


Ethics
Rule 1.12 Representation of an Organization & Privilege
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 Executive Director and General Counsel



Rule 1.12	Who's the client?	Privilege	Cases	Pot pouri
\$200	\$200	\$200	\$200	\$200
\$400	\$400	\$400	\$400	\$400
\$600	\$600	\$600	\$600	\$600
\$800	\$800	\$800	\$800	\$800

- Is a governmental organization such as a city, town or state government an organizational client for purposes of Rule 1.12?

Comments to Rule 1.12

Yes.

“The duty defined in this Rule applies to governmental organizations.”>

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In a council-manager form of government, the city manager hires you to be the city attorney. Do you represent the manager, the council, the city, the residents, someone else?

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- May depend on your charter or state law.
- Generally, you represent the city as an organization.

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- Identifying the client may be more difficult in the government context and is a matter beyond the scope of these Rules.
- The client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole.
- A government lawyer may have authority under applicable law to question conduct more extensively than that of a lawyer for a private organization in similar circumstances. >

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- Can you assign a non-lawyer to supervise one of your assistant attorneys?

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- Yes. South Carolina Advisory Opinion 06-12
- However, the lawyer must retain the authority to exercise the lawyer's professional judgment on the handling of all legal matters.
- Policy vs. tactics
- Texas Rule 1.12(a): "While the lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity's duly authorized constituents, . . ."

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SC Adv. Op. 06-12

- However, the Committee would caution lawyers employed by governmental entities to ensure that they properly determine who their client is, since there may be multiple levels of clients ranging from the specific agency and its director or commissioners all the way up to the state or federal government as a whole.>

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- A Council member proposes legislation to enable residents of the city to import prescription medicines from Canada.
- The City Manager asks for your opinion but asks you not to share your opinion with the Council.
- How do you respond?

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- Assuming you represent the city, you must advise the Manager that if the Council asks for your opinion, you will be obliged to give it to the Council.
- What if the measure passes and you believe the policy is wrong or illegal?>

[Lawyer's duty](#)

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- As City Attorney, you have been asked to represent the city in a discrimination claim filed with the EEOC. You are about to interview the director of the agency where the discrimination has allegedly taken place.

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- What should you tell the director, prior to the interview?

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Rule 1.12

- In dealing with an organization's directors, officers, employees, . . . or other constituents a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.>

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• One of the Council members asks you privately during a break in a board meeting for your opinion as to whether the member can move to reconsider a motion the member has just voted to approve in a 3-2 favorable vote.

• A second member (who offered the original motion) saw you speaking and asks what the other member wanted.

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• What is your response?

• Is this communication protected by [Rule 1.05](#)?

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• A city council member having received complaints about the promotional process for firefighters, contacts you to discuss concerns about the process and the complaint that the process is race and gender biased. The council member asks to meet with you, the manager, the HR director and the fire chief.

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• If you respond and meet with the Councilmember as requested, will the communications between all of these constituents of the organization be protected by privilege?

• What if prior to the meeting the chief advises you that the race and gender based employment decisions were to promote diversity – a Council goal?

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• “In sum, the interests of Ross and Bratcher were adverse to those of Haley and Baxter, and the two councilmen were not clients of the city attorney with respect to the meeting of December 16, 1992. Because Councilmen Ross and Bratcher participated in the meeting as third parties, the discussion was not held in confidence for purposes of the attorney-client privilege. See 8 Wigmore § 2311 (“One of the circumstances[] by which it is commonly apparent that the communication is not confidential is the presence of a third person...”). Their discussion is not shielded from disclosure by the attorney-client privilege.”
Reed v. Baxter, 134 F.3d 351, C.A.6 (Tenn.), 1998.>

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• As the city attorney, you discuss the office romance between the police dept’s chief deputy and another employee of the department with the chief deputy.

• At a public meeting, a member of the Council asks you to disclose your communications with the chief deputy.

• May you?

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Comments to Rule 1.12

- When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.05.
- This does not mean that constituents of an organizational client are the clients of the lawyer.

