language.¹⁰⁵ While the attorney-client privilege in Wyoming is now statutory, the federal privilege is part of the federal common law.¹⁰⁶

The attorney-client privilege in Wyoming is codified in statute, but the statute is regrettably sparse, especially on issues involving its application to an entity.¹⁰⁷ The statute simply says:

The following persons shall not testify in certain respects:

*An attorney or physician concerning a communication made to him by his client or patient in that relation, or his advice to his client or patient. The attorney or physician may testify by express consent of the client or patient, and if the client or patient voluntarily testifies the attorney or physician may be compelled to testify on the same subject,*¹⁰⁸

That is it. The statute sets forth three criteria. First, an “attorney” may not testify in certain respects. Second, the privilege is limited to “communications” from a client to an attorney or the attorney’s “advice” to the client. Finally, the communications or advice must be “in that relation,” i.e., communications which are a part of the attorney-client relationship. The statute

101. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

102. *Swidler & Berlin v. U.S.*, 524 U.S. 399, 403 (1998).

103. WOLFRAM, *supra* note 3, § 6.1.1.

104. WYO.R.EVID. 501.

105. FED.R.EVID. 501.

106. *Upjohn*, 449 U.S. at 389.

107. WYO. STAT. ANN. § 1-12-101(a) (LexisNexis 2001).

108. *Id.* (emphasis added).

leaves numerous questions unanswered, especially questions about how the privilege applies to organizational clients.¹⁰⁹

The first problem is that Wyoming's statute, on its face, only protects attorneys from being compelled to testify about their communications to or from clients; it does not provide a reciprocal privilege for clients. Second, the statute makes no mention of the non-attorney staff members who work for an attorney, persons such as secretaries, investigators, and paralegals, who often have more communications with a client than the attorney. Third, the statute is silent on if or how the privilege should be applied to organizational clients. That silence raises three significant issues: (1) Does the attorney-client privilege apply to organizational clients at all? (2) If so, which communications between an attorney and individuals within the organization are privileged? (3) Finally, who within the organization may waive the privilege? This section will address the general questions surrounding the attorney-client privilege in Wyoming, as well as those issues unique to organizations.

1. The attorney-client privilege applies to clients, as well as lawyers

As noted above, Wyoming's statute says that "attorneys" may not testify in certain respects, but it says nothing about clients. The notion that the omission of any reference to clients means that they are not covered by the attorney-client privilege flies in the face of the reasons for the privilege, as well as the applicability of the common-law privilege.

The reason for the attorney-client privilege, according to the United States Supreme Court, is to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice."¹¹⁰ That policy is so important that the privilege has been extended to include not just communications between a lawyer and a client, but observations "which [are] the product of a privileged communication."¹¹¹ Not extending the privilege to include observations "might chill free and open communication between attorney and client and might also inhibit counsel's investigation of his client's case."¹¹² So, too, not applying the privilege to protect clients from testifying would severely chill attorney-client communications, and

109. Statutes in other states often address such issues directly. In Arizona, for example, the statute includes an attorney's "paralegal, assistant, secretary, stenographer or clerk . . ." ARIZ. STAT. ANN. § 12-2234(A) (LexisNexis 2003). It further provides that "any communication is privileged between an attorney for a corporation, governmental entity, partnership, business, association or other similar entity or an employer and any employee, agent or member of the entity . . ." *Id.* § 12-2234(B).

110. *Upjohn*, 449 U.S. at 389.

111. *People v. Meredith*, 631 P.2d 46, 52 (Cal. 1981).

112. *Id.* at 48.

courts have interpreted the privilege to foster communications, not chill them.

Over a century ago, the Alabama Supreme Court put it well. The privilege “against the disclosure of such communications by counsel would be a mockery if the client could be compelled to disclose that as to which counsel’s lips are sealed.”¹¹³ So, too, not extending Wyoming’s attorney-client privilege to prevent a client from testifying would seriously chill full and frank communication between attorneys and their clients; not doing so would make a mockery out of the privilege. It is hard to imagine, therefore, the Wyoming Supreme Court would not construe the statute, which creates the attorney-client privilege, to also prevent clients from having to testify.

2. The attorney-client privilege applies to an attorney’s non-attorney staff.

A second problem with Wyoming’s attorney-client privilege statute is that it refers only to a communication between a client and an “attorney.”¹¹⁴ Many of a lawyer’s communications with a client, however, are through non-attorney support staff members, such as a secretary, an investigator, or a paralegal. The absence of any reference in the statute to non-attorney support staff raises the question of whether the attorney-client privilege covers communications between a client and a non-attorney staff member. It should.

One of the most recent and most comprehensive analyses of the attorney-privilege is contained in the THIRD RESTATEMENT OF THE LAW GOVERNING LAWYERS. The Restatement asserts that the attorney-client privilege applies to communications between “privileged persons.”¹¹⁵ The term “privileged persons” is then defined as “the client (including a prospective client), the client’s lawyer, [and] agents of either who facilitate communication between them”¹¹⁶ A person is a privileged agent if “the person’s participation is reasonably necessary to facilitate the client’s communication with a lawyer”¹¹⁷ Since it is often reasonably necessary for a client and a lawyer to communicate through other persons, the attorney-client privilege should extend to them as well.

3. The attorney-client privilege applies to organizational clients

Although there has been substantial debate about whether the attorney-client privilege applies to organizations, that debate has been resolved in

113. *Birmingham Ry & Elec. Co., v. Wildman*, 24 So. 548, 549-50 (Ala. 1898).

114. WYO. STAT. ANN. § 1-12-101(a)(i) (LexisNexis 2001).

115. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (200).

116. *Id.* § 70.

117. *Id.* at cmt. f.

favor of such a privilege in every jurisdiction that has considered the issue.¹¹⁸ Accordingly, the general view is that when the client is “a corporation, unincorporated association, partnership, trust, estate, sole proprietorship, or other for-profit or not-for-profit organization, the attorney-client privilege extends” to qualified communication between privileged persons.¹¹⁹ A qualified communication is one which is made “for the purpose of obtaining or providing legal assistance to the client.”¹²⁰ Privileged persons include those whose participation “is reasonably necessary to facilitate the client’s communication with a lawyer.”¹²¹ Since an organization can act only through its agents, it is reasonably necessary to protect communications between at least some agents and the organization’s attorney. Extending the privilege to organizations is also consistent with promoting the policy behind the privilege. Including associations within the privilege “encourages organizational clients to have their agents confide in lawyers in order to realize the organization’s legal rights and to achieve compliance with law.”¹²²

Although the Wyoming attorney-client statute is silent¹²³ and no Wyoming Supreme Court opinions are on point, it is reasonable to expect that the privilege will be extended to organizations in Wyoming as has been done everywhere else.¹²⁴ In addition to the overwhelming weight of authority in other jurisdictions, the Wyoming Supreme Court has acknowledged the need for corporate privacy by limiting the *ex parte* contacts a lawyer for an opposing party may have with corporate employees.¹²⁵ The same principles argue in favor of extending the attorney-client privilege to include organizations. Doing so, however, does not end the inquiry. The next issue is to define the scope of the privilege in an organizational setting. And while it is reasonable to assume that the privilege will be extended to organizations in Wyoming, predicting the scope of the privilege is more difficult.

4. Which communications to or from which persons in an organization are protected by the attorney-client privilege?

Two general views of the scope of the attorney-client privilege in the corporate or organizational setting have emerged: (1) the control-group

118. WOLFRAM, *supra* note 3, at 283-84.

119. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 (2000).

120. *Id.* § 68(4).

121. *Id.* § 70 cmt. f.

122. *Id.* § 73 cmt. b.

123. The Wyoming statute refers only to “client,” without definition of that term. WYO. STAT. ANN. § 1-12-101(a)(i) (LexisNexis 2001).

124. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 cmt. b (2000) (“Extending the [attorney-client] privilege to corporations and other organizations was formerly a matter of doubt but is no longer questioned.”).

125. *Strawser v. Exxon Co., U.S.A.*, 843 P.2d 613, 617-22 (Wyo. 1992)

test; and (2) the subject-matter test.¹²⁶ The control-group test is based on the notion that the attorney-client privilege applies only to communications between the organization's lawyer and persons who have managerial responsibility or control of the issue(s) involved in the communications. The standard is difficult to apply, however, because the parameters of the control group will vary with the issue(s) involved.¹²⁷ The persons with managerial responsibility for one area of the entity's operation may be different than the persons responsible for another. As the composition of the control group varies, it is difficult to know which communications with which persons are protected. This lack of predictability renders the test impractical since "the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected [because an] uncertain privilege . . . is little better than no privilege at all."¹²⁸ In addition, by definition, the test excludes communications between the attorney for the organization and persons without managerial responsibility. As a result, persons with important information, usually factual, fall outside the protection of the privilege. Similarly, individuals who are not part of the control group may be responsible for implementing the lawyer's legal advice. Not protecting the communications with the organization's lawyer "makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy."¹²⁹ Ultimately, the narrow scope of the control-group theory "not only makes it difficult for corporate attorneys to formulate sound advice . . . [it] also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law."¹³⁰

The subject-matter test takes a very different approach. Communications between an organizational lawyer and any persons within the organization are subject to the attorney-client privilege if they relate to the giving or receiving of legal advice.¹³¹ The test was given a significant boost in 1981 when the United States Supreme Court rejected the control-group and, at least implicitly, adopted the subject-matter test in its decision in *Upjohn Co. v. United States*.¹³² The Court began by reiterating the purpose of the privilege. It is, wrote then Justice Rehnquist, to "protect . . . the giving of professional advice to those who can act on it, but also the giving of information to the lawyer to enable him to give sound and informed advice."¹³³ Although the Court criticized and rejected the control group theory, its adoption of the subject-matter theory has not ended the debate since: (1) *Upjohn*

126. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 cmt. d (2000); see also *Upjohn Co. v. United States*, 449 U.S. 385, 392 (1981).

127. *Upjohn*, 449 U.S. at 393 (noting that the control group test "is difficult to apply").

128. *Id.*

129. *Id.*

130. *Id.*

131. WOLFRAM, *supra* note 3, § 6.5.4, at 284.

132. 449 U.S. 383, 397 (1981).

133. *Id.* at 390.

involved the scope of the federal law of attorney-client privilege and the scope of the privilege is often an issue of state law; and (2) the subject-matter test requires a case-by-case analysis. Since *Upjohn*, some states have rejected the subject-matter test, deciding to retain the control group test.¹³⁴ Courts have generally been unwilling to adopt the subject-matter test *in toto*, preferring some sort of hybrid test. Also, applying the test case-by-case has resulted in numerous attempts to formulate a workable standard. The decision in *Boyer v. Board of County Commissioners*¹³⁵ is a good example of the latter.

Boyer involved a Section 1983 claim of unlawful retaliation. Ruling on a motion to compel discovery, the court discussed the practical application of the subject-matter test. The court took a pragmatic approach, noting that corporations act “through all employees acting within the scope of their employment.”¹³⁶ Accordingly, it adopted the *Upjohn* decision’s approach that the giving of sound legal advice requires corporate counsel to gather information from “multiple levels of the corporation”¹³⁷ When it comes to the question of the applicability of the attorney-client privilege, therefore, the inquiry must be “whether the communications [to or from non-managerial persons] were made at the request of management in order to allow the corporation to secure legal advice.”¹³⁸ The court then crafted a two step test: (1) the status of the employee; and (2) the context of the communication. If the employee occupies a managerial position, communications will generally be privileged. If the employee is a “primary source for information concerning the facts” involved in the legal matter, however, the attorney’s communications with that person will be covered by the attorney-client privilege regardless of the employee’s status.¹³⁹

The *Boyer* opinion recognizes that entities often act through persons who are not in managerial positions, and that if the attorney-client privilege is going to accomplish its goals, it must include communications with the relevant actors, regardless of their positions.¹⁴⁰ The opinion represents a logical, practical approach to the issue, an approach which is similar to the approach taken by the Wyoming Supreme Court in the *Strawser* case, which involved the related issue of *ex parte* communications with corporate em-

134. See, e.g., *Nalian Truck Lines, Inc., v. Nakano Warehouse & Trans. Corp.*, 6 Cal. App. 4th 1256, 1263 n.7 (Cal. Ct. App. 1992) (noting that the drafters of the rules of professional conduct in California intended “to retain the control group test”).

135. 162 F.R.D. 687 (D. Kan. 1995).

136. *Id.* at 690.

137. *Id.* at 689.

138. *Id.*

139. *Id.* at 690.

140. *Id.*

ployees.¹⁴¹ Further, *Boyer* was affirmed by the Tenth Circuit.¹⁴² Judge Brorby authored the unpublished opinion.¹⁴³

The Restatement also favors the subject matter test over the control-group test since the latter “overlooks that the division of functions within an organization often separates decisionmakers from those knowing relevant facts.”¹⁴⁴ It seems clear, therefore, that the better reasoned approach is a subject-matter test or some variant of it. When all is said and done, however, lawyers in Wyoming have no clear standards for which communications with which individuals within an organization will be protected by the attorney-client privilege.

Although the parameters of the attorney-client privilege in Wyoming with respect to organizations are unclear, an attorney can and should advise organizational clients about that uncertainty. The lawyer should advise organizational constituents that the scope of the privilege in Wyoming is unclear, and that communications with non-managerial persons may not be protected. The attorney should make such a disclosure since most employees will have the expectation that their communications with the organization’s lawyer *are* privileged. Disclosing that the communications may not be privileged may result in reticent employees, but that is preferable to employees having an expectation of confidentiality which turns out to be incorrect. If that occurs, the lawyer will likely be the target of a grievance, a malpractice action or both, premised on the lawyer’s failure to properly disclose the true situation.

While the scope of the attorney-client privilege is unclear, an organizational lawyer’s ethical duty is clear. Whatever the source of the information, it is confidential under rule 1.6, meaning that the lawyer may not disclose it in the absence of a waiver from the client, unless it falls within one of the exceptions to the rule or the lawyer has a duty to disclose.¹⁴⁵

5. Who within an entity may waive the attorney-client privilege?

The attorney-client privilege belongs to the client.¹⁴⁶ Since an organizational lawyer’s client is the organization, the privilege belongs to it,

141. *Strawser v. Exxon Co., U.S.A.*, 843 P.2d 613, 617-22 (Wyo. 1992).

142. *Boyer v. Johnson County Bd. of County Comm’rs*, 108 F.3d 1388 (10th Cir. 1997).

143. *Id.*

144. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 cmt. d (2000).

145. For discussions of exceptions to the rule and a lawyer’s duty to disclose, see J.M. Burman, *Ethical Issues: Exceptions to the Attorney-Client Privilege*, WYO. LAW. 14 (April 1996); J.M. Burman, *The Duty to Disclose Privileged Communications: Client Perjury*, WYO. LAW. 17 (June 1996); J. M. Burman, *Disclosing Privileged Communications: A Lawyer’s Duty to Warn*, WYO. LAW. 17 (August 1996).

146. See, e.g., WYO. STAT. ANN. § 1-12-101(a)(i) (LexisNexis 2001) (stating that an attorney may testify “by express consent of the client”).

regardless of which test is adopted to define the scope of the privilege. Accordingly, the organization may waive the privilege.¹⁴⁷ This creates the potential that persons who were not involved in communications with the organization's lawyer may, nevertheless, have the authority to decide to waive the privilege. Similarly, persons who were involved in the communications may not be in a position to oppose a waiver. Such a rule is likely contrary to the expectations of those who were involved in the communications. It is important, therefore, for the lawyer involved in the communications to ensure constituents' expectations are accurate.

Under the control-group test, the subject-matter test, or any other test which the court might adopt, it is likely that at least some of the persons who communicate with an organization's lawyer are not in a position to control the decision of whether to waive the privilege. Yet those persons will probably assume that their communications with the organization's lawyer are privileged and that they are the ones who may waive or insist on the privilege. Both of those assumptions may be incorrect, and it is the lawyer's responsibility to correct them.

As discussed above, the scope of the attorney-client privilege in Wyoming is unclear, and that uncertainty should be disclosed to the organization's constituents with whom the attorney is interacting. In addition, the constituent(s) with whom the lawyer is dealing may not be the ones who will decide if the privilege should be waived. To ensure that those persons are properly informed, the lawyer should explain that someone else will be making that decision. The reason is that the organization's interests may well diverge. Consider a simple example.

