

MAYER • BROWN

Avoiding Sand Traps and Moguls: A Refresher Course for In-House Counsel

Presented by:

Fern C. Bomchill, *Partner*

Mayer Brown LLP

312-701-7331

fbomchill@mayerbrown.com

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You are meeting with a V.P.
to discuss allegations of irregularities:

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Before the meeting, what do you tell him?



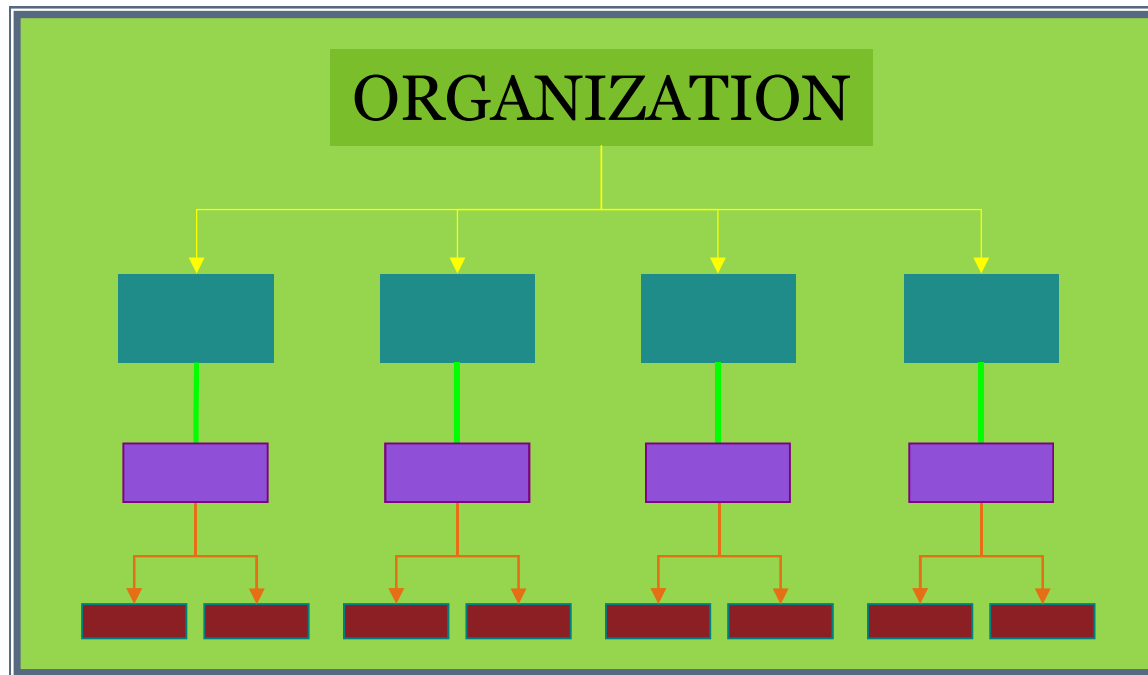
Who do you represent?

Is what he tells you confidential?

Is what he tells you privileged?

Rule 1.13: Organization As Client

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Rule 1.13: Organization's Best Interest

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- A lawyer employed by an organization represents the organization acting through its duly authorized constituents (e.g. officers, directors, employees).
- If a lawyer knows or should know that organization's interests are adverse to the constituent with whom he is dealing, **he must explain to that individual the identity of the client → the corporation.**

If VP's Interests Are Not Aligned with Corporation:

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YOU MUST TELL HIM

You represent
the
CORPORATION;

You don't
represent
him;

He has a
right to
counsel.

Rule 1.13: Reporting Obligation

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- If a lawyer for an organization knows that an officer/employee is violating law or legal obligations to the organization, must take steps to bring to the attention of a “higher authority.”
- If you comply with your ethical duties and obligations, you will minimize damage to the corporation and to yourself.
- If “highest authority” acts/fails to act in violation of law AND “likely to result” in substantial injury to organization, may reveal information (to extent permitted by Rule 1.6).