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Comments to Rule 1.12

- 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 1.05.
- What if it is just one council member who wants to ask the question?>

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- Who are the constituents of an organizational client?

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Comments to Rule 1.12

- A lawyer representing an office constituent decision-making organization constituent lawyer

the lawyer-client relationship must be maintained through a constituent who acts as an intermediary between the organizational client and the lawyer.

This fact requires the lawyer under certain conditions to be concerned whether the intermediary legitimately represents the organizational client >

[Comments to Rule 1.12](#)

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- You are the city attorney of a small city with a full time private practice.
- Can you represent the city's director of public works in a DUI case brought by a state trooper in a different judicial district?

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- (g) 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. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders. (Not in Texas Rule)
- Florida Ethics Opinion 63-24. Yes, but from a very widely split committee.
- Texas Ethics Opinion 49 (1952)

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Colorado Ethics Opinion #46

- May not ethically represent a criminal defendant who is being prosecuted in the municipal court.
- May represent a criminal defendant in a non-municipal court case in which an employee of a municipality will appear as a witness for the prosecution under some circumstances.
- In rare situations, may represent a client in litigation under circumstances where such representation may require the lawyer to take a position which could adversely affect the validity of a law or ordinance governing the municipality.

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Arkansas AG Opinions

- A part-time prosecutor is not statutorily limited in the scope of his private practice, he or she should not, ethically speaking, take a private position which appears contrary to his or her public duties. Op. Att'y Gen. 95-083.
- Moreover, this office has specifically opined that, because of his role as a prosecutor, a city attorney cannot ethically represent criminals before a criminal court anywhere in his judicial district. Ops. Att'y Gen. 95-243; 99-091.
- For these reasons, it is my opinion that a City Attorney or Deputy City Attorney, who serves as prosecutor in the city division of a given court pursuant to [A.C.A. § 16-21-115](#), cannot ethically represent criminal defendants in the county division of the same court. Ops. Att'y Gen. 09-01.
- **Iowa Ethics Opinion 01-03** concludes city attorney cannot represent criminal defendants in cases brought by municipal officers of the city.>

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- If you are subpoenaed to testify in a matter involving your communications with the council or the city manager,
- Who must raise privilege?
- What if it is a newly elected council and the council waives privilege?
- *Tail of the Pup, Inc. v. Webb*, 528 So. 2d 506, 506-07 (Fla. 2d DCA 1988).
- Would your answer change if the communications involved the city manager?>

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- You are counsel to the President (POTUS), during an investigation of possible corruption involving acts of the President prior to assuming office, the President seeks your advice.
- Are those conversations protected by attorney client privilege?
- *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, C.A.8 (Ark.), 1997. >

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- You are counsel to the Governor and a grand jury has been impaneled to inquire into alleged violations of law committed by the Governor in the course of performing the duties of the office.
- The Governor seeks your advice, are those communications privileged?
- *In re Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289, 290 (7th Cir. 2002).
- *United States v. Doe (In re Grand Jury Investigation)*, 399 F.3d 527, 534 (2d Cir. 2005). >

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- You are an assistant town attorney who has been asked to advise the transit department regarding the adoption of new transit service fees. During those discussions the issue of whether it makes good business sense to serve an area outside the town and you offer your advice on that topic.
- Are those communications protected by the attorney client privilege?
- *Pritchard v. County of Erie (In re County of Erie)*, 473 F.3d 413 (2d Cir. 2007). >

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- As city attorney you are required by law to represent the city's ethics commission.
- A charge is filed against a majority of the city council for ethics violations.
- The city council appoints you and may remove you as city attorney.
- May you represent the city ethics commission in this ethics complaint?
- No. Texas Ethics Opinion No. 567 (2006).>

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- A resident calls you on the phone and describes a conflict that has arisen with an adjoining neighbor over an overhanging and perhaps diseased tree. The resident seeks your advice – how do you respond?

[Answer](#)

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- In representing the city, your office represents the code official and the board of appeals.
- A defendant in a code enforcement case moves to disqualify your office from presenting the code violation to the board on the basis that your office has a conflict representing both agencies. How should that motion be resolved?
- [Wise v. Lowery, 1995 Conn. Super. LEXIS 2400, 6-7; 1995 WL 506071 at *3 \(Conn. Super. Ct. Aug. 16,1995\)](#)
(Unreported)>

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- In federal court, does the collateral order doctrine allow an immediate appeal of an order to disclose information covered by the attorney-client privilege?

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Mohawk Industries v Carpenter

- In Justice Sotomayor's first decision, writing for a unanimous court, she said:
- The question before us is whether disclosure orders adverse to the attorney-client privilege qualify for immediate appeal under the collateral order doctrine. Agreeing with the Court of Appeals, we hold that they do not.
- Other options available:
 - Certification under 28 U. S. C. §1292(b)
 - May seek mandamus in the CTA
 - Defy the order and appeal the sanctions when imposed.>

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- In representing an employee of the county in litigation involving the employee's work with the county, you learn that the employee has engaged in a course of conduct that is illegal and may be imputed to the county.
- How do you proceed?

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SC Adv. Op. 83-33

- A's employment as County Attorney does not in itself preclude him from defending clients in any criminal prosecutions in the Court of General Sessions or other criminal courts in his county. However, individual situations may arise where the attorney should decline employment.

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SC Adv. Op. 83-33

There are many cases where there would be no apparent or actual conflict for A in the representation of criminal defendants such as cases prosecuted by the Highway Patrol, by municipal authorities, or by private citizens. Where County employees are involved in the prosecution of a case, A must exercise his judgment according to the factors set forth in the ethical considerations and disciplinary rules.

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We believe that the Supreme Judicial Court would reach the same result under the current Massachusetts Rules of Professional Conduct (MRPC). One indication of the Supreme Judicial Court's position can be found in Comment [4] of the Scope Note to the Massachusetts Rules of Professional Conduct, which states that "lawyers under the supervision of [certain government law officers] may be authorized to represent several governmental agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients." Another indication appears in special Massachusetts Comment [8A] to Rule 1.7, which states more broadly that with respect to government lawyers, "public policy considerations may permit representation of conflicting interests in some circumstances where representation would be forbidden to a private lawyer."

Mass. Bar Assoc. Ethics Opinion 2004-3

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- We believe that this case, however, is different for several reasons. The Solicitor's representation of the Board and his appearance before it are both contemplated by, indeed mandated by, the municipal Charter. Moreover, the Solicitor represents the Board in its official and not in any personal capacity, and so any fear of partiality seems less reasonable. Finally, the dual role the Solicitor is filling – representing the agency and appearing before it -- is a common and generally accepted feature of agency lawyering. We conclude, therefore, that it is normally permissible for the Solicitor to appear before a client agency even though the Solicitor represents the agency in unrelated matters.

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As city attorney, you opined on legislation pending before the Council determining that the pending legislation was outside the authority of the Council to enact based upon your reading of several cases.

The ordinance/law has been enacted and is being challenged in court.

Can you defend the law?

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Are you required to disclose to the court the opinion you gave to the Council?

What if your opinion was made part of the legislative record?

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The trouble with opinions!

"Although the State of Maryland has been represented by a distinguished Delaware attorney in this appeal, the State of Maryland has also been represented by more than one Assistant Attorney General. In view of the prior, published Maryland Attorney General Opinion that was issued to the Sheriff of Montgomery County [to the contrary], it is surprising that the State of Maryland would assert that the State of Maryland would especially surprising because one of the Maryland Assistant Attorneys General who appears on the briefs filed in this Court also appeared on the Attorney General's General Opinion." >

Kent County, State of Md. v. Sheriff of Montgomery County, 713 A.2d 290 (DE. 1998)

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- Always a tricky subject. I've used a couple of analogies to help people understand what they are asking for. Asking for private legal advice is no different from asking the Public works department to come lay a foundation for your new house or asking the Parks department to come plant flowers in your flowerbed, your asking that resources paid for by tax dollars be devoted to your private benefit.
 -
 - And sometimes the best approach is a direct one: "I know you're not asking for preferential treatment, just the same treatment others would get in the same situation, and what we normally do is..."
- Don Knight from the IMLA listserv.>

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You are the city attorney. The director of one of the city departments was subpoenaed to a deposition in the director's official capacity in a private lawsuit between two parties and sought your representation.