A corporation is being investigated for illegal activity. The corporation's lawyer learns, through conversations with corporate constituents, that persons within the entity were involved in the activity. The corporate management decides that the best approach is to disclose to the appropriate regulatory officials which individuals were involved in the illegal activity. The decision, in other words, is to hang someone out to dry, all for the benefit of the corporation. While that may be the best strategy for the organization, it is likely counter to the interests of the person(s) who are to be hung out to dry. Because of the clear divergence of interests, which was a potential conflict from the outset, the lawyer should have notified the constituents of the possible outcome, i.e., that although the conversations between the lawyer and the constituent may well be privileged under any test the court may adopt, the corporation may decide to waive the privilege, regardless of the wishes of the constituents involved in the communications. Only with such a disclosure at the time of the initial contact with the constituent can the lawyer avoid being the subject of a disgruntled constituent's wrath when

147. WOLFRAM, *supra* note 3, § 6.5.4, at 287.

there is a waiver of the privilege, thereby disclosing the individual's potential culpability. Such a disclosure will also satisfy the lawyer's disclosure obligations under Rule 1.13(d); those obligations are discussed below.¹⁴⁸

6. The attorney-client privilege applies to government organizations

Shielding the workings of government from public scrutiny is antithetical to democracy. After all, the business of government is the public's business, and the public has a right to know how its business is being conducted. That sentiment finds expression in Wyoming's Open Meetings Law: "The agencies of Wyoming exist to conduct public business. Certain deliberations and actions shall be taken openly"¹⁴⁹ Accordingly, "[a]ll meetings of the governing body of an agency are public meetings, open to the public at all times, except as otherwise provided."¹⁵⁰ An agency's deliberations, however, often include consulting with the agency's lawyers. In the private sector, it is well established that a client's statements to a lawyer and the lawyer's advice are protected from disclosure by the attorney's ethical duty of confidentiality¹⁵¹ and the attorney-client privilege.¹⁵² There is an obvious conflict, however, between the general notion that government deliberations should occur in public, and the shield which generally protects communications between an attorney and the attorney's client. The question arises, therefore, of whether the attorney-client privilege should apply to government entities.

The statute which codifies Wyoming's attorney-client privilege is silent on whether it applies to government entities. Nor has the Wyoming Supreme Court ever addressed the issue. Perhaps the most accurate indication of the general view around the country is the Restatement's assertion that the privilege applies to governmental organizations "[u]nless applicable law otherwise provides"¹⁵³ This position reflects "the generally prevailing rule that governmental agencies and employees enjoy the same privilege as non-governmental counterparts."¹⁵⁴ The Wyoming Open Government Act does not abrogate the privilege, rather, the act recognizes the need for agencies to consult with their lawyers; implicit in that recognition is the need for the existence of the attorney-client privilege between a government agency and its lawyers.

148. See *infra* notes 169-278 and accompanying text.
149. WYO. STAT. ANN. § 16-4-401 (LexisNexis 2001).
150. *Id.* § 16-4-403(a).
151. WYOMING RULES OF PROF'L CONDUCT R. 1.6(a).
152. WYO. STAT. ANN. § 1-12-101(a)(i).
153. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74 (2000).
154. *Id.* cmt. b.

A government body may hold an executive session, not open to the public, for a variety of reasons, at least two of which will likely involve consulting with the body's attorney, and seven of which may.¹⁵⁵ First, the public may be excluded when the government meets "with the attorney general, county attorney, district attorney, [or] city attorney . . . on matters posing a threat to the security of public or private property, or a threat to the public's right of access."¹⁵⁶ Second, an executive session may be held "concerning litigation to which the governing body is a party or proposed litigation to which the governing body may be a party."¹⁵⁷ Either of those meetings will likely involve the governing body's attorney. In addition, the governing body may withdraw to an executive session, which may involve consulting with its attorney, regarding: (1) employment matters;¹⁵⁸ (2) national security;¹⁵⁹ (3) parole or release from incarceration;¹⁶⁰ (4) acquisition of real property;¹⁶¹ (5) information which is confidential by law;¹⁶² (6) employment negotiations;¹⁶³ or (7) disciplinary actions against a student.¹⁶⁴ Since the public may be excluded when the foregoing matters are discussed, it makes sense that the consultations with the governing body's attorney would be protected by the attorney-client privilege.

The Wyoming Public Records Act¹⁶⁵ contains similar protections. A records' custodian may deny access to "[r]ecords of investigations conducted by . . . any . . . county attorney, city attorney, [or] attorney general . . ." ¹⁶⁶ Furthermore, access may be denied to "[i]ntra-agency or interagency memoranda or letters which would not be available by law to a private party in litigation with the agency."¹⁶⁷ A litigant may discover documents which are "not privileged."¹⁶⁸ Intra or interagency memoranda or letters may include communications to or from the agency's attorney. Such memoranda or letters are protected by the attorney-client privilege in litigation, and so are not available under the Government Records Act.

Although the Wyoming statute is silent on whether the attorney-client privilege should apply to government entities, or any entities for that matter, the general rule is that the privilege does apply to government enti-

155. WYO. STAT. ANN. § 16-4-405 (LexisNexis 2001).

156. *Id.* § 16-4-405(a)(i).

157. *Id.* § 16-4-405(a)(iii).

158. *Id.* § 16-4-405(a)(ii).

159. *Id.* § 16-4-405(a)(iv).

160. *Id.* § 16-4-405(a)(vi).

161. *Id.* at (a)(vii).

162. *Id.* at (a)(ix).

163. *Id.* at (a)(x).

164. *Id.* at (a)(xi).

165. *Id.* §§ 16-4-201-05 .

166. *Id.* § 16-4-203(b)(i)

167. *Id.* at (b)(v).

168. WYO.R.CIV.P. 26(b)(1)(A).

ties. That conclusion is bolstered by the exceptions to the Wyoming Open Meetings Act and the Wyoming Government Records Act, exceptions which allow for and are consistent with the existence of the attorney-client privilege.

D. Summary

Although the applicability and scope of the attorney-client privilege in Wyoming are not specified in the statute, the answers to three fundamental questions are reasonably predictable, while the answer to a fourth is less certain. First, there is little doubt that the privilege will apply to protect clients, and not just their lawyers. Second, it is reasonable to assume that the privilege will be applied to organizations in Wyoming, just as it has in every jurisdiction which has considered the issue. To hold otherwise would completely undermine the purpose of the privilege, encouraging full disclosure between an attorney and the attorney's client. Third, there is also little doubt that the privilege belongs to the organization, and it, acting through its governing body, may waive the privilege, just as it may waive a lawyer's ethical duty of confidentiality.

The fourth question, which is both unanswered and difficult to predict with accuracy is: What is the scope of the privilege? Will it be defined by the control-group test, the subject-matter test, or something else? The better reasoned view is the subject matter test, or some variant of it. That view is better reasoned because it recognizes reality. Entities act through all employees, not just those in managerial positions, and it is critical that an organization's lawyer be able to commentate with relevant employees, regardless of their position in the organization, confident that the communications will be privileged.

Whatever the scope of the privilege, an organization's lawyer must be careful to correct constituents' misconceptions about the nature of their communications. A constituent needs to know that the communications may not be privileged, and that the organization, not the constituent, will have the ability to waive the privilege, if it exists, the attorney's ethical duty of confidentiality, or both.

PART III: A LAWYER'S WHISTLE-BLOWING OBLIGATIONS.

Identifying the client, the constituents authorized to act on behalf of the client, and properly applying the confidentiality principles to organizations are critically important, but doing so does not end an organizational lawyer's ethical duties to the client. Among the lawyer's other duties is the obligation to blow the whistle when the actions or inactions of an individual within or associated with the organization threaten the organization. This Part addresses that obligation – a lawyer's duty to act to protect an organizational client by blowing the whistle.

A. The Ethical Framework

Generally, clients, not lawyers, call the shots: ethically, a lawyer “shall abide by the client’s decisions regarding the objectives of the representation.”¹⁶⁹ Further, a lawyer “shall consult with the client as to the means by which they [the objectives] are to be pursued.”¹⁷⁰ As in any attorney-client relationship, the attorney for an organization is an agent for the client, who is the principal in that relationship. An agent must, of course, “act solely for the benefit of the principal”¹⁷¹ Furthermore, as an agent, “the lawyer generally owes the client rigorously enforced fiduciary duties”¹⁷² The lawyer for an organization, therefore, is both an agent and a fiduciary for the organization – and to it flow all the ethical and legal duties a lawyer owes to any client, including the duties of loyalty, confidentiality, and competence.¹⁷³

Paragraph (b) of Rule 1.13 articulates the importance of the lawyer’s paramount duty of loyalty to an organizational client. It is based on the principle that since a lawyer for an organization represents the organization, the lawyer must act to protect the organization from individuals who might harm it, even if those individuals are constituents who work for or are associated with the organization and constituents with whom the lawyer interacts. The lawyer must, in short, ignore his or her personal relationship with any such constituent and blow the whistle on any person whose actions or inactions threaten the organization’s best interests from within.

The whistle-blowing provisions, paragraphs (b) and (c) of Rule 1.13, contain two components. First, the organization’s lawyer must “know” certain things. Second, if the lawyer does “know” those things, the lawyer must act to protect the organization.

“Know” is a defined term. It means “actual knowledge of the fact in question. A person’s knowledge may [however] be inferred from circumstances.”¹⁷⁴ It is not enough, therefore, for a lawyer to suspect, believe, or even reasonably believe something. The lawyer must “know” something before the whistle blowing obligation is triggered. The lawyer must know four things: (1) that “an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act;” (2) “in a matter related to the representation;” (3) “that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be

169. WYOMING RULES OF PROF’L CONDUCT R. 1.2(a).

170. *Id.*

171. RESTATEMENT (SECOND) OF AGENCY § 387 (1958).

172. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 7 cmt. b (2000).

173. WOLFRAM, *supra* note 3, § 4.1.

174. WYOMING RULES OF PROF’L CONDUCT, terminology ¶ 5.

imputed to the organization;" and (4) the violation is "likely to result in substantial injury to the organization" ¹⁷⁵

The question is what does that really mean? What must a lawyer know? Two types of events fall within Rule 1.13(b). Actions or inactions by a person associated with the organization that are either (1) "a violation of a legal obligation to the organization;" or (2) "a violation of law which reasonably might be imputed to the organization."¹⁷⁶ The former type of activity generally involves the "breach of a constituent's fiduciary duty to the organization, such as usurpation of a corporate opportunity or self-dealing."¹⁷⁷ The latter type of activity "refers to conduct for which an organization would be traditionally responsible under the common law doctrine of 'respondent superior' or by operation of statute or regulation."¹⁷⁸ Many environmental statutes or regulations, for example, impose liability on an entity when an individual who works for the entity pollutes.¹⁷⁹

How will a lawyer know? A common scenario will be that an organization's lawyer is asked for an opinion about one of the organization's proposed activities. The lawyer opines that the proposal will involve either actions by a constituent that are a violation of legal obligations owed to the organization or a violation of law which might reasonably be imputed to the organization, and, therefore, taking the proposed action would be ill-advised. The lawyer's advice is rejected by the person or persons with whom the lawyer is interacting. Another common scenario is that a lawyer is asked to investigate certain activity and learns of on-going, improper activity by someone associated with the organization. Finally, a lawyer who has an on-going relationship with an organizational client may become aware of improper actions just because of the lawyer's general familiarity with how the organization operates. However the lawyer comes to "know," once he or she does, the question for the lawyer is "What next?" The question is a tough one, but the rule helps to answer it by clarifying that the lawyer's ultimate duty is to the organization, not the individuals within it, regardless of the individuals' positions in the organization.

If a lawyer "knows" the foregoing, i.e., that an individual associated with an organization is about to embark on or has already embarked on a course of conduct which is in violation of the individual's obligations to the organization or which is illegal and may be imputed to the organization, and

175. *Id.* at Rule 1.13(b).

176. *Id.*

177. Mary C. Daly, *Avoiding the Ethical Pitfall of Misidentifying the Organizational Client*, 1319 PRAC. LAW INST. 721, 25-26 (1997).

178. *Id.* at 726.

179. *See, e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act, codified at 42 U.S.C. §§ 9601-9675 (1994), which imposes liability on "any person" who improperly disposes of hazardous waste. 42 U.S.C. § 9607(a)(2) (1994). "Person" is defined as "an individual, firm corporation, association, partnership . . ." *Id.* § 9601(21).

the injury to the organization will be substantial, the lawyer must act. He or she “shall,” says the rule, “proceed as is reasonably necessary in the best interest of the organization.”¹⁸⁰ This language makes the organization’s primacy clear. The lawyer “shall” act in the best interest of “the organization,” even at the expense of the interests of the individual(s) who may control it. The rule then articulates several factors for the lawyer to consider in deciding how to proceed:

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.¹⁸¹

While the lawyer’s primary obligation is to protect the organization, the lawyer must act with caution: “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.”¹⁸² The emphasis on not disclosing otherwise confidential information outside the organization is a natural outgrowth of a lawyer’s general obligation not to reveal “information relating to the representation.”¹⁸³ The idea is that a lawyer can take steps within the organization to protect the best interests of the organization, while at the same time preserving the client’s confidences.

In addition to the rule’s general directive to “minimize disruption of the organization,” the rule provides specific ideas. Acting in the best interest of an organization “may include” the following. First, the lawyer may ask for “reconsideration of the matter.”¹⁸⁴ The persons to ask, of course, are the persons, the constituents, in the words of the rule, who are authorized to act on behalf of the organization.¹⁸⁵ They are the persons who made the decision in question, and they are the persons who can change it. If that does not work, the second recommended step is that the lawyer “advise[e] that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization.”¹⁸⁶ Once again, the advice to ask for a “separate legal opinion” should be given to the constituent or constituents authorized to act on behalf of the organization. If that advice falls on deaf ears,

180. WYOMING RULES OF PROF’L CONDUCT R. 1.13(b).

181. *Id.* (emphasis added).

182. *Id.*

183. *Id.* at Rule 1.6(a).

184. *Id.* at Rule 1.13(b)(1).

185. See, J.M. Burman, *Representing Organizations: Part I, Who is the Client, and With whom Should the Lawyer Interact?*, WYO. LAW. 39-41 (Apr. 2002).

186. WYOMING RULES OF PROF’L CONDUCT R. 1.13(b)(2).

the third suggestion is to “refer[] 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.”¹⁸⁷ Who is a “higher authority” depends on with whom the lawyer has been interacting and, as the rule notes, “applicable law.”

If, for example, the organization is a corporation and the “authorized constituent” with whom the corporation’s lawyer has been dealing is a vice-president, the CEO is obviously a higher authority. If the CEO is the authorized constituent, the “higher authority,” according to Wyoming law, the applicable law, is the board of directors, which has ultimate authority over the corporation.¹⁸⁸ If the organization is a limited liability company, governance is vested in its members.¹⁸⁹ Whatever the entity, the ultimate control will be established by “applicable law,” and the lawyer better know that law.

If asking for reconsideration, requesting a second opinion, and referring the matter to a higher authority do not succeed in diverting the organization from a harmful course of conduct, paragraph 1.13(c) provides further guidance. If “the highest authority that can act on behalf of the organization” is unwilling to alter the organization’s conduct, and the conduct is “*clearly a violation of law* and is likely to result in *substantial injury* to the organization, the *lawyer may resign* in accordance with Rule 1.16.”¹⁹⁰ The language of this paragraph is more restrictive than the language of paragraph (b), which requires the lawyer to blow the whistle. Instead of blowing the whistle when an act or proposed act is “a violation of a legal obligation to the organization, or a violation of law,” paragraph (c) requires an action which is “*clearly a violation of law.*” The “substantial injury” language of paragraph (c) is the same as the language of paragraph (b). Accordingly, when the action is “clearly a violation of law” a lawyer may resign in accordance with Rule 1.16¹⁹¹ (the “may resign” standard may become a shall resign if the lawyer’s continued representation of the organization “will result in violation of the Rules of Professional Conduct or other law”).¹⁹² While withdrawal likely satisfies the client’s ethical duty, it may be an empty gesture. The client may not be deterred from the conduct which led to the lawyer blowing the whistle, and, ultimately, the lawyer’s withdrawing. The issue which then arises is whether the lawyer may disclose the now former client’s intended conduct.

187. *Id.* at (b)(3)

188. By law, a corporation is governed by its board of directors. WYO. STAT. ANN. § 17-16-801(a) (LEXISNEXIS 2001).

189. *Id.* § 17-16-116.

190. WYOMING RULES OF PROF’L CONDUCT R. 1.13(c) (emphasis added).

191. *Id.* at Rule 1.16. Paragraph (a) of Rule 1.16 requires withdrawal in certain circumstances. *Id.* at Rule 1.16(a). Paragraph (b) permits withdrawal in others. *Id.* at Rule 1.16(b).

192. *Id.* at Rule 1.16(a)(1).

