



# Ethics 2014 IACP

Presented by  
Bill Amato & Eric Edwards

**“You Just Can’t Teach Ethics”**



# Ethics



**"We're able to cut back on legal fees by being more ethical."**



# Who is your client?

## ABA Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees

- ▶ (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
  - (1) is subject to Rule 1.9(c); and
  - (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.
- ▶ (b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
  - (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
  - (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.
- ▶ (c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.
- ▶ (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:
  - (1) is subject to Rules 1.7 and 1.9; and
  - (2) shall not:
    - (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or
    - (ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).
- ▶ (e) As used in this Rule, the term "matter" includes:
  - (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
  - (2) any other matter covered by the conflict of interest rules of the appropriate government agency.



# Hypothetical– Who is your client?

You are an Assistant City Attorney for City. You are representing the City and Officer Doe in an excessive force suit naming both the City and Doe as defendants. The facts are that 105 lb. Jane is suing the defendants because she claims that after being arrested for DUI, Doe used excessive force on her. As a result of this force, Jane claims that she sustained injuries (which is corroborated by her father and medical records). Doe claims that Jane “went ballistic” after her arrest and that he merely used self defense against Jane’s attack. Doe has two prior IAs in which an allegation of excessive force was made, but both were investigated and determined to be without merit. As you are preparing for trial, you meet with the Chief, City Attorney and reps from the insurance company. You feel that the case is winnable but does have some potential liability. The Chief feels very strongly that this case must be settled, and the City Attorney agrees. Doe does not want to settle this case under any circumstances.

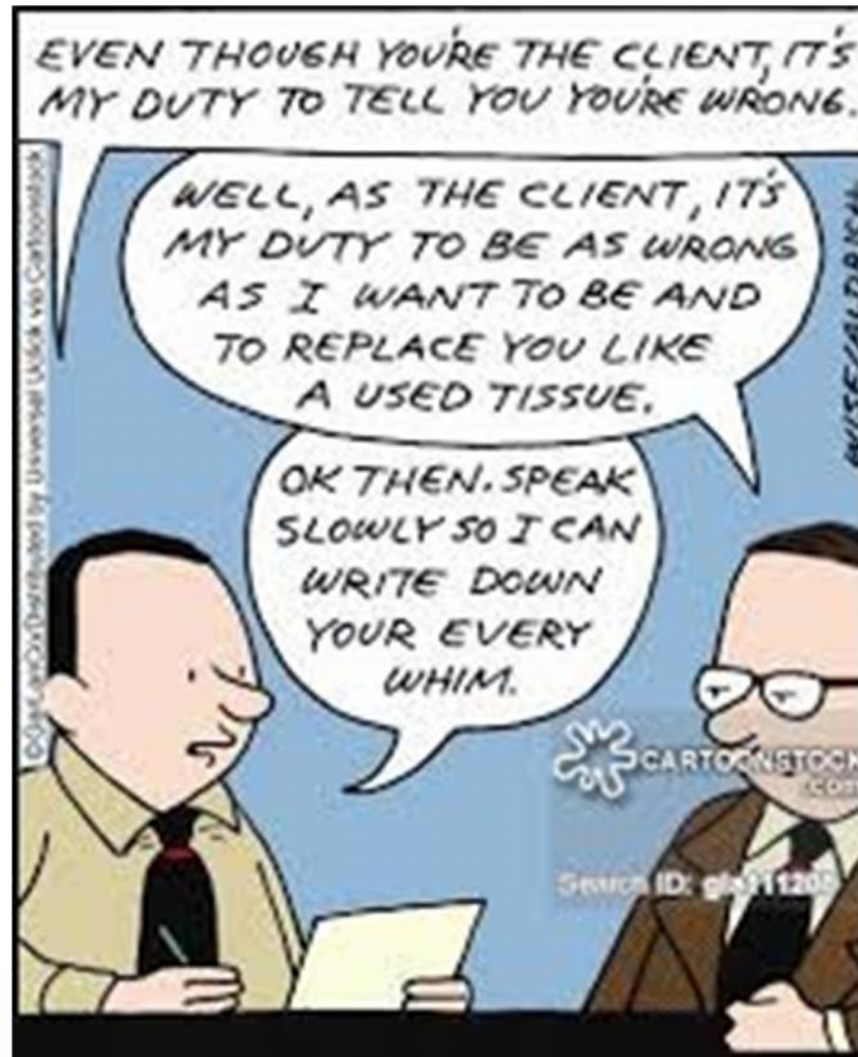
- ▶ Q: Do you have a conflict of interest between the Chief and Doe?
- ▶ Q: Does it matter if you answer to the City Attorney or the Chief?

During your trial prep, you come to realize that Doe’s disposition and demeanor are going to be significant issues at trial and gives you serious cause for concern.

- ▶ Q: Do you share this information with the Chief?
- ▶ Q: How do you handle your Clients?



# Duty to client



# Hypothetical– Duty to client

Your federal court of appeals decides a case holding that in an armed standoff, once a suspect is seized by virtue of being surrounded and ordered to surrender, the passage of time and treating the incident as a barricade waive the exigent circumstances and renews the warrant requirement.

After your tactical team and their chain of command are briefed they jointly state that the officers on your agency are not going to follow this holding. They believe it is an officer safety issue and the Chief agrees.

- ▶ Q: What is your duty?

After explaining the potential liability, civil and criminal, to the Chief and chain of command they still insist it is unsafe and they will not abide by the ruling.

- ▶ Q: Do you have a duty to go over the Chief's head?
- ▶ Q: Does it matter if you answer to the City Attorney or the Chief?



# Conflict of interest

- ▶ AZ Ethics Opinion 79–30
- ▶ AZ Ethics Opinion 81–5
- ▶ AZ Bar Opinion 81–27
- ▶ Other States (Wisconsin)





# AZ Ethics Opinion 79-30

December 31, 1979

- ▶ The City Attorney has assigned a Staff Attorney to represent the Civil Service Board in litigation and to provide general legal advice.
- ▶ The City Attorney's Office also represents the various City departments in appearances before the Civil Service Board involving an employee's challenge of discipline.
- ▶ This Opinion holds that the policy of the City Attorney's Office in this matter violates the terms of the Code of Professional Responsibility.
  - Canon 5: Refusing to accept or continue employment if the interests of another client may impair the independent professional judgment of the lawyer.
  - Canon 9: Should avoid even the appearance of professional impropriety



# AZ Ethics Opinion 81-5

March 17, 1981

- ▶ It is not possible for a governmental entity to represent the municipal corporation and the individual officials if they have differing interests.

Facts which would exonerate the individual defendants from liability would impose liability upon the towns, and vice versa.

Canon 5: Refusing to accept or continue employment if the interests of another client may impair the independent professional judgment of the lawyer.

- ▶ “If the individuals were joined merely as a matter of formality, in their official capacities only, and if the attorney could be reasonably certain that his would not change while the case was in progress, we would see no problem in the lawyer’s representing them as well as the towns”.

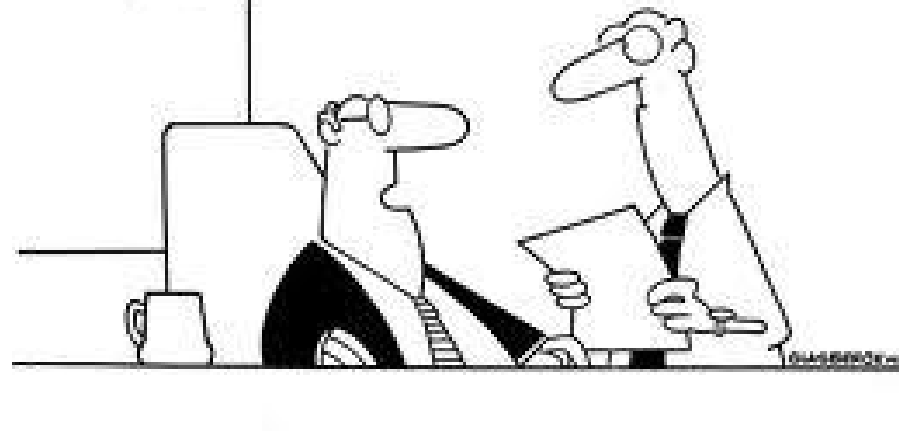


# AZ Bar Opinion 81-27

- ▶ Two police legal advisors
  - One advises primarily line officers
  - Second advises primarily administration and personnel management
- ▶ Question asked is whether either attorney can represent the Department at Personnel Board Hearings.
- ▶ Answer is “No”. Appearance of professional impropriety; nearly impossible to represent agency against the officers in personnel board free of compromising influences of or loyalties from associations and working with the individual.



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**"We've got to draw the line on unethical behavior.  
But draw it in pencil."**



# Confidentiality

## ABA Rule 1.6 Confidentiality of Information

- ▶ (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph.
- ▶ (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) to prevent reasonably certain death or substantial bodily harm;
  - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
  - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
  - (4) to secure legal advice about the lawyer's compliance with these Rules;
  - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
  - (6) to comply with other law or a court order; or
  - (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
- ▶ (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.



# 'Lincoln Lawyer' Video



# Hypothetical – Confidentiality

You are the Legal Advisor for City PD. You are sitting in your office one day when Officer Jones walks in and asks to speak with you. He starts telling you about a situation that happened last week when he stopped a suspect on the street. He describes the facts and circumstances to you and then tells you that he conducted a “Terry pat down” search of the suspect. This search led to him finding a baggie of cocaine on the suspect. He is questioning whether he had sufficient reasonable suspicion to conduct the search. This has been weighing on him, because suspect is a three time loser and is looking at 20 years in prison if convicted. Based on his account of the facts, you quickly come to the conclusion that he did not have reasonable suspicion. A few weeks later, you learn that Officer Jones testified in the case of State v. