Who's the Client?
Why Does It Matter?

Who is the Client?
Rule 4-1.13(a)

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

Rule 4-1.13 Comment [6]

- Government Agency. The duty defined in this Rule 4-1.13 applies to governmental organizations. . . .
So, Who Is the Client?

- The people?
- The legislature/governing board?
  - All or a majority?
- The employing agency?

Direction from Comment [6]

- Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18].
- Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole.
"No Universal Definition of the Client" – Restatement Law Governing Lawyers § 97

- Generally "government lawyers represent the public, or the public interest"
- "For many purposes, the preferable approach on the question [of who is the client]. . . is to regard the respective agencies as the clients and to regard the lawyers working for the agencies as subject to the direction of those officers authorized to act in the matter involved in the representation. . . " NYC Ethics Opinion 2004-03

When Does It matter?

- Disputes between agencies or agencies and employees
- Intra-agency/department conflicts
- Policy conflicts
- Strategic disputes
- Privilege
Example

- In 2005, the Missouri Attorney General sued the Missouri Department of Natural Resources over MDNR's decision to give up interest in a Missouri River railroad bridge
  - Prior MDNR director had sent a letter claiming the bridge for state use
  - Later MDNR director claimed the letter was not effective

NYC Opinion 2004-03

- What is the statutory framework?
  - Who has statutory authority to direct litigation?
- Factual determination – what is at issue?
Statutory Framework

Statutory Framework – Federal

- 28 U.S.C. § 516 – USDOJ attorneys under the US Attorney General "conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested"
- 28 U.S.C. § 547 – US Attorneys "prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned."
Statutory Framework – Missouri

- Missouri Constitution Art. IV, § 12 places the Attorney General in the Executive Department

Missouri Revised Statute § 27.060

- The attorney general shall institute, in the name and on the behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, and
- enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary; and
- he may also appear and interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved.
Missouri Revised Statute § 27.020.2

- The attorney general may, at the request of any officer, department, board, bureau, commission or agency of the state, assign assistant attorneys general to perform the duties prescribed by law before or upon behalf of such officer, department, board, bureau, commission or agency and may, upon request as aforesaid, from time to time reassign such assistants.

Specific Agency Authority

- RSMo. § 620.010 provides for the general counsel to the Department of Economic Development
Prosecuting Attorney – Mo Rev Stat § 56.060

1. Each prosecuting attorney shall commence and prosecute all civil and criminal actions in the prosecuting attorney's county in which the county or state is concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county. In all cases, civil and criminal, in which changes of venue are granted, the prosecuting attorney shall follow and prosecute or defend, as the case may be, all the causes, for which, in addition to the fees now allowed by law, the prosecuting attorney shall receive his or her actual expenses. If any misdemeanor case is taken to the court of appeals by appeal the prosecuting attorney shall represent the state in the case in the court and make out and cause to be printed, at the expense of the county, all necessary abstracts of record and briefs, and if necessary appear in the court in person, or shall employ some attorney at the prosecuting attorney's own expense to represent the state in the court, and for his or her services he or she shall receive the compensation that is proper, not to exceed twenty-five dollars for each case, and necessary traveling expenses, to be audited and paid as other claims are audited and paid by the county commission of the county.

2. Notwithstanding the provisions of subsection 1 of this section, in any county for which a county counselor is appointed, the prosecuting attorney shall only perform those duties prescribed by subsection 1 of this section which are not performed by the county counselor under the provisions of law relating to the office of county counselor.

Prosecuting Attorney Duties – Mo. Rev. Stat. § 56.070

1. The prosecuting attorney shall represent generally the county in all matters of law, investigate all claims against the county, and draw all contracts relating to the business of the county. He shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county commission or any judge thereof, except in counties in which there is a county counselor.

2. Notwithstanding the provisions of subsection 1, in any county of the first class not having a charter form of government for which a county counselor is appointed, the prosecuting attorney shall only perform those duties prescribed by subsection 1 which are not performed by the county counselor under the provisions of law relating to the office of county counselor.
County Counselor – Mo. Rev. Stat. § 56.640

- If a county counselor is appointed, the county counselor and the county counselor’s assistants under the county counselor’s direction shall represent the county and all departments, officers, institutions and agencies thereof, except as otherwise provided by law and shall upon request of any county department, officer, institution or agency for which legal counsel is otherwise provided by law, and upon the approval of the county commission or governing body, represent such department, officer, institution or agency. The county counselor shall commence, prosecute or defend, as the case may require, and exercise exclusive authority in all civil suits or actions in which the county or any county officer, commission, governing body, or agency is a party, in the county counselor’s or its official capacity, the county counselor shall draw all contracts relating to the business of the county, the county counselor shall represent the county generally in all matters of civil law, and the county counselor shall upon request furnish written opinions to any county officer or department.

Special Roles

- Mo. Rev. Stat. § 56.293. In addition to all other duties imposed upon the prosecuting attorney in counties of the second, third and fourth classes, if any elected county official be sued in connection with the performance of this office, under the provisions of Section 1983, Title 42, United States Code, the prosecuting attorney shall, if requested to do so by such elected county official, act as defense counsel or co-counsel for such elected official.
Factual Determination

Rule 4-1.13 comment [6]

- Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole.
- For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule 4-1.13.
State ex rel. Nixon v. American Tobacco Company, Inc. (Mo. 2001)

- State retained special counsel (private lawyers) to bring claims against cigarette manufacturers
- Challenge brought *inter alia* to involvement and fee arrangements for special counsel
- Could State/Attorney General consent to having someone other than the client pay the state's lawyers their fees?
  - If so, who could consent, and what was required?

Why Identity of Client Matters
Disagreement over Representation

- What does enabling legislation say – who is responsible for decision?

- Possibility lawyer should withdraw where strong disagreement over strategy
  - Rule 4-1.16 – a lawyer may withdraw when:
    (4) the client insists upon taking action that the lawyer

Inter-Agency Disagreement

- Disagreement whether multiple agencies are the same or multiple clients
- Government may need independent counsel due to conflict
Official Capacity Representations

- Analogous to representation of entity
- Person represented personally has direct lawyer-client relationship with counsel

Confidences and Client Problems

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 to the organization, 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.
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.

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. Such measures may include among others:

1. Asking for reconsideration of the matter;
2. Advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
3. Referring 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 on behalf of the organization as determined by applicable law.

Reporting Up (and Out?)

MO Rule 4-1.13(c) If, despite the lawyer’s efforts in accordance with Rule 4-1.13(b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that 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 4-1.16.
Reporting Up and Out – Illinois

- Illinois Rule 1.13(c) Except as provided in paragraph (d), if

1. despite the lawyer’s efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a crime or fraud, and

2. the lawyer reasonably believes that the crime or fraud is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

Thank You

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