A lawyer whose former (or current) client intends to pursue an illegal or otherwise improper course of conduct is caught in a bind, between two potentially conflicting ethical and legal duties. On the one hand, a lawyer “shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.”¹⁹³ Further, a lawyer must withdraw from representation of a client if “the representation will result in violation of the Rules of Professional Conduct or other law.”¹⁹⁴ On the other, a lawyer has an obligation of confidentiality to both current and former clients and may not use or reveal any “information relating to the representation” of a current¹⁹⁵ or former client.¹⁹⁶ A lawyer may not, therefore, simply withdraw and disclose the reasons for doing so. There is authority, however, to support a lawyer making a “noisy withdrawal,” in which the lawyer communicates, at least implicitly, the fact and the reasons for withdrawing.¹⁹⁷ That authority is considerably stronger in Wyoming because of Wyoming’s lenient rule on disclosing confidential information. Disclosure is discussed in detail below.¹⁹⁸

In addition to a lawyer’s ethical duty to blow the whistle to protect an organization, a lawyer has a legal duty to do so. The Third Restatement of the Law Governing Lawyers mirrors the ethical duty described above:

If a lawyer representing an organization knows of circumstances indicating that a constituent of the organization has engaged in action or intends to act in a way that violates a legal obligation to the organization that will likely cause substantial injury to it, or that reasonably can be foreseen to be imputable to the organization . . . the lawyer must proceed in what the lawyer reasonably believes to be in the best interests of the organization.¹⁹⁹

The Restatement suggests the same steps as Rule 1.13(b). First, the lawyer may “ask the constituent to reconsider” the proposed action.²⁰⁰ Second, the lawyer may “recommend that a second legal opinion be sought.”²⁰¹ Third, the lawyer may “seek review by appropriate supervisory authority within the organization, including . . . the highest authority that can act on

193. *Id.* at Rule 1.2(d).

194. *Id.* at Rule 1.16(a)(1).

195. *Id.* at Rule 1.6(a).

196. *Id.* at Rule 1.9(c)(2).

197. Valerie Breslin & Jeff Dooley, *Whistleblowing v. Confidentiality: Can Circumstances Mandate Attorneys to Expose Their Clients*, 15 GEO. J. LEGAL ETHICS 719, 720-22 (2002).

198. *See infra* notes 210-45 and accompanying text.

199. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 96(2) (2000).

200. *Id.* § 96(3).

201. *Id.*

behalf of the organization.”²⁰² Blowing the whistle on constituent wrongdoing is not, however, all an organizational lawyer must do.

As discussed in detail above,²⁰³ when it is “apparent” to an organization’s lawyer that the interests of the organization and its constituents “are adverse,” the lawyer must “explain the identity of the client . . . [and] that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.”²⁰⁴ If the constituent with whom the lawyer is interacting does not have a lawyer, the only advice the lawyer may give the individual, which the lawyer should give, is that the individual should obtain counsel.²⁰⁵ If the constituent has counsel, the lawyer may not communicate about the matter with the individual “unless the lawyer has the consent of the other lawyer or is authorized by law to do so.”²⁰⁶

Requiring a lawyer to take reasonable steps to protect an organization’s best interests is consistent with the rules’ general requirement that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent”²⁰⁷ It is also consistent with the ethical mandate that a lawyer “shall withdraw from the representation of a client if . . . the representation will result in violation of the Rules of Professional Conduct or other law.”²⁰⁸ Despite these clear directives, a lawyer must remember that the duty of confidentiality always applies and a lawyer’s withdrawal from representing a client does not mean that the lawyer may disclose information about the client’s conduct.²⁰⁹

B. Disclosing the Information Which Led to Whistle-blowing.

A lawyer’s ethical duty of confidentiality is broad: “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, and except as stated in para-

202. *Id.*

203. *See supra* notes 51-53 and accompanying text.

204. WYOMING RULES OF PROF’L CONDUCT R. 1.13(d).

205. *Id.* at Rule 4.3 cmts. (“An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer’s representation of a client, *the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.*”) (emphasis added).

206. *Id.* at Rule 4.2.

207. WYOMING RULES OF PROF’L CONDUCT R. 1.2(d).

208. *Id.* at Rule 1.16(a)(1).

209. *Id.* at Rule 1.9(c) (“A lawyer who has formerly represented a client in a matter . . . shall not thereafter . . . [u]se information relating to the representation to the disadvantage of the former client . . . or . . . [r]eveal information relating to the representation”); *see also id.* at Rule 1.6 cmt. 23 (“The duty of confidentiality continues after the client-lawyer relationship has terminated.”).

graph (b).²¹⁰ Since it is unlikely that an organization will consent to the disclosure of the information which triggered the lawyer's whistle-blowing obligation, the question becomes: Is the lawyer permitted to disclose the information pursuant to "paragraph (b)," or is the lawyer required to remain mute, knowing that the proposed action may cause injury, either physical or otherwise, to third parties? In answering this question, Wyoming has taken a much different approach than the ABA.

The ABA suggests restricting a lawyer's disclosure of confidential information to circumstances where the lawyer "reasonably believes"²¹¹ that disclosure is necessary to prevent "reasonably certain death or substantial bodily injury."²¹² The Wyoming rule, however, takes a much more liberal approach, permitting disclosure "to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act."²¹³

Wyoming is not alone in rejecting the ABA's view. It is one of twenty-one jurisdictions which have adopted the view that a lawyer may disclose otherwise confidential information to prevent the client from committing a criminal act.²¹⁴ By contrast, eighteen jurisdictions have adopted the ABA's view and permit disclosure only when a client's intended criminal act will result in substantial harm or death.²¹⁵ Another eleven jurisdictions require disclosure to prevent serious bodily harm or death, and they

210. *Id.* at Rule 1.6(b) (emphasis added).

211. "Reasonable belief" is a defined term. It means: "that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." A.B.A. MODEL RULES OF PROF'L CONDUCT R. 1.0(3) (2003).

212. *Id.* at Rule 1.6(b)(1).

213. WYOMING RULES OF PROF'L CONDUCT R. 1.6(b)(1).

214. *Id.* at Rule 1.6(b)(1). *See also* ARK. RULES PROF'L CONDUCT R. 1.6(b)(1); COLO. R. PROF'L CONDUCT R. 1.6(b); IDAHO R. PROF'L CONDUCT R. 1.6(b)(1); IND. R. PROF'L CONDUCT R. 1.6(b)(1); IOWA RULES OF PROF'L CONDUCT R. 4-101(C)(3); KAN. RULES PROF'L CONDUCT R. 1.6(b)(1); ME. RULES OF PROF'L CONDUCT R. 3.6(h)(4); MICH. RULES PROF'L CONDUCT R. 1.6(c)(4); MINN. RULES PROF'L CONDUCT R. 1.6(b)(3); MISS. RULES PROF'L CONDUCT R. 1.6(b)(1); NEB. RULES PROF'L RESP. R. 4-101(C)(3); N.Y. CODE PROF'L RESP. R. 4-101(C)(3); N.C. RULES BAR, ch. 2, R. 1.6(d)(4); OHIO CODE PROF'L RESP. R. 4-101(C)(3); OKLA. RULES PROF'L CONDUCT R. 1.6(b)(1); OR. CODE PROF'L RESP. R. 4-101(C)(3); S.C. RULES CT. PROF'L CONDUCT 1.6(b)(1); TENN. SUP. CT. R. 8 CODE OF PROF'L RESP. R. 4-101(C)(3); WASH. RULES PROF'L CONDUCT 1.6(b)(1); W. VA. RULES PROF'L CONDUCT 1.6(b)(1).

215. The eighteen jurisdictions are: ALA. RULES PROF'L CONDUCT R. 1.6(b)(1); ALASKA R. PROF'L CONDUCT R. 1.6(b)(1); DEL. RULES PROF'L CONDUCT R. 1.6 (b)(1); D.C. RULES PROF'L CONDUCT R. 1.6(c)(1); GA. BAR RULES 4-102 R. 1.6(b)(1); HAW SUP. CT. RULES PROF'L CONDUCT R. 1.6(c)(1); KY. SUP. CT. RULES 30 PROF'L CONDUCT R. 1.6(b)(1); LA. BAR art. 16 RULES PROF'L CONDUCT R. 1.6(b)(1); MD. RULES CTS. JUDGES AND ATTY'S RULES PROF'L CONDUCT R. 1.6(b)(1); MASS. SUP. CT. RULES 3:07 R. 1.6(b)(1); MO. RULES 4 R. 4-1.6 (b)(1); MONT. RULES PROF'L CONDUCT R. 1.6 (b)(1); N.H. RULES PROF'L CONDUCT R. 1.6 (b)(1); N.M. RULES PROF'L CONDUCT R. 16-106 B ("a lawyer should reveal"); PA. RULES PROF'L CONDUCT R. 1.6(c)(1); R.I. SUP. CT. art. v RULES PROF'L CONDUCT R. 1.6(b)(1); S.D. tit. 16, ch. 16-18, App., Rule 1.6(b)(1); UTAH RULES PROF'L CONDUCT R. 1.6 (b)(1).

permit disclosure of information to prevent lesser crimes.²¹⁶ The last jurisdiction, California, does not permit disclosure under any circumstances.²¹⁷ Allowing disclosure of confidential information to prevent a "criminal act" will certainly permit an organization's lawyer to disclose information to prevent the corporation from committing a crime.

Under no circumstances, however, may a lawyer disclose a client's past conduct. The exception is for future conduct because one can prevent it, not past crimes which have already occurred. A "lawyer may disclose otherwise confidential information in order to prevent the criminal act which the lawyer reasonably believes is intended by the client. [But it] is very difficult for a lawyer to 'know' when such a purpose will actually be carried out for the client may have a change of mind."²¹⁸ Accordingly, while a Wyoming lawyer may disclose a client's intent to commit a future crime, he or she never has an ethical duty to disclose, and "[a] lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule."²¹⁹ (Even though a Wyoming lawyer has no ethical duty to disclose, he or she may have a tort duty to disclose when a client intends to commit a crime which will result in substantial bodily harm or death to an identifiable victim.²²⁰)

In sum, withdrawing from representation of an organization does not free a lawyer from the duty of confidentiality discussed above as a lawyer owes a similar duty not to use or reveal confidential information regarding a former client.²²¹ The commentary²²² to Rule 1.6 explains the effect of withdrawal on a lawyer's confidentiality obligation:

After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as other-

216. ARIZ. SUP. CT. RULES 42 RULES PROF'L CONDUCT AND ETHIC RESP. R. 1.6(b); CONN. RULES PROF'L CONDUCT R. 1.6(b); FLA. BAR RULE 4-1.6(b)(1); ILL. SUP. CT. RULES PROF'L CONDUCT R. 1.6(b); NEV. SUP. CT. RULE 156(2); N.J. RULES PROF'L CONDUCT R. 1.6 (b)(1); N.D. RULES PROF'L CONDUCT R. 1.6(a); TEX. RULES PROF'L CONDUCT R. 1.05(e); VT. RULES PROF'L CONDUCT R. 1.6(b)(1); VA. SUP. CT. RULES PT. 6 § 2 RULES PROF'L CONDUCT R. 1.6(c)(1); WIS. SUP. CT. RULES PROF'L CONDUCT R. 20:1.6 (b).

217. California is the only American jurisdiction whose ethical rules do not create an obligation of confidentiality; the rules are silent. The California Business and Professional Code, however, does impose such an obligation: "[i]t is the duty of an attorney . . . [t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." CAL. BUS. AND PROF'L CODE § 6068(e).

218. WYOMING RULES OF PROF'L CONDUCT R. 1.6 cmt. 13.

219. *Id.* at Rule 1.6 cmt. 14; *see also id.*, at scope ¶ 8 ("The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination.").

220. *See, e.g., J.M. Burman, Disclosing Privileged Communications: A Lawyer's Duty to Warn.*, 19 WYO. LAW. 17 (August 1996).

221. WYO. RULES OF PROF'L CONDUCT R. 1.9(c); *see also* Rule 1.6 cmt. 23.

222. The comments which accompany each rule "explain and illustrate the meaning and purpose of the Rule." *Id.* at scope ¶ 9.

wise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.²²³

The commentary makes clear that the rule contemplates giving notice of the fact of withdrawal. The more difficult question is what does it mean to and how should a lawyer “disaffirm any opinion, document, affirmation, or the like?” The answer depends on the context.

When a lawyer enters an appearance in a court on behalf of a client, the rules change. The lawyer now owes his or her highest duty to the court. The lawyer must not, among other things, “make a false statement of material fact or law . . . fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client . . . [or] offer evidence the lawyer knows to be false.”²²⁴ In addition, if the lawyer has offered evidence which the lawyer subsequently learns to be false, the lawyer “shall take reasonable remedial measures.”²²⁵ Such measures begin with the lawyer seeking to persuade the client to correct the falsity.²²⁶ If that fails, the lawyer “must disclose the existence of the client’s deception to the court or to the other party.”²²⁷ This duty to disclose is much different from a lawyer’s general duty of confidentiality, which overrides the lawyer’s duties to third parties.²²⁸ A lawyer’s duties to a court, however, have primacy.

A lawyer’s duties to the court “apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.”²²⁹ This means that if the lawyer has filed a pleading with the court that the lawyer later learns contains a material misstatement of fact or law, or that omits a material fact when disclosure “is necessary to avoid assisting a criminal or fraudulent act by a client,” the lawyer must correct or supplement the pleading, or disaffirm it. Doing so is required by Rule 3.3 (“Candor to the Tribu-

223. *Id.* at Rule 1.6 cmt. 17.

224. *Id.* at Rule 3.3(a)(1), (a)(2), (a)(4).

225. *Id.* at Rule 3.3(a)(4).

226. *Id.* at Rule 3.3 cmt. 5.

227. *Id.* at Rule 3.3 cmt. 6. Although the ethical duty applies to criminal defense lawyers, it may be qualified by the client’s Constitutional rights: “The general rule – that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client – applies to defense counsel in criminal cases However, the definition of the lawyer’s ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases.” *Id.* *But see* *Nix v. Whiteside*, 574 U.S. 157 (1985) (holding it was not a violation of a defendant’s Sixth Amendment right to effective assistance of counsel for his attorney to threaten to withdraw if client committed perjury).

228. *See, e.g.*, WYOMING RULES OF PROF’L CONDUCT R. 4.1(b) (A lawyer shall not “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, unless disclosure is prohibited by Rule 1.6.”).

229. *Id.* at Rule 3.3(b).

nal").²³⁰ The disclosure of otherwise confidential information, however, "should be no greater than the lawyer reasonably believes necessary."²³¹

Finally, a lawyer who has entered an appearance in a court may not withdraw without the permission of the court, regardless of the client's actions.²³² The lawyer must receive the court's permission even if the rules would otherwise require the lawyer to terminate the representation because of the severity of the client's conduct.²³³ The lawyer who wishes to withdraw, and who is ethically obligated to withdraw, because of a client's conduct, may not tell all. Instead, the lawyer must be careful not to disclose too much information, even information which would clearly establish the impropriety of the client's actions and the appropriateness of the lawyer's request to withdraw since the lawyer still owes a duty of confidentiality to the client and the disclosure must be limited to that which is "necessary." The lawyer should resist the temptation to detail the reasons for seeking to withdraw, and the court should not require the lawyer to specify the reasons:

Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. *The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.*²³⁴

If the matter is not in litigation and the lawyer has not entered an appearance, Rule 3.3, which requires candor to the tribunal, will not apply, although the rule on confidentiality will. Withdrawal from the representation will be governed by Rule 1.16 ("Declining or terminating representation"). Paragraph (a) of the rule requires termination of the representation if

230. The lawyer may also have a problem with Rule 11. The problem is that a lawyer who signs a pleading which is filed with the court is certifying that the document is: (1) not submitted for any improper purpose; (2) the legal contentions in the document are "warranted;" and (3) the factual allegations have evidentiary support. WYO.R.CIV.P. 11(b) (LexisNexis 2002). If that turns out to be incorrect, the signing lawyer may be sanctioned. *Id.* at Rule 11(c); see also WYOMING RULES OF PROF'L CONDUCT R. 1.16 cmt. 3 ("When a lawyer has entered an appearance or has been appointed to represent a client, withdrawal ordinarily requires approval of the tribunal.").

231. WYOMING RULES OF PROF'L CONDUCT R. 1.6 cmt. 15.

232. UNIFORM RULES FOR THE DISTRICT COURTS OF WYO. R. 1.2(c) (LexisNexis 2002) ("[C]ounsel will not be permitted to withdraw from a case except upon court order." The rule applies in circuit court, as well. *Id.* at Rule 1.02 ("The Uniform Rules for the District Courts of Wyoming shall govern the practice before the circuit courts of Wyoming.").

233. WYOMING RULES OF PROF'L CONDUCT R. 1.16(c) ("When ordered to do so by a tribunal, a lawyer may continue representation notwithstanding good cause for terminating the relationship.").