Rule 4.3: Dealing With Unrepresented Person

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- Dealing with a constituent with interests adverse to the corporation is the same as dealing with Unrepresented Person.
- A lawyer must clarify his role and CANNOT give legal advice other than advice to secure counsel.
- Lawyer must clarify loyalty to the corporation and ensure that constituent with adverse interest understands that protections of confidentiality and privilege may not be available to him.

Rule 4.2: Communication with Represented Person

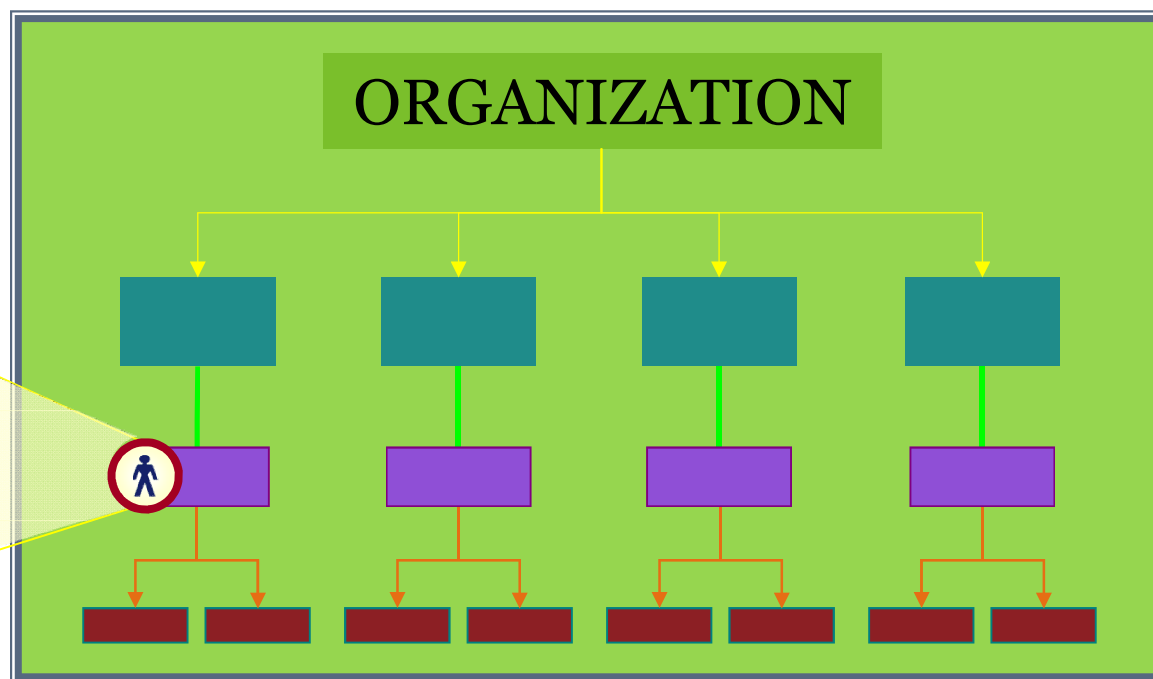
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- A lawyer cannot communicate with a personally represented constituent with “adverse interest” to corporation on subject matter of representation without consent or court order.
- A lawyer may confer with constituent on matters outside representation.

Can You Ever Represent a Constituent?