The department head has left the city and is now suing the city in an "unrelated" matter.

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Can you defend the city against the director's suit?
Can you use the deposition testimony in defense of the city?

Mass. Bar. Assoc. Ethics Op. 2003-1
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Mass. Bar Assoc. Ethics Op. 2003-1

We are assuming that the responsibilities of lawyers for the municipality in that regard have been explained to the various municipal officials with whom they work and that the former department head had testified to any impropriety, the lawyer would have been obligated to reveal that information to the appropriate municipal official despite any contrary instruction from the department head.

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- As city attorney you meet with the city manager to discuss a matter and the manager includes a city financial consultant in the meeting.
- Are the discussions privileged, or did the city waive the privilege by having its consultant present?
- What if the same meeting was with the Council, can the council claim privilege?
- *TAUSZ v. CLARION-GOLDFIELD COM. SCH. DIS.*, 569 N.W.2d 125; (1997 Iowa Sup Ct.) > [Categories](#)

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- In Florida, Public Records Act only exempts work product and then only until conclusion of litigation for which it was prepared.
- Miami Herald v. City of North Miami, 452 So.2d 572(1984).
- Sec. 119.07(3)(o), Fla. Stat.(1984)>

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- The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

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Rule 4-1.16

- A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law.

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Rule 4-1.13

- Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See note on Scope.
- If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

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Rule 4-1.2

- A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.
- In Florida Rule 4-1.6(b) requires a lawyer to reveal information the lawyer reasonably believes necessary to prevent a client from committing a crime.>

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- If the legislative body hires its own attorney can that attorney use Rule 4.2 to prevent the city attorney from speaking with the legislature directly?

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- Indiana Bar Ethics Opinion 1988 No. 9
- It depends on whether the city attorney represents the legislative body as part of the city attorney's duties.>

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- What are corporate Miranda Warnings?

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Corporate Miranda Warnings (Upjohn Warnings)

- the lawyer represents the corporation and not the interviewee;
- discussions between the lawyer and the interviewee are protected by the corporation's privilege and are confidential;
- the corporation may waive the privilege and provide the information to the government;

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- the interviewee cannot prevent the corporation from waiving the privilege; and
- the company has control over what will be done with the information provided.

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- If the company may want to use information gathered in the interview for internal disciplinary purposes, counsel should consider providing that additional, explicit warning to the interviewee.>

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- A high level employee becomes upset about the policy direction taken by the city manager.
- The employee is your colleague and friend and approaches you about concerns regarding the manager’s policy.
- You too are troubled by the policy and have a strained relationship with the manager.
- What do you tell your friend and colleague?
- *Texas v. Martinez*, 116 S.W.3d 385 (TX SCT 2003)>

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Final Jeopardy!

METADATA and THE CLOUD

What are the duties of lawyers in Texas with regard to metadata in documents?

EXTRA CREDIT

What are the duties of lawyers in Texas when using cloud computing services?

- ABA Formal Opinion 06-442
- ABA Formal Opinion 05-437
- No Texas Opinion

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- Sending Lawyer must act competently to avoid improper disclosure of privileged and confidential information. Rule 1.6 (Texas Rule 1.05).
- Receiving Lawyer:
 - if the receiving lawyer believes the metadata was inadvertently sent, under Rule 4.4 (No similar rule in Texas) must notify the sending lawyer of its receipt.
 - Based fact Md. did not have similar rule, it allows metadata mining.
- Federal and Texas Rules of Procedure may impose other obligations.

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Cloud Computing Services – Cloud Storage

- Article by Joshua H. Brand, Assistant Director Minnesota Office of Lawyers Professional Responsibility
(As submitted to Minnesota Lawyer for publication on 1/2/12)
- Understand the technology so as to be able to explain to client
- “completely acceptable under the Rules of Professional Conduct provided an attorney first conducts the requisite due diligence necessary to safeguard the integrity of stored client information”

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