234. *Id.* at Rule 1.16 cmt. 3 (emphasis added).

continued representation “will result in violation of the Rules of Professional Conduct or other law.”²³⁵ Paragraph (b) permits termination for a variety of reasons, including when “the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent,”²³⁶ or “the client has used the lawyer’s services to perpetrate a crime or fraud.”²³⁷ Conduct which gives rise to a lawyer’s duty to blow the whistle will likely fall under either the mandatory or the permissive withdrawal provisions, and if the attorney has not entered an appearance, those provisions will control withdrawal.

A lawyer’s whistle-blowing duty to an organization is the reciprocal of the lawyer’s obligation to ensure that constituent(s) whose conduct may lead to liability for the organization know that the organization’s lawyer does not represent them. Almost by definition, when a lawyer has a duty to blow the whistle, the interests of the constituent(s) and the organization are very much in conflict. The rules anticipate such a conflict and require an organizational lawyer to take steps to avoid that conflict.²³⁸

Before disclosing confidential information, however, a lawyer has another duty, the duty to communicate with the client about the lawyer’s proposed actions, and whether the client wishes to act to eliminate the need for the attorney’s disclosure. The reason is that a client, not the client’s lawyer, is authorized to make decisions about the objectives of the representation, and the lawyer “shall abide” by those decisions.²³⁹ Further, the lawyer “shall consult with the client as to the means by which they are to be pursued.”²⁴⁰ Accordingly, whether disclosing information is an objective or a means, the lawyer has a duty to consult with the client about potential disclosure and its possible effects. Furthermore, a lawyer has a duty to “explain a matter to the extent reasonably required for the client to make an informed decision about the representation.”²⁴¹ The client thus needs to make an informed decision about whether to act to eliminate the need for disclosure by the lawyer, or to do nothing knowing the lawyer will disclose.

Requiring a lawyer to consult with a client before disclosure appears to be effective. In the only study which has been done on the efficacy of lawyers trying to dissuade their clients from committing violent acts, lawyer suasion was found to be very effective with individual clients who had told their lawyers of their intentions to commit violent crimes.²⁴² It should be

235. *Id.* at Rule 1.16(a)(1).

236. *Id.* at Rule 1.6(b)(1).

237. *Id.* at Rule 1.16(b)(2).

238. *See supra* notes 146-48 and accompanying text.

239. WYOMING RULES OF PROF’L CONDUCT R. 1.2(a).

240. *Id.*

241. *Id.* at Rule 1.4(b).

242. A 1993 study of New Jersey lawyers showed both that lawyers confront the issue of clients intending violent criminal action fairly often, and that the lawyers are generally suc-

similarly effective with organizational clients. It may be more effective as the organization's ultimate decision-maker may not have been involved in the original decision and may be very pleased to be able to correct the proposed action.

The lawyer's ethical duties are clear. The lawyer represents the organization, and he or she must act to protect it when the lawyer knows that the organization may be substantially harmed by the actions or inactions of an individual within or associated with the organization. Similarly, the lawyer must take care not to create the impression that the lawyer represents the individuals who work for or with the organization. This obligation means that the lawyer must explain his or her role to the individuals with whom the lawyer is interacting.

When all is said and done, a lawyer in Wyoming has discretion to reveal information when the lawyer reasonably believes disclosure is necessary to prevent the client from committing a crime.²⁴³ That will often permit a lawyer for an organization to disclose at least some of the conduct which has given rise to the lawyer's obligation to blow the whistle to protect the best interests of the organization. A disclosure outside the organization, however, must be limited. It "should be no greater than the lawyer reasonably believes necessary to the purpose."²⁴⁴ And if the lawyer decides not to disclose, even to prevent substantial bodily injury, death, or significant financial harm, that decision does not violate a lawyer's ethical obligations.²⁴⁵

C. The Legal Framework

A lawyer owes both ethical and legal duties to a client. As a general matter, a lawyer owes every client an ethical duty of competence, which "requires the legal knowledge, skill, thoroughness and preparation reasona-

cessful in persuading the client not to commit the acts. Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81, 119 (1994). First, Professor Levin found that sixty-seven lawyers out of 776 responding lawyers reported that they had, at least once in their careers, reasonably believed that a client intended to commit a future crime which would cause serious injury to another. Second, the study found that lawyers who reasonably believed that their clients were going to seriously harm a third party tried to convince the clients not to do so. *Id.* at 117. The lawyers believed they had been successful in persuading their clients not to commit the crimes 92.4% of the time. *Id.*

243. *Id.*; WYOMING RULES OF PROF'L CONDUCT R. 1.6(b)(1).

244. *Id.*; WYOMING RULES OF PROF'L CONDUCT R. 1.6 cmt. 15.

245. *Id.*; see also *supra* notes 213-20 and accompanying text.

bly necessary for the representation."²⁴⁶ The legal duty is similar. A lawyer is held to the standard of "a reasonable, careful and prudent lawyer . . ."²⁴⁷

The legal duties a lawyer owes to an organizational client mirror the lawyer's ethical duties. The Wyoming Supreme Court addressed an organizational lawyer's legal duties in *Bowen v. Smith*.²⁴⁸ In that case, minority shareholders sued the corporation's lawyers. Although the history leading up to and culminating in the suit is lengthy and complex, the salient facts are both simple and important. The corporation retained a law firm, at the sole expense of the majority shareholder, to represent it in complex and lengthy litigation. The litigation was resolved through a cash settlement favorable to the corporation. The majority and minority shareholders then disagreed about the division of the settlement proceeds, a dispute which, itself, ultimately ended in litigation. In that dispute, the corporation's former law firm represented the majority shareholder. While the suit over the division of the settlement proceeds was pending, the minority shareholders sued the corporation's former law firm, the firm which was then representing the majority shareholder. The trial court granted the law firm's motion for summary judgment. The judgment was upheld on appeal.

The minority shareholders' suit against the corporation's former law firm was premised on the notion that an attorney-client relationship had existed between the corporation's law firm and the corporation's minority shareholders.²⁴⁹ The minority shareholders thus asserted claims against the firm for breach of fiduciary duty; conspiracy; breach of contract; fraud; malpractice; and punitive damages.²⁵⁰ Cutting through the thicket of charges and counter-charges, the Court held that the key was "one simple issue."²⁵¹ That is, whether "representation of the parent corporation . . . by attorneys employed in the interest of the majority shareholder . . . create[d] an attorney/client relationship with the minority shareholders in the same corporation."²⁵² The answer, said the Court, was no: "[T]he law firm was not representing the minority shareholders and violated no fiduciary relationship to them"²⁵³ Furthermore, as it should have been, "the settlement [had been] approved by the board of directors of the corporation . . ."²⁵⁴ The law firm, in other words, represented the corporation, the organization, to which it owed ethical and legal duties, and not the individual shareholders who com-

246. WYOMING RULES OF PROF'L CONDUCT R. 1.1.

247. *Moore v. Lubnau*, 855 P.2d 1245, 1248 (Wyo. 1993); see also ABA/BNA LAWYERS' MANUAL, *supra* note 48, at 301:105 ("[L]awyers owe a duty to their clients to provide services with reasonable competence.").

248. 838 P.2d 186 (Wyo. 1992).

249. *Id.* at 187 n.1.

250. *Id.*

251. *Id.* at 189.

252. *Id.*

253. *Id.* at 187.

254. *Id.* at 190.

prise it, the constituents. The Wyoming view is in accord with the prevailing principle that a lawyer for an organization owes legal duties to the organization, and not to the organization's constituents.²⁵⁵

Bowen vs. Smith is premised on a fundamental principle of corporate law. A corporation is an "independent entity" which must be "distinguished from individual shareholders."²⁵⁶ Not only is that distinction well-established in law, it is, said the Court, a "principle" of the Wyoming Rules of Professional Conduct, Rule 1.13, in particular.²⁵⁷ The ultimate question for the Court, therefore, was whether the law firm had fulfilled its duties to its client, the corporation, not whether the law firm was looking out for the interests of the shareholders, who were non-clients. The answer, said the Court, was yes: "The parent corporation was faithfully and fully represented by the law firm"²⁵⁸

While *Bowen* remains good law, a lawyer who represents an organization must be careful not to blur the line between representing the organization and the constituents within it. The problem is that in Wyoming, the attorney-client relationship is a contractual one. It may arise by express agreement of the parties, or it "may be implied from the conduct of the parties."²⁵⁹ When a shareholder or other constituent claims an attorney-client relationship existed with both the organization and the constituent, the question for a reviewing court will be whether the constituent reasonably believed the lawyer represented him or her individually, and "the burden of proof to show that it was unreasonable for a client to believe that an attorney-client relationship existed . . . has to rest with the attorney."²⁶⁰

One of the difficulties an organizational lawyer faces is that he or she "may also represent any of its directors, officers, employees, members, shareholders or other constituents" so long as the dual representation does not involve an impermissible conflict of interest.²⁶¹ So long as no problems arise, it is unlikely for an impermissible conflict to prevent dual representation of a constituent and the organization. When an obligation to blow the whistle arises, however, it is extremely likely that the circumstances which gave rise to that obligation will be the result of an adverse relationship between the constituent(s) involved and the organization.²⁶² When that occurs, having an attorney-client relationship with both an organization and some of

255. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96(1) (2000).

256. 838 P.2d 186, 193.

257. *Id.*

258. *Id.*

259. *Chavez v. State*, 604 P.2d 1341, 1346 (Wyo. 1980), *cert den.* 446 U.S. 984; *see also* *Carlson v. Langdon*, 751 P.2d 344, 347 (Wyo. 1988).

260. *Carlson*, 751 P.2d at 348 (emphasis added).

261. WYOMING RULES OF PROF'L CONDUCT R. 1.13(d).

262. The issue of conflicts between the interests of constituents and the organization is discussed in detail at *infra* notes 316-47 and accompanying text.

its constituents likely will place the lawyer in an impossible conflict, one which will require the lawyer's complete withdrawal from representing both the organization and its constituents.²⁶³

The frequency and likelihood of an organizational constituent reasonably believing that the organization's lawyer also represents that individual is the reason for the organizational attorney's ethical duty to be aware of when the organization's interests and those of a constituent begin to diverge, and the further duty of the lawyer to clarify the identity of the client when that occurs.²⁶⁴ It is critical, therefore, that the lawyer not create the impression in the minds of constituents that the lawyer represents them, as well as the organization.

D. Special Considerations for Health Lawyers

When the client is an organization which provides health care and receives federal funds (virtually all health care providers receive Medicare or Medicaid payments, which include federal funds), the lawyer needs to be aware of federal law which arguably overrides a lawyer's general ethical and legal obligations of confidentiality, even with respect to past acts. A little known provision of the Social Security Act has the potential to fundamentally alter a lawyer's responsibility to a health care client:

Whoever . . . having knowledge of the occurrence of any event affecting (A) his initial or continued right to any such benefit or payment, or (B) the initial or continued right to any such benefit or payment of any other individual in whose behalf he has applied for or is receiving such benefit or payment, conceals or fails to disclose such event with an intent fraudulently to secure such benefit or payment either in a greater amount or quantity than is due or when no such benefit or payment is authorized [is guilty of a felony].²⁶⁵

Whether a lawyer who represents a provider of health care who learns that the provider has received federal funds in excess of that to which the provider is entitled falls under the mandate of the statute is not clear. Nevertheless, its plain language – “whoever” – could be construed by a zealous federal prosecutor to apply to an organizational lawyer and effectively force him or her to inform on the lawyer's client. Such a result would

263. Some conflicts may not be waived. The question is whether the lawyer with the conflict “reasonably believes” the conflict may be waived. WYOMING RULES OF PROF'L CONDUCT R. 1.7(a)(1), (b)(1). The commentary to the rule explains that the question is whether a “a disinterested lawyer” would conclude that waiver of the conflict would be appropriate. *Id.* at cmt. 4.

264. WYOMING RULES OF PROF'L CONDUCT R. 1.13(d).

265. 42 U.S.C. § 1382a-7b(a)(3) (emphasis added).

dramatically change the traditional relationship between a client, who consults a lawyer for legal assistance, and the lawyer, who would become the client's worst nightmare (a government informant), instead of a confidant who will zealously represent the client's interests.

Thus far, no reported cases say that a lawyer falls within the purview of the above statute.²⁶⁶ There are also many potential defenses should such a case arise. Lawyers who represent health care providers which receive federal funds, however, need to be aware of the law and its potential applicability and advise their clients accordingly.

E. Special Considerations for Lawyers who Practice Before the SEC.

Historically, lawyers have been licensed by and subject to the disciplinary authority of state licensing boards.²⁶⁷ That is changing; other entities are asserting authority over attorneys.

Part of the fallout from the Enron debacle was a call for lawyers to take a more active role in policing corporate clients. Congress got into the act with the passage of the Sarbanes-Oxley Act of 2002.²⁶⁸ Officially known as the "Public Company Accounting Reform and Investor Protection Act," the Act was passed "[t]o protect investors by improving the accuracy and reliability of corporate disclosures"²⁶⁹ One of the methods specified in the Sarbanes-Oxley Act to try and accomplish that goal is a mandate to the Securities and Exchange Commission ("SEC") to increase the accountability of lawyers for the actions or inactions of their clients.

Section 307 of the Sarbanes-Oxley Act is entitled: "Rules of professional responsibility for attorneys." It directed the SEC to "issue rules, within 180 days, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the [SEC]."²⁷⁰ The SEC complied. The new rules are comprehensively discussed in *Lawyer Liability After Sarbanes-Oxley – Has the Landscape Changed*, which also appears in this issue of the WYOMING LAW REVIEW,²⁷¹ and this article does not attempt to do likewise.

266. See R.J. Nessim, *Health Care Disclosure Statute: What Does It Mean?* CRIM. JUST. 34 (Winter 1999). For an extensive discussion of a health care lawyer's duty to report, see BEST PRACTICES HANDBOOK IN ADVISING CLIENTS ON FRAUD & ABUSE ISSUES, chapters 1-2 (American Health Lawyers Association 1999).

267. In Wyoming, lawyers are subject to the jurisdiction of the Wyoming Supreme Court, acting through the Board of Professional Responsibility. DISCIPLINARY CODE FOR THE WYOMING STATE BAR, Rule I (LexisNexis 2002).

268. Pub. L. No. 107-204, 116 Stat. 745.

269. *Id.*

270. 116 Stat. 745, 784.

271. Marc I. Steinberg, *Lawyer Liability After Sarbanes-Oxley – Has the Landscape Changed?*, 3 WYO. L. REV. (2003).

It is important, however, for lawyers who practice before the SEC to know that complying with the Rules of Professional Conduct may no longer be sufficient. Lawyers who are subject to the SEC rules are held to new disclosure requirements.

As directed by Congress, the SEC rules establish “minimum standards of professional conduct for attorneys appearing and practicing before the Commission [The] standards supplement applicable standards of any jurisdiction where an attorney is admitted or practices”²⁷² Now, just as courts have authority to regulate the conduct of lawyers who appear before them,²⁷³ the SEC has authority to regulate the conduct of lawyers who appear before it.

The SEC rules define “attorney” broadly, to include “any person who is admitted, licensed, or otherwise qualified to practice law *in any jurisdiction, domestic or foreign*”²⁷⁴ The rules adopt the view that an attorney who represents an “issuer”²⁷⁵ represents the organization, not the individuals within it: “An attorney appearing and practicing before the Commission in the representation of an issuer owes his or her professional and ethical duties to the *issuer as an organization*.”²⁷⁶ The SEC rules also echo the whistle-blowing obligation of the Rules of Professional Conduct:

If an attorney . . . becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney shall report such evidence to the issuer's chief legal officer (or the equivalent thereof) or to both the issuer's chief legal officer and its chief executive officer (or the equivalents thereof) forthwith.²⁷⁷

If reporting the concern does not yield any benefits, an attorney must continue up the ladder, reporting his or her concerns to the board of directors, if

272. 17 C.F.R. § 205.1 (2002).

273. *Mansfield v. State Board of Law Examiners*, 601 P.2d 174, 177 (Wyo. 1974) (“[T]he courts have an inherent power to regulate the conduct of attorneys as officers of the court and to control and supervise the practice of law generally, whether in or out of court.”) (quoting 7 AM. JUR. 2D, *Attorneys at Law* § 2 (1974)).

274. 17 C.F.R. § 205.2(c) (2002) (emphasis added).

275. An “issuer” is an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78(c)(2002)), the securities of which are registered under section 12 of that Act (15 U.S.C. § 78l (2002)), or that is required to file reports under section 15(d) of that Act (15 U.S.C. § 78o(d) (2002)), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), and that it has not withdrawn, but does not include a foreign government issuer. For purposes of paragraphs (a) and (g) of this section, the term “issuer” includes any person controlled by an issuer” *Id.* § 205.2(h).

276. *Id.* § 205.3(a) (Emphasis added).