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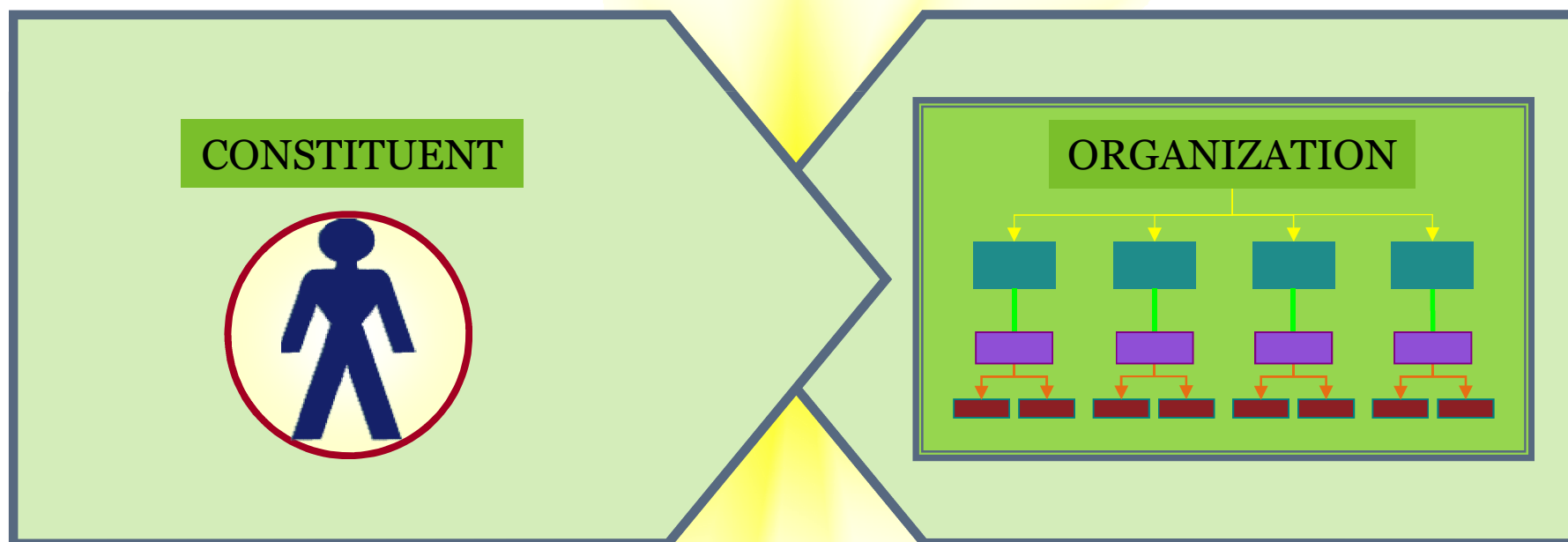
CONSTITUENT



Can You Ever Represent a Constituent?

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Rule 1.7: Conflicts of Interest



Rule 1.7: Conflicts of Interest

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NO: • If the interests of the corporation and the constituent are adverse;

OR

- If there is a significant risk that the representation of constituent is **MATERIALLY LIMITED** by your responsibility to the corporation, another person or your personal interests.

Rule 1.7: Conflicts of Interest

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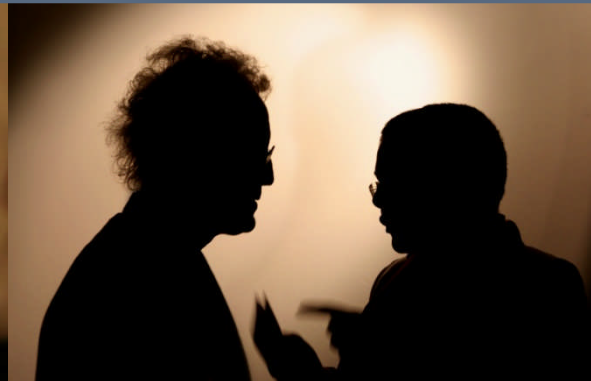
- UNLESS:**
- You REASONABLY BELIEVE you can provide competent and diligent representation to each;
 - Representation not prohibited by law;
 - You don't represent both corporation and constituent on claims between them in same proceeding;
 - Constituent AND Corporation (through a different constituent) each give INFORMED CONSENT IN WRITING.

