


Ethics and Open Government in a Virtual World

Ethics Week 2020
Board of Ethics and Government Accountability

The background of the slide is a photograph of a modern office interior. Several people in business attire are gathered around a table, appearing to be in a meeting. The scene is dimly lit, with light coming from large windows in the background, creating a professional and collaborative atmosphere.

Real Ethics in a Virtual World Sponsored by BEGA

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General Ethics Resources

www.dcbbar.org

- D.C. Rules of Professional Conduct
- D.C. Legal Ethics Committee Formal Opinions
- Confidential Ethics Helpline – 202-737-4700 x. 1010
- Ask the Ethics Expert/Speaking of Ethics Columns
(Washington Lawyer)

D.C. Rules of Professional Conduct:

- Govern the conduct of lawyers admitted to practice in the District of Columbia
- MAY, SHOULD, or SHALL –
“Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process.” Scope [3]
- “The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.” Scope [1]

Other Considerations:

- The Rules exist within a larger legal context including court rules, federal, and state law.
- Substantive law may guide or dictate ethical conduct.
- If the Rules are permissive and the law prohibits: Can't do it. If the law allows the conduct but the Rules prohibit: Can't do it.

Hypotheticals

Question 1

Charles Loomer is a lawyer in the General Counsel's Office for the Office of the Chief Financial Officer of the District of Columbia. Due to COVID, he is working from his "home office" (a corner in his basement). During a burglary his laptop, which contains sensitive documents containing the city's financial projections and assumptions, is stolen.

Has Charles committed an ethical violation?

- A. Yes, he violated his duty of confidentiality.
- B. Yes, he violated his duty of competence.
- C. No.
- D. A and B.

Question 1

Best Answer: C. No.

Remember, there are always circumstances in which a lawyer could have a heightened duty to protect information.

Follow up: Has Charles violated any government ethics rules for failing to properly protect government property?

Question 2

CFO Cathy finds out about the stolen laptop. She sets up a zoom call with Charles in which she proceeds to rage about his irresponsibility and the risk to the agency as a result of the theft. Charles knew his daughter was in the basement but he thought she was engaged in distance learning with her headphones on. In fact, she was recording the call and put it on TikTok with the catchy title “Watch ‘Karen’ Zoom!”

Does Charles face any ethical risk in this situation?

- A. Yes.
- B. No, every one of us is at all times vulnerable to a fourteen-year old with a phone and social media.
- C. No, what is described here is simply not confidential information protected by Rule 1.6.
- D. Distance learning @#*&*!

Question 2

Best Answer: A. Yes.

Rule 1.6(b):

“Confidence” refers to information protected by the attorney-client privilege under applicable law, and “secret” refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.

Was Charles acting competently to protect confidential information?

Question 2

Rule 1.6 comment [40]:

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule.

Question 2

Comments [5] and [6] to Rule 1.1 (Competence):

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation and continuing attention to the needs of the representation to assure that there is no neglect of such needs. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, and engage in such continuing study and education as may be necessary to maintain competence.

Question 3

The next day, Cathy calls Charles to apologize about losing her temper. She told Charles that she had been diagnosed with COVID four days ago and hadn't been feeling well. However, she said she was back to normal and planning to head into the office the next day.

What should Charles do?

- A. Tell Cathy that if she insists on going in, he will send a blast email to all agency employees informing them not to go to the office until further notice.
- B. Tell Cathy that her actions are not consistent with DC policy on COVID and that he will be forced to elevate this issue up to the office of the Mayor if she does not comply.
- C. Because this is a health crisis that could reverberate beyond just the agency, use the “bodily harm” exception to go so far as to notify the police.
- D. Nothing – Cathy is the agency’s duly authorized constituent and as GC, he has an obligation to protect her confidentiality under Rule 1.6.

Question 3

Best Answer: B. Tell Cathy that her actions are not consistent with DC policy on COVID and that he will be forced to elevate this issue up to the office of the Mayor if she does not comply.

Rule 1.13:

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

(b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

Question 3

Rule 1.13 (continued)

(c) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests may be adverse to those of the constituents with whom the lawyer is dealing.

(d) 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.

Question 3

Rule 1.6(a):

Except when permitted under paragraph (c), (d), or (e), a lawyer shall not knowingly:

- (1) reveal a confidence or secret of the lawyer's client;
- (2) use a confidence or secret of the lawyer's client to the disadvantage of the client;
- (3) use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person.

Question 3

Rule 1.6(c):

A lawyer may reveal confidences and secrets, to the extent reasonably necessary:

- (1) to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm absent disclosure of the client's secrets or confidences by the lawyer; or
- (2) to prevent the bribery or intimidation of witnesses, jurors, court officials, or other persons who are involved in proceedings before a tribunal if the lawyer reasonably believes that such acts are likely to result absent disclosure of the client's confidences or secrets by the lawyer.