277. *Id.* § 205.3(b).

necessary.²⁷⁸ The rules provide other options, as well, about which an attorney who practices before the SEC should know.

As with the Wyoming whistle-blowing requirements, the SEC requirements rely on internal communication, taking the view that an attorney reporting to the higher-ups in the organization, those persons who are in a position to change the organization's conduct, will have a salutary effect. This approach represents a balance between the need to protect investors by blowing the whistle, and still preserving attorneys' duty of confidentiality to their clients.

F. Summary

A lawyer for an organization owes primary allegiance to the organization, not the individuals, the constituents, who make up the organization and with whom the lawyer interacts. When the actions or inactions of anyone, even constituents, threaten the organization, the lawyer must blow the whistle; he or she must act to protect the organization, even at the expense of the constituents with whom the lawyer interacts.

A lawyer has some options. The lawyer may ask for reconsideration, for a second legal opinion, or refer the matter to a higher, or even the highest, authority in the organization. If that doesn't work, the lawyer may withdraw (withdrawal will be required if the lawyer's services will be used to perpetuate a crime or fraud). Both before and after withdrawal, a lawyer owes a duty of confidentiality to the client. The lawyer may be permitted, however, to disclose both the fact of withdrawal and at least some information about why withdrawal occurred. The lawyer should neither withdraw nor disclose information, however, until after he or she has advised the client of why the lawyer is proposing to withdraw, the potential ramifications of withdrawal, and that before the lawyer withdraws, the client has an opportunity to change its conduct so as to prevent the lawyer from withdrawing.

Because an organizational lawyer's primary obligation is to the organization, the lawyer must strive to keep the line between the client (the organization) and its constituents (the individuals) clear. A lawyer who allows the line to blur, and by whose conduct allows an implied attorney-client relationship with such constituents to arise, may well face a conflict which cannot be waived. If that occurs, the lawyer will be required to withdraw from representing the organization and the constituents. Such a result will be a grave disservice to all clients, especially the organization which hired the lawyer, and to whom the lawyer owed his or her primary loyalty.

278. *Id.* § 205.3(b)(3).

PART IV: CONFLICTS OF INTEREST

A lawyer who represents an organization, represents the organization, not the individuals within it.²⁷⁹ Since the organization is the client, the lawyer for the organization owes his or her primary allegiance to it. An attorney's allegiance to a client includes the duties of loyalty and confidentiality. Accordingly, the lawyer must also avoid any threats to those primary duties. The lawyer must, in other words, avoid conflicts of interest which threaten the lawyer's loyalty to the organization, the lawyer's duty of confidentiality, or both.

Conflicts of interest are not unique to lawyers who represent organizations; they may arise in any setting. Two types of conflicts of interest, however, are unique to the organizational setting and present special issues for organizational lawyers. First, a conflict arises when a lawyer for an organization is asked to or inadvertently begins to represent individuals within the organization. Second, a conflict occurs when the lawyer for an organization agrees to serve on the governing body of the organization.

*A. Conflicts of Interest—The General Framework*²⁸⁰

An attorney must represent every client zealously.²⁸¹ Zealous representation requires undivided loyalty to the client.²⁸² Loyalty, therefore, is the touchstone of the attorney-client relationship.²⁸³ That obligation of loyalty is grounded in the law of agency, which applies to every attorney-client relationship since a lawyer is always an agent for each of the lawyer's clients.²⁸⁴ An agent, of course, owes his or her principal an unwavering duty of loyalty,²⁸⁵ including fiduciary²⁸⁶ and confidentiality²⁸⁷ obligations. As both an agent and a fiduciary, a lawyer must subordinate his or her interests to each client's. Accordingly, except in those rare instances where a lawyer's duties

279. WYOMING RULES OF PROF'L CONDUCT R. 1.13(a).

280. This section is based, in part, on J.M. Burman, *Conflicts of Interest in Wyoming*, 35 LAND AND WATER L. REV. 79, 80-82 (2000).

281. *Brooks v. Zebre*, 792 P.2d 196, 200 (Wyo. 1990).

282. *Id.* "No servant can serve two masters. For he will either hate the one and love the other, or he will cling to the one and despise the other . . ." *Luke* 16:13.

283. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 15(3) (2000) (stating that a lawyer shall "avoid impermissible conflicts of interest").

284. *See, e.g., Multiple Resort Ownership Plan, Inc. v. Design-Build-Manage, Inc.*, 45 P.3d 647, 652-53 (Wyo. 2002) (noting that a client is bound by the acts of "his 'lawyer-agent'"); CHARLES WOLFRAM, MODERN LEGAL ETHICS § 4.1 (noting that a lawyer is a "fiduciary agent" for the lawyer's clients).

285. RESTATEMENT (SECOND) OF AGENCY § 39 (stating that an agent "must act for the benefit of the principal").

286. *Id.* § 13.

287. *Id.* § 395.

to the court²⁸⁸ or the lawyer's duty to an innocent third party²⁸⁹ override the duty to the client, a lawyer's obligation to the client is paramount. Anything which interferes with an attorney's loyalty or threatens a client's expectation of confidentiality is, therefore, a conflict of interest, or at least a potential one. To avoid a grievance, a malpractice suit, and/or being disqualified from further representation, a lawyer has three, inter-related duties regarding conflicts of interest. The lawyer must: (1) detect any actual or potential conflicts of interest; (2) properly evaluate such conflicts; and (3) react properly, which may mean to seek waivers or decline or withdraw from the representation.

B. Ethical Standards

Conflicts of interest are not just a matter of ethics. They may also serve as a basis for a malpractice case and/or a motion to disqualify an attorney. The ethical standards, however, generally reflect what a reasonable lawyer would do. The ethical standards, therefore, often serve as the basis for other actions, whether disqualification or malpractice.²⁹⁰ Consequently, lawyers must be familiar with the ethical standards regulating conflicts of interest.

1. Sources of conflicts

Conflicts can and will emerge from at least three different sources.²⁹¹ First, the interests of clients, whether former, current, or prospective, may diverge or have the potential to diverge. Second, the interests of a non-client third party may conflict with those of a client. And third, the lawyer's own interests, or those of one of the lawyer's partners or employees, may be inconsistent with those of a client or a prospective client.

Client-client conflicts are often obvious, whether both clients are individuals or one, or both, is an organization. Assume, for example, that a lawyer represents both a corporation and an individual within it, say a director or officer (such dual representation is ethically permissible so long as no improper conflict exists).²⁹² Assume further that one client, the individual, has a grievance against the corporation, the other client, and wishes to sue it.

288. See John M. Burman, *The Duty to Disclose Privileged Communications: Client Perjury*, 15 WYO. LAW. 17 (June 1996).

289. See John M. Burman, *Disclosing Privileged Communications: A Lawyer's Duty to Warn*, 15 WYO. LAW. 17 (Aug. 1996).

290. See, e.g., *Carlson v. Langdon*, 751 P.2d 344, 347 (Wyo. 1988) (disqualifying an attorney for violating Rule 1.9 of the Rules of Professional Conduct); *Woodruff v. Tomlin*, 616 F.2d 924, 936 (6th Cir. 1980) (stating that the code of ethics regulating conflicts of interest "constitutes some evidence of the standards required of attorneys").

291. Scott Krob, *A Practical Approach to Conflicts of Interest*, COLO. LAW. 87, 88 (Sept. 1997).

292. WYOMING RULES OF PROF'L. CONDUCT R. 1.13(e).

The divergence of interests, i.e., the conflict of interests, is plain; one of the lawyer's clients wants to sue the other, and the lawyer may not ethically represent the individual client against the organizational one, or vice versa.²⁹³ A conflict is less obvious, however, when two clients have interests which appear to be congruent. Assume the same scenario, a lawyer represents both a corporation and one or more of its constituents. The corporation and its constituents often have some common interests. But the potential for diverging interests is always present; the personal interests of the individual, for example, may become more important to him or her than the interests of the corporation. Accordingly, lawyers must be alert to potential conflicts, not just existing ones. Finally, the interests of a prospective client may conflict with those of a current or former client, and that conflict, too, must be identified and properly handled.

The interests of non-clients may also be so significant as to create an actual or potential conflict of interest. Third-party payers, such as insurance companies, may have objectives which differ from the insured that the lawyer has been retained to represent.²⁹⁴ So, too, parents who hire a lawyer for their child who is charged with a delinquent act may have different objectives than the child, who is the client. Also, the lawyer may feel obligations to other third parties, such as the lawyer's family members or friends, persons who may be affected by the lawyer's representation of a particular client.²⁹⁵

A lawyer's own interests may create insurmountable conflicts (conflicts, that is, which ethically may not be waived). A client, or a prospective client, may have done things, or allegedly have done things, which a lawyer finds morally offensive, such as sexually abused a child. If the lawyer's

293. *Id.* at Rule 1.7 cmt. 7 ("Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated.").

294. Two conflicting views of the identity of the client have emerged in the insurance context. First, the insured is the client. Second, the insured and the insurance company are co-clients. The commentary to the WYOMING RULES OF PROFESSIONAL CONDUCT supports the view that the insured is the client. Rule 1.2 addresses the "Scope of Representation." *Id.* at Rule 1.2. Comment 4 refers to "a lawyer [who] has been retained by an insurer to represent an insured . . ." *Id.* at Rule 1.2 cmt. 4. Rules 1.8(e) and 5.4(c) also support this position by stressing the importance of a lawyer retaining independent professional judgment when a third party pays the lawyer's bills. *Id.* at Rules 1.8, 5.4. The other view is that the lawyer represents both the insured and the insurance company. Even under this view, however, the lawyer's "primary" client is the insured, and his or her interests come first. The former view, that the insured is the sole client, is the better and more widely accepted view. For a discussion of the issue, see John M. Burman, *Conflicts of Interest: Third Party Payers*, WYO. LAW. 12 (Dec. 1998).

295. Laypersons may not understand that a lawyer's representation of a client "does not constitute an endorsement of the client's political, economic, social or moral views or activities." WYOMING RULES OF PROF'L CONDUCT R. 1.2(b).

representation of a client “may be materially limited” by the lawyer’s feelings, the lawyer ethically may not represent the client.²⁹⁶

2. Timing of conflicts

Conflicts may arise at any time. Some are concurrent, meaning that the interests of two or more current clients, a current and a potential client, or two potential clients are or may be in conflict. A concurrent conflict may also involve a conflict between the interests of a third party and a client or prospective client, or the interests of the lawyer may diverge from those of a current client or prospective client. Other conflicts are successive, meaning that the interests of a former client or former prospective client conflict with the interests of a current client or a prospective client. Whatever the type of conflict, and regardless of when it arises, certain general ethical standards apply.

3. Classification of conflicts

The Wyoming Rules of Professional Conduct classify conflicts of interest into three categories of severity.²⁹⁷ From most severe to least, they are: (1) clients and/or prospective clients with interests that are “directly adverse” to each other; (2) conflicts which may “materially limit” a lawyer’s representation of a client or a prospective client; and (3) *de minimus* conflicts. The classification of conflicts into one of the first two categories, those where clients’ interests are “directly adverse” or those where representation may be “materially limited,” does not end the inquiry. Rule 1.7 does not necessarily preclude a lawyer from representing a client when the client’s interests are “directly adverse” to those of another client or when the lawyer’s representation may be “materially limited.” Rather, the rule has three standards. First, it prohibits a lawyer from representing a client under certain circumstances. Second, the rule permits representation under others, despite a conflict. Finally, the rule permits, by omission, and without disclosure, representation when the only conflicts are *de minimus*.

Once an actual or potential conflict has been identified, it should be categorized as one where interests are “directly adverse,” one where the attorney’s representation may be “materially limited,” or *de minimus*. That does not, however, end the inquiry. The next question is whether the conflict may be waived. The rules specify the standards for obtaining a waiver. If the conflict may not be waived, a lawyer may not ethically ask for a waiver.²⁹⁸

296. *Id.* at Rule 1.7(b).

297. *Id.* at Rule 1.7.

298. *Id.* at cmt. 4.

In the case of conflicts where the interests of two clients or a client and a prospective client are directly adverse, the conflict ethically may be waived if the lawyer “reasonably believes” the representation “will not adversely affect the relationship with the other client,” and each client “consents after consultation.”²⁹⁹ Similarly, in the case of a conflict which may “materially limit” the lawyer’s representation, the conflict ethically may be waived if the lawyer “reasonably believes the representation will not be adversely affected” and “the client consents after consultation.”³⁰⁰ The term “reasonably believes” is defined to mean that “the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.”³⁰¹ The rule has an additional requirement when the lawyer is considering whether to have multiple clients: “When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.”³⁰² In other words, the lawyer must subjectively believe that the conflict will not adversely affect the representation *and* the belief must be the objectively reasonable belief of the proverbial reasonable lawyer. Representation is objectively reasonable, according to the commentary, if “a disinterested lawyer” would conclude that the client may agree to the representation.³⁰³

By definition, a lawyer evaluating whether he or she has a conflict and/or whether it may be waived, is not disinterested. Accordingly, while it is not required by the rules, the only safe path in such circumstances is for the lawyer or the client or potential client who is being asked to waive the conflict to consult a truly disinterested lawyer. At a minimum, the lawyer seeking the waiver should advise and affirmatively recommend that the individual from whom the waiver is being sought consult a disinterested lawyer. That recommendation should be, but is not required to be, in writing.

The determination of whether a conflict may be waived must be made *before* the lawyer asks the client for a waiver. If a conflict is such that a disinterested lawyer would conclude that the client should not agree to a waiver, “the lawyer cannot properly ask for [a waiver] . . . or provide representation on the basis of the client’s consent.”³⁰⁴ Accordingly, it is unethical for a lawyer to even ask for a waiver if a reasonable lawyer would not do so. A reasonable lawyer (i.e. a disinterested one) would not, of course, ask for a waiver when the parties’ interests are “substantially different.”³⁰⁵ It is also

299. *Id.* at Rule 1.7(a).

300. *Id.* at Rule 1.7(b)(1).

301. WYOMING RULES OF PROF’L CONDUCT, terminology.

302. *Id.* at Rule 1.7(b)(2).

303. *Id.* at Rule 1.7 cmt. 4.

304. *Id.*

305. Kelley’s Case, 627 A.2d 597, 600 (N.H. 1993).

unethical to represent a client who has consented to a waiver in circumstances where a disinterested lawyer would find a waiver to be inappropriate.

If the conflict is one that may be waived by the client's consent, that consent must be properly obtained. Consent is effective only if given "after consultation."³⁰⁶ "Consultation" is defined to mean the lawyer has "communicat[ed] . . . information reasonably sufficient to permit the client to appreciate the significance of the matter in question."³⁰⁷ This requirement of consultation is really only a restatement of the lawyer's general duty to "explain a matter to [the client] to the extent reasonably necessary to permit the client to make [an] informed decision . . ."³⁰⁸ Finally, before asking for consent, a client needs to be told that consent may be withdrawn at any time and for any reason or for no reason.³⁰⁹ If the consent is withdrawn, of course, the lawyer will have to withdraw from the representation of the client who has revoked the consent, and may have to withdraw from the matter entirely.³¹⁰

4. Current vs. Former clients

Conflicts or potential conflicts may involve a former or current client and a prospective client. Whether the conflict involves a current or former client is critical as different, more lenient standards apply to a conflict between a prospective client and a former client than those which apply to a conflict between a prospective client and a current client.

Assume that a lawyer or law firm represented ABC Corp. in a property dispute. A year later, an ABC employee, acting within the scope of his employment, was involved in a car accident, in which the other driver, Mary Smith, was seriously injured and the ABC employee appears to have been at fault. Ms. Smith asks the same lawyer to represent her in tort case against ABC. May the lawyer ethically do so? It depends on whether ABC is a former client or current client. If the lawyer properly terminated the attorney-client relationship with ABC, it is a former client. If not, ABC may still be a current client, which likely will preclude representing Ms. Smith.

Although the Rules do not clearly define when an attorney-client relationship ends, the commentary provides important guidance:

306. WYOMING RULES OF PROF'L CONDUCT R. 1.7(a)(2), (b)(2).

307. *Id.* at terminology.

308. *Id.* at Rule 1.4(b).

309. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. f (2000) ("A client who has given informed consent to an otherwise conflicted representation may at any time revoke the consent.").

310. WYOMING RULES OF PROF'L CONDUCT R. 1.16(a)(1). A lawyer must withdraw from representation when continued representation would result in a violation of the rules. *Id.* Continuing representation after consent to a conflict has been revoked would be a violation of Rule 1.6, which says that a lawyer "shall not represent a client" when impermissible conflicts exist. *Id.* at Rule 1.7(a), (b).

If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing³¹¹

To determine, therefore, whether ABC is a former client, more facts are needed. In particular, was the property dispute the only matter in which the lawyer represented ABC, or have there been others? If it is the former, the lawyer can assert that ABC is a former client, though ABC, through its constituents, may believe otherwise. If it is the latter, ABC is a current client. The whole issue can, of course, be easily answered if the lawyer sent ABC a closing letter at the conclusion of the property dispute so that ABC knew the representation was over. Ultimately, the question will be what ABC's duly authorized constituents reasonably believe.³¹²

If ABC is a current client, it is unlikely that the lawyer may represent Ms. Smith in the tort case. "Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, *even if the other matter is wholly unrelated.*"³¹³ The tort case is likely unrelated, but it doesn't matter. With few exceptions, a lawyer simply may not sue one client on behalf of another.³¹⁴

By contrast, if ABC is a former client, the analysis is much different. The lawyer may represent a client against a former client unless the matters of the first and second representation are "substantially related" and the positions of the former and current clients are "materially adverse."³¹⁵ It is unlikely that the property dispute and the tort case are "substantially related." The lawyer may, therefore, represent Ms. Smith against ABC, a former client.

311. *Id.* at Rule 1.3 cmt. 3.

312. *Carlson v. Langdon*, 751 P.2d 344, 347 (Wyo. 1988).

313. WYOMING RULES OF PROF'L CONDUCT R. 1.7 cmt. 2 (emphasis added).

314. *Id.* ("[T]here are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation."). See also ABA Formal Op. 95-390 ("Conflicts of Interest in the Corporate Family Context").

315. WYOMING RULES OF PROF'L CONDUCT R. 1.9(b).

There are many reasons to properly terminate an attorney-client relationship.³¹⁶ Avoiding disqualifying conflicts of interest is just one more, whether the client is an individual or an organization.

C. Organization-Constituent Conflicts of Interest

The potential for conflicts of interest between an organization and constituents of the organization is immense. Consider the rather common scenario of a suit against an organization arising out of the actions or inactions of a constituent. No plaintiff wants liability to be confined to the constituent, individually. The plaintiff's goal is to reach into the deep pockets of the organization, either through a direct suit or through vicarious liability for the constituent's actions or inactions. In either event, the plaintiff will blame the organization for the actions or inactions of the constituent. That attempt almost inevitably will create a serious conflict of interest for the organization's lawyer, especially if that lawyer has allowed an attorney-client relationship to arise with the constituent who is the actor in question.

The most common basis for alleging vicarious liability is that the constituent was acting within the scope of his or her employment.³¹⁷ A common defense for the organization is the reciprocal; the constituent was not acting within the scope; rather, he or she was on a frolic or detour.³¹⁸ The conflict is both actual and apparent, or at least it should be. On the one hand, the constituent has a strong interest in showing that he or she was acting within the scope of the employment. The organization, on the other hand, has a conflicting interest, showing that the constituent was not acting within the scope. One lawyer cannot represent both the organization and the constituent, whose interests are "directly adverse." The conflict is so severe that it cannot be waived since a disinterested lawyer would not "reasonably believe" that the organization or the individual defendant should have the same lawyer.³¹⁹ Accordingly, whenever an organization is sued, either directly or vicariously, because of the actions or inactions of a constituent, the organization's lawyer must take care not to allow the constituent to reasonably believe that he or she is represented by the same lawyer.³²⁰

316. Robert W. Martin, Jr., *Practicing Law in the 21st Century: Fundamentals for Avoiding Malpractice Liability*, 33 LAND AND WATER L. REV. 191, 205 (1998) ("It is always a good idea to make sure that you and the client are in agreement that your representation of them is concluded . . ."). For a sample closing letter, *see id.* at 242.

317. RESTATEMENT (SECOND) OF AGENCY § 219(1).

318. *Id.* at §§ 219(2), 228.

319. WYOMING RULES OF PROF'L CONDUCT R. 1.7 cmt. 4 (stating the disinterested standard).

320. For a discussion of the lawyer's duty to clarify the lawyer's role when it is apparent that the organization's interests are adverse to a constituent's, *see supra* notes 51-54 and accompanying text.

Conflicts may arise in other ways. In *Upjohn Company v. United States*,³²¹ for example, a corporation's auditors discovered that a foreign subsidiary had apparently been making payments which looked very much like (illegal) bribes to secure additional business.³²² The company decided to have its general counsel conduct an internal investigation to attempt to discover the extent of the payments and the company's potential liability. The investigation, naturally, included contacting corporate employees and seeking information from them about the payments. Such contacts created significant potential conflicts. On the one hand, Upjohn, the organization, wanted to determine if illegal payments had been made. If so, the company's concern was how to minimize any damage to or liability of the firm. The fate of individual employees was, naturally, of secondary importance. On the other hand, while Upjohn was looking for answers and seeking to formulate a strategy which would benefit the company, the interest of the individuals involved in making the potentially illegal payments was quite different. They wished to minimize their potential criminal and/or civil exposure; to them, the fate of the company was of secondary importance. Such a divergence of interests is precisely the reason for the disclosure requirements of Rule 1.13(d). It is critical that individuals within the organization do not reasonably believe the organization's lawyer is theirs.

As noted in Part I of this article, a lawyer who represents an organization "must be aware of the possible divergence of interest between the client (the organization) and the constituents of the organization with whom the lawyer is dealing."³²³ When it is "apparent," says the rule, that the interests of the organization and the constituent are adverse, the lawyer has an ethical duty to "explain the identity of the client . . . [and] that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."³²⁴ The only advice the lawyer may ethically give the constituent (who is usually an unrepresented individual), advice which the lawyer should give, is that the constituent should obtain counsel.³²⁵

The effect of a lawyer's telling a constituent that the lawyer represents the organization and not the constituent, as required by Rule 1.13(d),

321. 449 U.S. 383 (1981).

322. *Upjohn*, 449 U.S. at 383.

323. See *supra* notes 51-54 and accompanying text.

324. WYOMING RULES OF PROF'L CONDUCT R. 1.13(d).

325. *Id.* at Rule 4.3 cmt. The comment states:

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

Id. (emphasis added).

may well be that the constituent will elect not to disclose information which the organization would like to have, information which ultimately may be used to the detriment of the individual who furnished it. The alternative, however, is to let the constituent believe that the organization's lawyer is the constituent's lawyer (which is the common belief), thereby creating an attorney-client relationship by implication³²⁶ between the organization's lawyer and the constituent. Allowing an attorney-client relationship to arise with a constituent will place the lawyer in an impossible conflict, one which will require the lawyer to withdraw from representing either the organization or the individual (the conflict is, *inter alia*, that the lawyer will owe a duty of confidentiality to the constituent and may not ethically disclose the information the lawyer has learned to the organization,³²⁷ and the lawyer will owe a duty of communication with the organization, a duty which requires the lawyer to disclose the information learned from the constituent.³²⁸).

*D. Attorney-Director Conflicts of Interest*³²⁹

Lawyers are often asked to serve on the boards of directors of corporate clients. Agreeing to do so creates a significant potential conflict of interest, as well as significant potential liability.

1. Ethical Considerations

A lawyer who serves on the board of directors of a corporate client has an inherent conflict of interest. On the one hand, as the corporation's lawyer, the lawyer represents it.³³⁰ The lawyer must, therefore, "exercise disinterested, professional judgment and render candid advice"³³¹ to the corporation. On the other hand, as a director, the lawyer is no longer disinterested; the lawyer-director must act in "the best interests of the corporation."³³² While generally consistent, those interests, and their attendant duties, may diverge.

Rule 1.7(b) is the applicable rule. A lawyer "shall not" represent a client if the lawyer's representation may be "materially limited by the law-

326. In Wyoming, an attorney-client relationship is contractual. It may arise by express agreement of the parties or be implied from the parties' conduct. *Carlson v. Langdon*, 751 P.2d 344, 347 (Wyo. 1988).

327. See WYOMING RULES OF PROF'L CONDUCT R. 1.6(a).

328. *Id.* at Rule 1.4(b).

329. This section is based, in large part, on John M. Burman, *Conflicts of Interest in Wyoming*, 35 LAND & WATER L. REV. 79, 153-56 (2000).

330. WYOMING RULES OF PROF'L CONDUCT R. 1.13(a).

331. *Id.* at Rule 2.1; see also Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 68 TENN. L. REV. 179, 247 (2001) ("To serve the corporate client in the most effective manner, the lawyer for the corporation must maintain a certain measure of independence and objectivity When the corporate lawyer joins the board, the lawyer closes the distance . . .").

332. WYO. STAT. ANN. § 17-16-830(a)(iii) (LexisNexis 2001).

yer's responsibilities to . . . a third person"³³³ As a director, a lawyer will have responsibilities to the corporation, a third party. Since a potential conflict between the attorney's duties as the corporate lawyer and his or her duties as a director will always exist, the question simply becomes whether those responsibilities may "materially limit" the lawyer's representation of the corporation. If so, the representation is ethically inappropriate unless the corporation consents to the conflict.³³⁴

The Rules do not prohibit a lawyer from serving in the dual roles of corporate director and corporate counsel. The commentary to Rule 1.7 cautions that a lawyer considering whether to undertake such dual roles "should determine whether the responsibilities of the two roles may conflict."³³⁵ Furthermore, "Most experts on the subjects of both corporate governance and legal malpractice warn against falling victim to the temptation offered by the powerful dual role of counsel and director."³³⁶ The commentary's suggestion to "determine whether the responsibilities of the two roles may conflict" is not particularly helpful since the potential for conflicts will always be present. The only questions, therefore, are how likely and how serious is the potential conflict? For the lawyer, the question is whether the lawyer will put himself or herself in a position which is likely to be or become contrary to the lawyer's interests, and contrary to the corporation's.

The ABA's Committee on Ethics and Professional Responsibility has issued an opinion about the ethical propriety of a lawyer serving as both corporate counsel and a corporate director.³³⁷ While acknowledging, at some length, that such a dual role presents "ethical concerns," the opinion concludes that the Model Rules "do not prohibit a lawyer from serving as a director of a corporation while simultaneously serving as its legal counsel."³³⁸ Despite its conclusion, the opinion notes several recurrent problem areas, and concludes with specific guidelines for a lawyer who elects to play a dual role.

A lawyer who is considering serving both as corporate counsel and a corporate director should:³³⁹ (1) "Reasonably ensure" that corporate management understands the differing responsibilities the lawyer will have when acting as the corporation's lawyer or a board member; (2) "Reasonably assure" that corporate management and the board understand that the attorney-client privilege may not include anything other than communications be-

333. WYOMING RULES OF PROF'L CONDUCT R. 1.7(b).

334. *Id.* at Rule 1.7(b)(2).

335. WYOMING RULES OF PROF'L CONDUCT R. 1.7 cmt. 14.

336. ABA/BNA LAWYER'S MANUAL, *supra* note 48, at 51:4-6.

337. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 98-410 (1998) (Lawyer Serving as Director of Client Corporation).

338. *Id.*

339. *Id.*

tween the board and the lawyer when the lawyer is acting only as the corporation's lawyer (the reason is simple; the attorney-client privilege applies only to communications between an attorney and a client "in that relation,"³⁴⁰ i.e., as part of the attorney-client relation – not when an attorney is acting as a board member); (3) "Recuse herself as a director" from any discussions or deliberations which involve the corporation's relationship with the lawyer's firm, such as whether to continue it and, if so, on what terms; (4) "Maintain . . . independent professional judgment required of a competent lawyer," advising against actions or inactions which are illegal, even though favored by management; (5) "perform diligently the duties of counsel" after the board makes a decision with which the attorney disagrees; and (6) "Decline any representation as counsel when the lawyer's interest as a director conflicts with the responsibilities of a competent attorney."

The reason for the ABA's extensive opinion, with its plethora of cautionary notes and suggestions, is that the potential for conflicts is very high, so high that one wonders why the opinion did not conclude that such a dual role is ethically impermissible. In the final analysis, the significant number and degree of concerns expressed by the ABA are such that a lawyer who strives to follow the opinion's admonitions while serving in both capacities will have to curtail his or her activities to such an extent that it "would so infringe upon both the lawyer and the corporate client that the better course is not to serve in such a dual capacity."³⁴¹ Serving in dual roles is not only ethically problematic, but as "a business proposition, board service is a mistake" for corporate counsel.³⁴²

Although the better course is not to serve both as corporate counsel and as a corporate director, the rules do not prohibit a lawyer from doing so. Rather, the lawyer must comply with all relevant conflict of interest standards. This means, among other things, that the lawyer must make the appropriate disclosures and obtain the appropriate consents, and the ABA recommends that this be done in writing.³⁴³ Further, a lawyer who also serves on the board is an appealing target for a lawsuit.

2. Legal liability issues

Corporate directors are common defendants in lawsuits. If that occurs, the lawyer who serves on the board will become a defendant in a law-

340. WYO. STAT. ANN. § 1-12-101(a)(i) (LexisNexis 2001).

341. Robert W. Martin, Jr., *Lawyers as Members of the Clients' Boards of Directors*, COMMUNIQUE 22 (July 1998).

342. ABA/BNA LAWYER'S MANUAL, *supra* note 48, at 51:406 (quoting Carl Liago, general counsel for Arthur Young & Co.).

343. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 98-410 (1998) ("[T]he lawyer-director should consider providing a written memorandum in addition to an oral explanation [about the potential conflicting roles of lawyer and director].").

suit against the corporation. Further, a lawyer who serves on a corporate board is more visible. That visibility, warns Robert O'Malley, counsel to the Attorneys' Liability Assurance Society, "makes lawyers . . . personal targets in legal malpractice suits."³⁴⁴ Each type of suit presents problems for the lawyer with dual roles.³⁴⁵

In a suit against the corporation, the first problem for the lawyer-director is that he or she will not be able to represent the corporation in the lawsuit; nor will other lawyers in the firm. In addition, if there is a determination that the directors are liable, a question of insurance coverage will arise. "Most [legal] malpractice carriers will not cover the activity of lawyers who also function as board members."³⁴⁶ And while the corporation may insure its directors, many directors' policies do not cover a lawyer who serves the dual role of attorney and corporate director (or officer). A lawyer may, therefore, be completely exposed, covered neither by the lawyer's malpractice insurance nor by the corporation's directors' coverage. The only possible basis for shifting liability is not a particularly attractive one, at least to the lawyer's partners. That is, one may argue that the lawyer's firm is vicariously liable for the lawyer's actions as a member of the board of directors. The argument is much stronger if serving as a board member is part of the ordinary course of the firm's business. In such circumstances, the firm should, at least arguably, be responsible for the actions taken by one of its lawyers while serving as a member of the board.

The same considerations arise when the corporation is a not-for-profit one. Once again, a lawyer may ethically serve as corporate counsel

344. ABA/BNA LAWYERS MANUAL, *supra* note 48, at 51:406.

345. Kim, *supra* note 331, at 244.

In addition to facing personal liability for failure to meet the heightened standard of care, lawyer-directors are more likely to be sued for malpractice than corporate lawyers who do not act simultaneously as directors. Due to the combination of roles, these cases are much more difficult to defend and insure. In fact, there is a strong possibility that the lawyer-director will be denied insurance coverage by both the corporation's directors' and officers' ('D&O') liability insurance and the lawyer's own professional malpractice liability insurance.

Id.

346. Robert W. Martin, Jr., *Practicing Law in the 21st Century: Fundamentals for Avoiding Malpractice Liability*, 33 Land and Water L. Rev. 191, 199 (1998). The Individual Attorney's Supplement used by ALPS, which insures a large number of lawyers in Wyoming, contains the following question: "Do you serve as director or officer of, or do you exercise any fiduciary control over any business enterprise other than the applicant firm, including profit and not for profit organizations?"

and a member of the board, subject to the conditions described above,³⁴⁷ but the reasons not to fulfill dual roles are just as strong.³⁴⁸

The potential ethical and legal liability problems should convince lawyers to adopt a firm policy of not serving on the boards of directors of clients, and prohibiting others in the firm from doing so. If the lure of a directorship is too strong to ignore, however, there is an easy answer. Accept the directorship, but stop serving as the corporation's attorney. Be a businessperson or a lawyer, but not both.

E. Summary

Every time a lawyer represents an organization, the potential for conflicts of interest is present. It is present because the interests of the constituents with whom the lawyer must interact may diverge from the interests of the organization. Since the potential is always present, an organizational lawyer cannot avoid conflicts entirely. The lawyer may, however, keep them to an ethically acceptable minimum.

An important step for an organization's lawyer to take is to make sure that the constituents with whom the lawyer interacts understand the lawyer's role, i.e., the lawyer represents the organization and not the constituents. However tempting, the line between the client, the organization, and the constituents must be kept clear. If it blurs, the organization's lawyer may be found to have allowed an attorney-client relationship to arise with a constituent by implication. Having attorney-client relationships with both an organization and one or more of its constituents may well result in a conflict which may not be waived, and one which will require the lawyer to withdraw from both representations.

Agreeing to serve on a corporate client's board of directors is a invitation to disaster. A lawyer who becomes a board member will never be just another board member, especially when the lawyer is the corporation's attorney. He or she will always be a lawyer, and will always be regarded that way by other board members and other constituents. It simply does not matter how much a lawyer may wish to be a non-lawyer. At least sometimes, it just does not work. Whatever the lawyer says as a board member will be taken as something more – as legal advice from the corporation's attorney. Lawyers go to law school to become lawyers, not to become business persons. Therefore, be one, but not both.

347. See *supra*, notes 330-42 and accompanying text.

348. ABA/BNA LAWYERS MANUAL, *supra* note 48, at 51:406.

PART V: THE SPECIAL DUTIES OF GOVERNMENT LAWYERS.³⁴⁹

The government, whether federal, state, or local, is an organization. Within each level of government are myriad agencies, boards, commissions, etc., each of which is, too, an organization. And many lawyers work for or represent a governmental entity, either as in-house counsel or by contract as outside counsel. Prosecutors, at all levels, are government attorneys, as are most public defenders. The largest law firm in the state is the Wyoming Attorney General's office, with over fifty lawyers listed in the Wyoming State Bar 2003 Directory, and a host of different functions. The United States Attorney and the Federal Public Defender for the District of Wyoming employ lawyers. The State Public Defender has dozens of lawyers, some full-time and others on contract. And cities and towns throughout the state hire lawyers for both civil and criminal matters. Other lawyers work directly for federal, State or local agencies. And then there are the lawyers who clerk for judges; they, too, are government lawyers.

Generally, government lawyers are bound by the same ethical standards as are lawyers in private practice. But they may also be subject to special and different standards, standards which vary depending on the role they play in the legal system.

A. The Rules of Professional Conduct Generally Apply to Government Lawyers

Each attorney licensed to practice in Wyoming, as well as those who appear *pro hac vice*,³⁵⁰ must adhere to the Wyoming Rules of Professional Conduct.³⁵¹ The Preamble to the Rules describes a Lawyer's Responsibilities: "Every lawyer," it says, "is responsible for observance of the Rules of Professional conduct."³⁵² The rule which applies to organizations is Rule 1.13. "The duty defined in [Rule 1.13] applies to governmental organizations."³⁵³ For the most part, the rules do not distinguish between lawyers who are in private practice and those who work for or represent governmental entities. The rules recognize that the government is different, and lawyers who represent the government may have different obligations:

However when the client is a governmental organization, a different balance may be appropriate between maintaining

349. This part is based, in part, on John M. Burman, *Special Ethical Duties of Government Lawyers*, WYO. LAW. 14 (October 2000).

350. For a discussion of the responsibilities of out-of-state lawyers who appear in Wyoming courts, see John M. Burman, *The Duties of Attorneys Admitted pro hac vice and Local Counsel With Whom They Associate*, WYO. LAW. 12 (June 1999).

351. DISCIPLINARY CODE FOR THE WYOMING STATE BAR R. I(a) (LexisNexis 2002).

352. WYOMING RULES OF PROF'L CONDUCT, pmb. ¶ 11.

353. *Id.* at Rule 1.13 cmt. 7.

confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, *defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context.*³⁵⁴

Identifying the client is always critical because a lawyer's duties, for the most part, flow to the client.³⁵⁵ When a lawyer represents the government, however, the issue is inherently troublesome; whom does he or she represent – an agency, the government as a whole, or the people? The answer is it varies. “Although in some circumstances the client may be a specific agency, it is generally the government as a whole.”³⁵⁶ Identifying the client has important consequences in defining such critical issues as the scope of the attorney-client privilege, who is an authorized constituent upon whom the lawyer may rely for direction, and when does the lawyer have a conflict of interest. As a general matter, defining the client as the entire government is not particularly realistic. Consider, for example, the consequences of saying that every lawyer who works for the Attorney General represents all of state government. Applying the attorney-client privilege becomes a nightmare, and the number of conflicts of interest would skyrocket. It seems much more manageable, therefore, to say that each attorney represents the agency or agencies to which the attorney is assigned. With towns or cities, by contrast, it makes much more sense to say an attorney represents the entire entity. So while the rules do not define who the client is, they do make it clear that a lawyer's ethical responsibilities vary, to an extent, depending on the nature of the lawyer's work.

B. The Rules May Be Modified By Government Lawyers' Legal Duties

The most extensive discussion of the potentially differing obligations of government lawyers is contained in the Scope section of the Rules (the Scope is designed to “provide general orientation” to the Rules).³⁵⁷ Paragraph 4 says that a government lawyer's ethical obligations *may be modified* by “various legal provisions, including constitutional, statutory and common law” In particular, the general rule that a client defines the objectives of legal representation and that a lawyer has the final say on the

354. *Id.* (emphasis added).

355. *See, e.g.,* Brooks v. Zebree, 792 P.2d 196, 200 (Wyo. 1990) (“[I]t is indisputable that [the lawyer] owed his professional duty to . . . his clients . . .”).

356. WYOMING RULES OF PROF'L CONDUCT R. 1.13 cmt. 7.

357. *Id.* at scope ¶ 22.

means to be used,³⁵⁸ may be modified, giving the government lawyer more responsibility for defining the goal(s) of the representation:

[T]he responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers.³⁵⁹

In certain circumstances, different, more flexible conflict of interest standards may apply:

[L]awyers under the supervision of these officers may be authorized to represent several government agencies in intra governmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so.³⁶⁰

As suggested by the comment, government lawyers in Wyoming are subject to more lenient conflict of interest standards than their counterparts in private practice.

The Wyoming Rules of Professional Conduct contain restrictions on a lawyer switching sides or a lawyer switching firms. A lawyer may not ethically switch sides, i.e., represent a new client against a former client, if the new representation involves "the same or a substantially related matter," and the new client's position is "materially adverse" to the former client's.³⁶¹ The Wyoming Supreme Court has adopted the ethical standard as the standard for disqualifying private attorneys.³⁶²

358. *Id.* at Rule 1.2(a).

359. *Id.* at scope ¶ 4.

360. *Id.*; see also Ann Bradford Stevens, *Can the Attorney General Represent Two Agencies Opposed in Litigation?*, GEO. J. OF LEGAL ETHICS 757, 811 (1989) (concluding that "[i]n the context of government lawyers representing government entities, [the conflict of interest] rules need to be reexamined").

361. WYOMING RULES OF PROF'L CONDUCT R. 1.9(a).

362. *Carlson v. Langdon*, 751 P.2d 344 (Wyo. 1988).

According to the court, the purpose of Rule 1.9(a), prohibiting lawyers from switching sides, “is to protect confidential communication.”³⁶³ The only way to effectively do that, said the court, is to “assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation.”³⁶⁴ The only issue on a motion to disqualify because an attorney switched sides, therefore, is whether there is a “substantial relationship” between the subject matter of the former representation and the new one.³⁶⁵ While it held that the presumption that a client conveyed confidential information to his or her attorney is irrefutable, the court did not need to and did not address the issue of whether the presumption that confidences were disclosed should be imputed to other lawyers with whom the disqualified lawyer practices.³⁶⁶ Whether the court will so hold for private lawyers remains unclear; it has declined to do so, however, regarding government lawyers.

A series of Wyoming Supreme Court opinions in recent years has confirmed that government lawyers are held to more flexible conflict of interest standards than private attorneys.³⁶⁷ The trend toward allowing government lawyers more flexibility regarding conflicts of interest began with the decision in *Blumhagen v. State*.³⁶⁸ In *Blumhagen*, a criminal defendant was represented by a public defender.³⁶⁹ During the pendency of the action, the attorney left the public defender’s office and joined the office of the district attorney which was prosecuting the defendant.³⁷⁰ *Blumhagen* appealed on the basis, *inter alia*, that he had been denied the effective assistance of counsel because of the conflict of interest which arose when his original defense lawyer joined the prosecutor’s office.³⁷¹ That claim of ineffective assistance was denied.³⁷²

After acknowledging that the Rules of Professional Conduct in general “prohibit attorneys from representing clients when there is a potential conflict of interest . . . the rules recognize that attorneys change employment and, consequently, include a number of safeguards to protect the clients’ interests under such circumstances.”³⁷³ When an attorney leaves government practice for private practice, or switches government employment, the law-

363. *Id.* at 347.

364. *Id.* at 348 (quoting *T.C. Theater Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953).

365. *Id.* at 349.

366. *Id.* at 349.

367. *See State v. Asch*, 62 P.3d 945 (Wyo. 2003); *State v. Hart*, 62 P.3d 566 (Wyo. 2003); *Johnson v. State*, 61 P.3d 1234 (Wyo. 2003).

368. *Blumhagen v. State*, 11 P.3d 889 (Wyo. 2000).

369. *Id.* at 896.

370. *Id.*

371. *Id.*

372. *Id.* at 896-97.

373. *Id.* at 896.

yer cannot be involved in an adversarial role in any matter in which the lawyer participated in his or her previous employment.³⁷⁴ The new government office is not, however, disqualified from the matter if “the disqualified lawyer is screened from any participation in the matter.”³⁷⁵ Since the evidence in the record was that the “district attorney’s office complied with the requirements . . . by screening Blumhagen’s former attorney” the court found no impermissible conflict.³⁷⁶ Implicit in the *Blumhagen* opinion is the notion that government lawyers are held to different, more lenient conflict of interest standards than private attorneys.³⁷⁷ That implicit difference has been made explicit.

Jason Hart was charged with, tried, and convicted of aggravated assault and battery.³⁷⁸ He requested a public defender, one was appointed for him, and she represented him at the arraignment, where he pled not guilty, “and for some time thereafter.”³⁷⁹ The attorney then joined the prosecutor’s office where “due to her representation of Hart in the very same case, Ms. Bennett was disqualified from involvement in the state’s prosecution of Hart.”³⁸⁰ The issue was whether her disqualification should be imputed to the entire prosecutor’s office.³⁸¹

The court began by reiterating that trial courts have broad discretion in disqualifying counsel: “As the first step in providing guidance to trial courts in handling such a question, we will adopt the standard that a trial court has substantial latitude in deciding if counsel must be disqualified.”³⁸² The court then reaffirmed that it will use a case-by-case approach to evaluate motions to disqualify.³⁸³ “This Court will continue to follow the majority of jurisdictions that reject the per se rule of disqualification, and we will continue to look at each case on its facts.”³⁸⁴ The court refused to assume that the government lawyer who had switched from the defense to the prosecution had obtained confidential information and would convey it to her new employers (those assumptions are the theoretical underpinning of the notion of imputed disqualification in which no one in a firm can undertake a representation if one lawyer in the firm may not).³⁸⁵ In *Blumhagen*, the district attorney had screened the disqualified lawyer.³⁸⁶ In *Hart*, by contrast, there

374. *Id.*

375. *Id.* (quoting WYOMING RULES OF PROF’L CONDUCT R. 11(a).

376. *Id.* at 896-97.

377. *See id.*

378. *State v. Hart*, 62 P.2d 566, 569 (Wyo. 2003).

379. *Id.* at 571.

380. *Id.*

381. *Id.*

382. *Id.* at 572.

383. *Id.*

384. *Id.*

385. WYOMING RULES OF PROF’L CONDUCT R. 1.10(a).

386. *Blumhagen v. State*, 11 P.3d 889, 896 (Wyo. 2000).

was “no evidence in the record that the county attorney's office employed screening procedures.”³⁸⁷ Despite the absence of evidence of any steps to protect Mr. Hart's expectation of confidentiality, the court simply assumed that the disqualified attorney had not conveyed confidential information to her new colleagues.³⁸⁸ Accordingly, the court declined to disqualify the prosecutor's office.³⁸⁹

Although the court did not disqualify the county attorney's office in *Hart*, it was clearly concerned about government lawyers switching from the defense to the prosecution side.³⁹⁰ The court laid down six guidelines to be followed in future cases:

1. Oral and written directions must be given to all staff members that the attorney will not participate in any matter in which the attorney participated as a public defender or criminal defense attorney. A written screening policy must be put in place to ensure this requirement is met.
2. A letter should be directed to every former client of the attorney announcing the new employment relationship. . . . Ideally, this letter should appear in the court record of an affected criminal case.
3. The prosecuting attorney's screening policy should be sent to every judge in the district, circuit, and/or county affected.
4. A copy of the screening policy should be placed in every active case file in which the attorney participated.
5. All office employees should be advised both orally and in writing that any violation of the screening process must be reported immediately and that inattention to the screening policy will result in discipline.
6. In a prominent location near case files, post a list of all cases from which the attorney is to be screened. These, or comparable procedures, should remain in place until the need for them has passed.³⁹¹

387. *Hart v. State*, 62 P.3d 566, 573 (Wyo. 2003).

388. *Id.* at 573-74.

389. *Id.* at 574.

390. *See id.* at 572-73.

391. *Id.* at 572.

In addition, prosecuting attorneys should be familiar, or as necessary become familiar, with applicable ABA standards relating to the prosecution function, as well as with pertinent case law, as may be required by circumstances such as those which arose here.

It seems unlikely that the same result would have obtained if the lawyers involved had been non-government lawyers. The court notes the importance of the lawyers' status as government lawyers: "[I]t must be remembered that Carlson generally dealt with civil matters involving private attorneys."³⁹² Further, "There is, of course, quite a difference in the relationship between law partners and associates in private law firms and lawyers representing the government."³⁹³ Finally, the court emphasized the absence of a financial incentive as apparently justifying a departure from the protection normally afforded clients: "The salaried government employee does not have the financial interest in the success of departmental representation that is inherent in private practice."³⁹⁴ The court applied a similarly flexible rule in the context of a conflict of interest within the public defender's office.³⁹⁵

In *State v. Asch* two attorneys from the same office of the State Public Defender were briefly involved in representing co-defendants.³⁹⁶ The case involved an issue which has troubled courts around the country. Should a public defender's office be treated as a "firm" under the rules of professional conduct for purposes of imputed disqualification?³⁹⁷ The Wyoming Supreme Court adopted the case-by-case approach: "[W]e agree with the courts of those jurisdictions that have found a case-by-case inquiry, rather than *per se* disqualification, appropriate for cases alleging a conflict of interest based on representation of co-defendants by separate attorneys from the State Public Defender's Office."³⁹⁸

The court gave four reasons for not considering the State Public Defender's Office to be a firm.³⁹⁹ First, the office provides representation to individual defendants, and ordinarily "the office would have no reason to give one defendant more vigorous representation than other defendants whose interests are in conflict."⁴⁰⁰ Accordingly, "there is no financial incentive for attorneys in a public defender's office to favor one client over another."⁴⁰¹ Second, adoption of a *per se* disqualification rule "would needlessly jeopardize the right of individual defendants to skilled and competent

392. *Id.* at 573.

393. *Id.* (quoting *United States v. Caggiano*, 660 F.2d 184, 190 (6th Cir. 1981)).

394. *Id.* (quotations omitted).

395. *See State v. Asch*, 62 P.3d 945 (Wyo. 2003).

396. *Id.* at 950.

397. For a discussion of the competing views, *see Asch*, 62 P.3d at 952.

398. *Asch*, 62 P.3d at 953.

399. *Id.*

400. *Id.*

401. *Id.* (citation omitted).

representation” by excluding attorneys who specialize in criminal defense.⁴⁰² Third, a per se disqualification rule would be too expensive, and while “we cannot and should not ‘put a price on’ the legal representation we provide to indigent defendants, the judicial branch of government still has an obligation to be fiscally responsible.”⁴⁰³ Finally, the court found that “a per se disqualification rule is not necessary because [Wyoming Rules of Criminal Procedure] 44(c) already provides an effective mechanism for dealing with potential conflicts of interest in cases of multiple representation.”⁴⁰⁴ In a criminal case, the Rule says that a statement is likely to have such an effect if it: (1) relates to the character or credibility of a defendant or witness; (2) relates to a statement or admission of a defendant; (3) involves information about the results of a test; or (4) fails to clarify that a criminal charge is not tantamount to a conviction and that an accused is presumed to be innocent.⁴⁰⁵ Paragraph (c) of Rule 3.6 contains what was thought to be a “safe harbor,” statements which a lawyer could make without fear of running afoul of the rule.

The tranquility of Rule 3.6(c)’s safe harbor was called into question by the United States Supreme Court’s opinion in *Gentile v. State Bar of Nevada*,⁴⁰⁶ a case involving a Nevada rule which was identical to Wyoming’s. Although the Court upheld the general standard that a statement is impermissible if it “has a substantial likelihood of material prejudice,” the Court found Nevada’s interpretation of the rule to be void for vagueness. Shortly thereafter, the Connecticut Bar Association’s Committee on Professional Ethics discussed the meaning of Connecticut’s Rule 3.6, which is identical to Wyoming’s, in light of *Gentile*. The Committee suggested that the so-called “safe harbor” provision is no longer necessarily safe. Rather, “subsection [(c)] should be viewed as [containing] examples of possible permissive speech.”⁴⁰⁷ Wyoming prosecutors, as well as all other Wyoming lawyers, should be careful, therefore, with their public statements, as well as those of their staffs.