You are back meeting with the V.P. He hands you his personal paper and asks you to keep them confidential:

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CAN YOU?

SHOULD YOU?



You are back meeting with the V.P. He hands you his personal paper and asks you to keep them confidential:

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CAN YOU?

SHOULD YOU?

You do need to keep them
confidential for your client...THE CORPORATION

But Mr. V.P. is not your client. Make sure he
understands that once he turns over the papers to
you, they belong to your client...

THE CORPORATION

Rule 1.6: Confidentiality of Information

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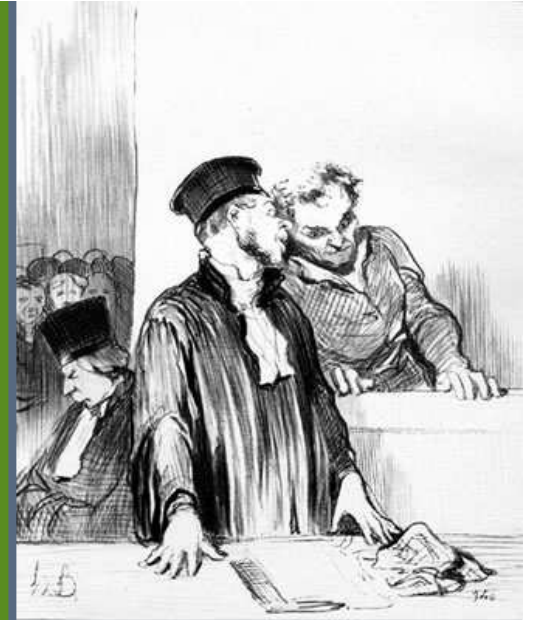
CONFIDENTIAL

Rule 1.6: Confidentiality of Information

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A lawyer shall not reveal client information without INFORMED CONSENT except...a lawyer may reveal client information to the extent the lawyer REASONABLY BELIEVES NECESSARY

- To prevent “reasonably certain death or substantial bodily harm”
- To prevent commission of crime/fraud that is “reasonably certain” to result in substantial injury to financial interests or property of another and in furtherance of which client used lawyer’s services
- To prevent, mitigate or rectify substantial injury that resulted from crime or fraud in furtherance of which client used lawyer’s services
- To secure legal advice re compliance with professional rules
- To establish claim/defense for lawyer
- To comply with other law/court order



Attorney / Client Privilege



What Is The Attorney-Client Privilege?

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Communication: Oral and/or written

“Privileged” persons:

- Client
- Attorney – including in-house counsel (“IHC”)
- Client ‘s Communicating agent
 - State law – control group vs. subject matter
 - Federal law – subject matter
- Lawyer’s Assisting agents

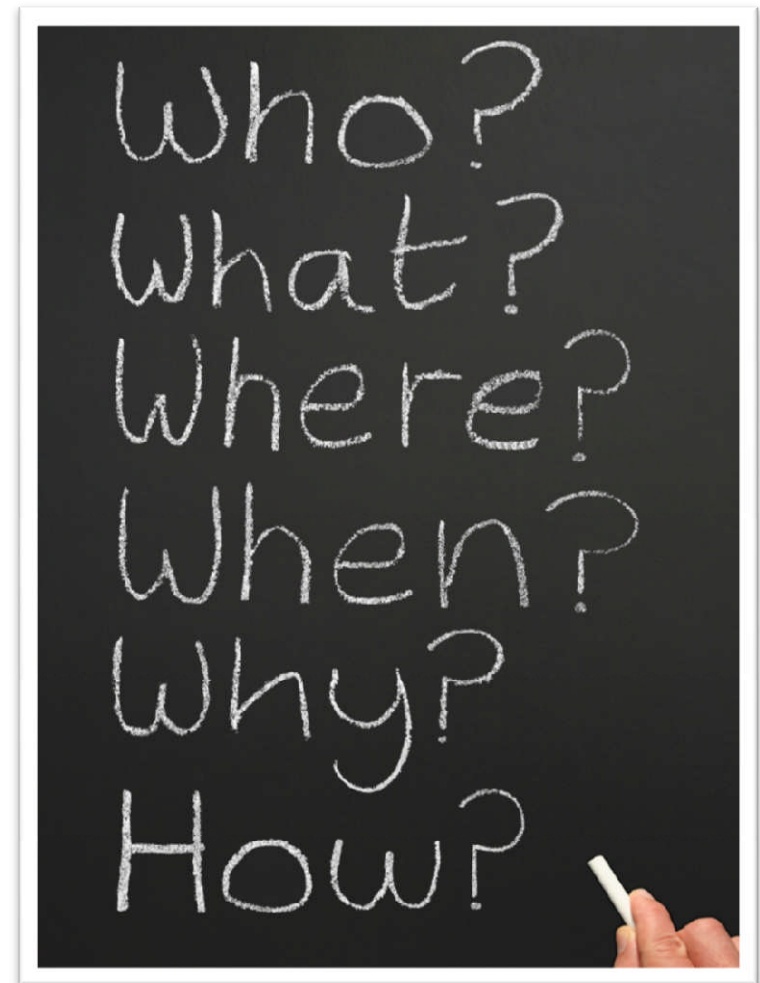
**For purposes of seeking, obtaining or
providing legal assistance to client:
Two-way street**



Scope of Privilege

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- Participants to the communication
- Purpose of communication
- Where communication takes place



Privileges In Foreign Jurisdictions

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Common Law Jurisdictions

- Can be broader than U.S.
- Can be narrower than U.S.
- Common law may be displaced by statute



Privileges In Foreign Jurisdictions

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Civil Law Jurisdictions

- Not a privilege - An obligation not to disclose confidential information:
 - By statute (codes of professional secrecy);
 - Professional conduct rules;
 - Local bar rules.
- Violation can lead to criminal sanctions.



Privileges In Foreign Jurisdictions

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Civil Law Jurisdictions

- Jurisdictional differences:
 - Documents in client's possession discoverable;
 - Attorney precluded from sharing information with client;
 - Attorney – not judge – decides on disclosure.



Privileges In Foreign Jurisdictions

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Civil Law Jurisdictions

- Some jurisdictions extend some protection to IHC under varying requirements/theories/restrictions.
- Some jurisdictions do not recognize any privilege between IHC and client:
 - IHC not independent – bound by employment relationship
 - IHC not entitled to bar membership or allowed to appear in court
- EC investigations - no regulations on privilege.
 - No recognition of privilege under case law for IHC or non-EU qualified lawyers.

Rule 5.5: Unauthorized Practice of Law

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**Generally must be admitted in jurisdiction
to practice law. Exceptions include:**

- Lawyer admitted in another jurisdiction practicing in state on “temporary basis”;
- Lawyer admitted in another state providing non-trial services to lawyer’s employer;

BUT WATCH OUT:

- CANNOT represent others;
- CANNOT assist another in “unauthorized practice of law.”

**Rule 3.4:
Fairness to Party and
Opposing Counsel**

**Rule 4.1:
Truthfulness**

**These provisions require ethical practices – no
obstruction or false statements**

Can be implicated by all aspects of work life

Can be implicated by personal dealings

Document Retention



Document Retention

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Is there a policy?

Do the employees live by it?

Can the employees live by it?

Rule 8.4: Misconduct

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It is professional misconduct for a lawyer to:

- a. violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- b. commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- c. engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- d. engage in conduct that is prejudicial to the administration of justice;
- e. state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; ...

Rule 8.3: Reporting Professional Misconduct

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- Required to report knowledge of another lawyer's violation of Professional Rules if raise “substantial question” of “honesty, trustworthiness or fitness as a lawyer” – not every breach.
- Reporting responsibilities differ in various jurisdictions.

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