Question 4

Cathy is not swayed by Charles's advice. Charles, realizing he doesn't have much time to act, loops in his brand-new assistant, Jarrett, who came highly recommended from the D.C. Department of Health. Charles asks for Jarrett's help in researching the D.C. government's COVID-19 policy so that Charles can figure out whom to notify in the event the agency needs help with enforcement of the policy. Within thirty minutes, Jarrett emails Charles that he has already briefed Dr. Nesbitt (Director of DC DOH) on the situation and that she is expecting a call from Charles to discuss next steps.

What has gone wrong here?

- A. Nothing! Jarrett is well connected and knows how to get things done.
- B. Rule 1.6 (Confidentiality) was violated.
- C. Charles failed to appropriately supervise Jarrett.
- D. B and C.

Question 4

Best Answer: D. B and C.

Rule 1.6(k):

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

Question 4

Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants):

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) A partner or a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm or government agency shall make reasonable efforts to ensure that the firm or agency has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) The lawyer requests or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer has direct supervisory authority over the person, or is a partner or a lawyer who individually or together with other lawyers possess comparable managerial authority in the law firm or government agency in which the person is employed, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Question 4

Follow up – What if Jarrett instead connects Charles with the CEO of a Rockville-based pharmaceutical company that offers the agency a free dose of a curative elixir for the CFO?

- What does Charles need to think about when assessing whether or not it would be appropriate to accept the offer?
- To whom can Charles go for further advice/guidance?
- What if the pharmaceutical company CEO is Jarrett's brother?

Question 5

Cathy is on a roll. She arbitrarily decides she wants to fire the city's long-term accounting firm and give the job to her neighbor's son – a newly minted accountant. She calls it a “fresh start.” She orders Charles to get started on whatever action is necessary to terminate the accountant's contract.

Which of the following are Charles's options?

- A. Determine the lines of reporting authority in the District of Columbia so that he can report up the chain.
- B. Follow Cathy's direction. She is the duly authorized constituent of the organization and as such, she sets the objectives of the representation.
- C. Consider whether, as an employee of city government, he has a duty to report his concerns even though he would be revealing confidential information.
- D. Ignore Cathy and hope she settles down soon.

Question 5

Best Answer: A or C.

Rule 1.13(b):

(b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

Question 3

Rule 1.6(e):

A lawyer may use or reveal client confidences or secrets:

- (1) with the informed consent of the client;
- (2) (A) when permitted by these Rules or required by law or court order; and
(B) if a government lawyer, when permitted or authorized by law;

Limiting phrases seen throughout Rule 1.6:

- To the extent reasonably necessary
- To the minimum extent necessary (in connection with fee recovery)

Question 5

Follow up: Does Cathy's proposal violate D.C.'s preferential treatment rules?

Question 6

When it rains, it pours. Charles ventures into the office and receives notice that the agency has been served with its first COVID-related employment lawsuit from Claude, a long-time employee. Cathy is outraged when she finds out that the OAG attorney representing the agency in the matter won't allow her to dictate the terms on which the agency will settle.

Charles tells Cathy:

- A. She is right, the client always has the right to set the objectives of the representation and approve settlement terms.
- B. Go pound sand! A government attorney's authority and control over decisions concerning the representation may be expanded by statute or regulation beyond the typical limits.
- C. Lawyer and client (in this case, the agency) need to work together on the strategy.
- D. As Agency General Counsel, he is responsible for making decisions in litigation matters and he approves of the OAG attorney's plans.

Question 6

Best Answer: B. Go pound sand! A government attorney's authority and control over decisions concerning the representation may be expanded by statute or regulation beyond the typical limits.

Rule 1.2(d):

A government lawyer's authority and control over decisions concerning the representation may, by statute or regulation, be expanded beyond the limits imposed by paragraphs (a) and (c).

This provision serves as an exception to the general rule set forth in Rule 1.2(a):

A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

Question 7

Claude, who is represented by counsel in his litigation against the agency, emails Charles that he needs to come into the office for a few hours the following week and asks for Charles's assurance that a COVID safety policy is in effect for the agency.

Charles is relieved that he has an excuse for not responding to the email because:

- A. Claude is represented by counsel in an action against the agency.
- B. The matter that Claude is inquiring about is directly related to Claude's lawsuit against the agency.
- C. A and B.
- D. None of the Above.

Best Answer: D. None of the Above.

4.2(a) “authorized by law” limitation:

During the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a person known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other person or is authorized by law or a court order to do so.