Prosecutors may also be held to more demanding conflict of interest standards than other lawyers in some circumstances.⁴⁰⁸ In addition to the general conflict of interest provisions of the Wyoming Rules of Professional Conduct,⁴⁰⁹ prosecutors are generally required to avoid “even the appearance of impropriety.” The reason is that a prosecutor occupies a “quasi judicial

402. *Id.*

403. *Id.* at 953-54.

404. *Id.* at 954.

405. WYOMING RULES OF PROF’L CONDUCT R. 3.6(b).

406. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

407. Connecticut Comm. on Ethics and Prof’l. Conduct, Informal Op. 99-3 (January 11, 1999).

408. As describe above, the standards are relaxed in some circumstances. *See supra* notes 367-81 and accompanying text.

409. For a general discussion of conflict of interest issues, *see* J. M. Burman, *Conflicts of Interest in Wyoming*, 35 LAND & WATER L. REV. 79 (2000).

position.”⁴¹⁰ Accordingly, the higher ethical standard still applies (although the “appearance of impropriety” standard formerly applied to all Wyoming lawyers,⁴¹¹ it was omitted from the current Rules). Along with prosecutors, judges must also avoid the “appearance of impropriety in all their activities.”⁴¹²

Prosecutors, as any lawyers, must be aware of former-client conflicts. A prosecutor who was in private practice is not to use information obtained from a former client to that individual’s disadvantage unless the information becomes generally known.⁴¹³ Similarly, part-time prosecutors must not use information gleaned from former or current clients in their private practices against those individuals.⁴¹⁴ Instead, a prosecutor is to base decisions about prosecuting an individual solely on his or her professional judgment, unaffected by “his or her own political, financial, business, property, or personal interests.”⁴¹⁵

Lawyers are generally prohibited from communicating about the “subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized by law to do so.”⁴¹⁶ The applicability of this so-called “no-contact” rule, Rule 4.2, to criminal investigations has spawned substantial controversy.

Criminal investigations often involve individuals who always have a lawyer on retainer, a lawyer whose job includes representing the individual in any and all criminal matters which may arise. The individual is, therefore, arguably a “party . . . represented by another lawyer” in any potential criminal matter; and the prosecutor may well know it. It is arguable, therefore, that it is impermissible for a prosecutor to contact the subject of the investigation because of the proscription on contacting another lawyer’s client. And the problem goes deeper. Since a lawyer may not violate the Rules directly or through the acts of another,⁴¹⁷ the argument is obvious. A prose-

410. *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967).

411. See WYOMING CODE OF PROF’L RESPONSIBILITY Canon 9 (LexisNexis 2002). The standard was not included in the ABA Model Rules, which were adopted, with modifications, in Wyoming in 1986.

412. WYOMING CODE OF JUDICIAL CONDUCT Canon 2 (Lexis 2002).

413. *Id.* at Rule 3.1.3(d); see also WYOMING RULES OF PROF’L CONDUCT R. 1.9(c) (containing a similar proscription).

414. For a discussion of the myriad and unique ethical issues facing part-time prosecutors, see J. M. Burman, *Conflicts of Interest in Wyoming*, 35 LAND & WATER L. REV. 79, 109-20 (2000).

415. ABA STANDARDS FOR CRIMINAL JUSTICE – THE PROSECUTION FUNCTION R. 3-1.3(f) (ABA 3d ed. 1993); see also WYOMING RULES OF PROF’L CONDUCT 1.7(b) (stating that a lawyer shall not represent a client if the lawyer’s representation will be “materially limited by . . . the lawyer’s own interests”).

416. WYOMING RULES OF PROF’L CONDUCT R. 4.2.

417. *Id.* at Rule 8.4(a).

cutor may not ethically conduct or direct an undercover operation, through others, involving individuals who are known to have lawyers on retainer. Courts differ on the applicability of Rule 4.2; many have held that Rule 4.2 does not apply to undercover operations. Others have taken the opposite view. And the ABA has issued an opinion taking the view that Rule 4.2 does apply to criminal investigations, with some exceptions.

In the late 1980s, the Antitrust Division of the Department of Justice conducted a nation-wide investigation of the moving industry.⁴¹⁸ Among those investigated was Donald Ryans, a mover from Oklahoma. After an undercover investigation, including the tape recording of conversations with Ryans, he was charged with conspiracy to restrain and suppress competition in the moving industry in and around Fort Sill, Oklahoma. Before trial, Ryans moved to suppress the tape-recorded conversations, arguing that they had been obtained in violation of Rule 7-104(A), the nearly identical predecessor to Rule 4.2, because he had a lawyer on retainer. The district court granted the motion, suppressing two of the tape recordings because they had been obtained in violation of the no-contact rule. An appeal to the United States of Appeals for the Tenth Circuit followed.

On appeal, the issue was "whether the government's use of an informant to initiate and record conversations with a suspect prior to indictment, but after the suspect has retained counsel . . . violates Disciplinary Rule 7-104(A) of the Code of Professional Responsibility."⁴¹⁹ After an extensive discussion of holdings in other jurisdictions, the court reversed. "We agree," it said, "with the majority of courts which have considered the question that DR 7-104(A)(1) was not intended to preclude undercover investigations of unindicted suspects merely because they have retained counsel."⁴²⁰ The *Ryans* view is the view of all the Circuit Courts which have considered the issue, except the Second Circuit.⁴²¹

Two important developments have occurred since the *Ryans* decision. First, in July of 1995, the ABA Committee on Ethics and Professional Responsibility issued an opinion entitled "Communications With Repre-

418. *United States v. Ryans*, 903 F.2d 731, 731-32 (10th Cir. 1990), *cert. denied*, 409 U.S. 885.

419. *Ryans*, 903 F.2d at 734.

420. *Id.* at 739.

421. *See United States v. Hammad*, 858 F.2d 834, 837-38 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990) (stating that the anti-contact rule applies to an Assistant United States Attorney); *but see United States v. Kenny*, 645 F.2d 1323 (9th Cir. 1981), *cert. denied*, 452 U.S. 920 (1981); *United States v. Lemonakis*, 485 F.2d 941 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989 (1974). At least two Circuits have applied the rule in a pre-indictment, but custodial, setting. *See United States v. Killian*, 639 F.2d 206 (5th Cir. 1981), *cert. denied*, 451 U.S. 1021 (1981); *United States v. Durham*, 475 F.2d 208 (7th Cir. 1973).

sented Persons.”⁴²² Second, the ABA amended Model Rule 4.2 to address, in its comments, criminal investigations.

In a Formal Opinion, the ABA’s Committee on Ethics and Professional Responsibility concluded that Rule 4.2’s no-contact rule applied equally to civil and criminal matters. It adopted what it characterized as the view of “a majority of court decisions . . . that Rule 4.2 and its predecessor [DR 7-104(a)] anti-contact rules apply to both federal and state prosecutors.”⁴²³ The Committee acknowledged that a number of courts, including the *Ryans* court, had adopted the opposite view.⁴²⁴ It concluded, however, that “to the extent those decisions suggest that the Rule has no application at all in the criminal context, or that it does not come into play until Sixth Amendment rights attach, they are not sound.”⁴²⁵ Despite the ringing rhetoric, the Committee left the door open for continued undercover investigations: “The Committee believes that so long as this body of precedent remains good law, it is appropriate to treat contacts that are recognized as proper by such decisional authority as being ‘authorized by law’ with the meaning of that exception stated in the Rule.”⁴²⁶

The month after the Committee issued its opinion, ABA Model Rule 4.2 was amended by the ABA’s House of Delegates, at the urging of the Committee on Ethics and Professional Responsibility. The word “party” was changed to “person,” and the commentary was substantially revised.⁴²⁷ According to the Committee Report, the term “person” better describes the scope of the rule than “party.” That is because the rule should apply to protect a person regardless of whether he or she is a “party” to a pending legal action.⁴²⁸

Comment 2 was rewritten to adopt the position articulated by the Committee in its formal opinion:

Communications authorized by law also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement . . . when there is applicable judicial precedent that either has found the activity permissible under this Rule

422. ABA Comm. on Ethics and Prof’l. Responsibility, Formal Op. 95-396 (July 28, 1995).

423. *Id.* at 4.

424. *Id.* at 6; *see also id.* at 6 n.23 (expressly mentioning *United States v. Ryans*, 903 F.2d 731 (10th Cir. 1990)).

425. *Id.* at 6.

426. *Id.* at 7.

427. S. GILLERS & R.D. SIMON, *REGULATION OF LAWYERS, STATUTES AND STANDARDS* 272 (2000).

428. *Id.* at 275.

or has found this Rule inapplicable. However, the Rule imposes ethical restrictions that go beyond those imposed by constitutional provisions."⁴²⁹

So where does this leave Wyoming prosecutors? Wyoming has not adopted the amendments to ABA Model Rule 4.2. We do not have, therefore, the commentary which expressly refers to decisional law and allows contacts as part of a criminal investigation. Furthermore, the Wyoming Supreme Court has never ruled on the applicability of Rule 4.2 to criminal investigations. Nevertheless, as currently in effect, Wyoming's Rule 4.2 allows contacts "authorized by law." And it seems fair to adopt the position of the ABA Committee on Ethics and Professional Responsibility that this language makes it "appropriate" to allow contacts to the extent they are allowed by the courts.⁴³⁰

The Tenth Circuit's opinion in *Ryans* involved an Oklahoma case and the court construed the Model Code. It seems reasonably safe to assume, however, that the Court would construe the similar provisions of Wyoming's Rules of Professional Conduct in a similar way, and that opinion, as well as the others which have adopted that view, would be persuasive when the Wyoming Supreme Court is called upon to interpret Rule 4.2.

Federal attorneys in Wyoming are generally members of the Wyoming State Bar. They are, therefore, subject to the same standards as other Wyoming lawyers. Federal attorneys who are not admitted to the Wyoming State Bar may appear in federal court in Wyoming to represent the United States under certain conditions.⁴³¹ Also, by statute, all federal attorneys are "subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."⁴³² As part of that statute, Congress has directed the Attorney General to "make and amend rules of the Department of Justice to assure compliance with this section."⁴³³ The rules adopted pursuant to that authority say that in criminal or civil investigations, federal attorneys are to "conform their conduct and activities to the state rules and laws, and federal local court rules, governing attorneys in each State"⁴³⁴ In particular, a federal attorney is not to "direct an investigating agent . . . to engage in conduct under circum-

429. COMP. OF PROF'L RESPONSIBILITY R. 4.2 cmt. 2 (1999).

430. *Id.* at cmt. 7.

431. A lawyer for the United States Government "who has been admitted to practice in the highest court of any state, but who is not otherwise qualified under this Rule to practice in this Court, may appear and participate in a case in his official capacity, as hereinafter provided." LOCAL RULES OF THE U. S. DIST. CT. FOR THE DIST. OF WYO. R. 83.12.2(e) (West 1999).

432. 28 U.S.C. § 530B(a) (2000).

433. *Id.* § 530B(b).

434. 28 C.F.R. § 77.3 (1999).

stances that would violate the attorney's obligations [to comply with State laws and rules]⁴³⁵

E. Public Defenders

The great majority of persons accused of crimes, or involved in related proceedings, such as juvenile delinquency actions, are represented by public defenders. Persons charged with violations of Wyoming Statutes are eligible to be represented by the Wyoming Public Defender,⁴³⁶ either through full-time or part-time assistant public defenders,⁴³⁷ or by private attorneys designated and paid by the Public Defender.⁴³⁸ The Federal Public Defender for the Districts of Wyoming and Colorado provides appointed counsel for persons charged with federal offenses who are indigent. In municipal courts, representation of indigent defendants charged with crimes for which a jail sentence is a possible punishment is usually furnished by private attorneys who accept appointments.⁴³⁹ Since public defenders are invariably paid by a governmental entity, either as salaried employees or contract attorneys, and not by the defendants themselves, a third-party payer relationship exists. Such lawyers are not, however, lawyers for an organization; they are lawyers for individual defendants.⁴⁴⁰

As a general matter, a lawyer may ethically receive payment from a third party if:⁴⁴¹ (1) the client "consents after consultation;"⁴⁴² (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of the client is kept confidential. The reason for the Rule is that the individual, not the payer, is the client. In the public defender context, there-

435. *Id.* § 77.4(f).

436. WYO. STAT. § 7-6-105(a) (LexisNexis 1999).

437. *Id.* § 7-6-104(f) ("The governor may appoint full or part-time assistant public defenders"). Full-time assistants may not engage in private practice; part-time assistants may. *Id.* § 7-6-104(h).

438. WYO.R.CRIM.P. 44(e) (LexisNexis 1999).

439. The State Public Defender is precluded by law from representing persons in municipal court. *Id.* § 7-6-112(a)(iii). While there are no Wyoming statutory provisions about appointing counsel for violations of municipal ordinances, such a right is guaranteed by the United States and Wyoming Constitutions, as well as Rule 44(a) of the Wyoming Rules of Criminal Procedure, if the sentence for the charged crime involves a possible jail term.

440. *Asch v. State*, 62 P.3d 945 (Wyo. 2003) ("The lawyers [in the State Public Defender's Office] provide legal services, not to the public defender office, but to individual defendants.").

441. WYOMING RULES OF PROF'L CONDUCT R. 1.8(f); *see also id.* at Rule 5.4(c) ("A lawyer shall not permit a person who . . . pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment").

442. Consultation is a defined term. It means "communication [from the lawyer to the client] of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." *Id.* at terminology.

fore, the individual defendant is the client, not the governmental entity, the employer, in this case.⁴⁴³

As discussed above, it is now clear that the State Public Defenders Office is not a single law firm for purposes of conflicts of interest.⁴⁴⁴ That does not mean, of course, that impermissible conflicts of interest cannot arise, but the office is held to a more flexible standard than are private attorneys.

VI. SUMMARY

The number and variety of organizations has been increasing, and is likely to continue to grow. As that happens, an ever greater percentage of the clients lawyers represent will be organizations. A lawyer must know, therefore, how ethically to do so.

The first task will always be to identify the client, the organization, and those persons within it who are duly authorized constituents, the persons with whom the lawyer may or must interact. Though not required, a written representation agreement which identifies the client and the duly authorized constituents is an excellent idea. It is critical when the lawyer has agreed to form an entity; all concerned need to know whom the lawyer represents, who is going to pay, and the scope of the representation.

The second issue facing a lawyer who represents an organization is how confidentiality concepts apply. The general ethical obligation of confidentiality applies to everything the lawyer learns about the representation. The more difficult question is knowing to whom that information may be or must be disclosed – and that will be the duly authorized constituents. The scope of the attorney-client privilege in Wyoming is unclear, particularly as it relates to organizations. The better view is the subject-matter test in which the subject of the communication, not the status of the individual who makes it, is the salient consideration. The control-group test, however, could be adopted so that only communications between a lawyer and certain persons are protected. While the former view seems to further the goals of the privilege, fostering full and frank communication between an attorney and a client, the question of the scope of the privilege cannot be answered until the Wyoming Supreme Court rules on the issue or the statute is amended. The most a lawyer can do, which a lawyer should do, is advise organizational clients that the scope of the privilege is uncertain in Wyoming.

Third, a lawyer's ethical and legal duty to blow the whistle to protect an organization from individuals who would harm it demonstrates the

443. See, e.g., *White v. Galvin*, 524 N.E. 2d 802, 803 (Ind. 1988).

444. See *supra* notes 436-43 and accompanying discussion.

primacy of the lawyer's duty to the organization. When blowing the whistle, a lawyer must be careful to balance the organization's expectation of confidentiality with the duty to act in the organization's interests. Further, the lawyer must be careful not to mislead constituents about the lawyer's role as they will likely expect the lawyer represents them, too.

Fourth, actual and potential conflicts of interest abound when the client is an organization. A lawyer must be alert to a divergence of interests between the client, the organization, and its constituents. Further, a lawyer simply should not agree to serve as both corporate counsel and a member of the board of directors, though it is ethically permissible to do so in limited circumstances.

Finally, government lawyers face different issues. While most ethical standards apply to government lawyers, too, important differences may exist. First, government lawyers' authority is often greater than private lawyers', placing a heavier burden on them. That additional authority may change the balance between confidentiality and the public interest. Second, government lawyers are, at times, subject to more flexible conflict of interest standards than are private lawyers. Finally, the different roles government lawyers play often alter their ethical obligations, and it is crucial that government lawyers understand their legal duties, and how those duties alter their ethical ones.

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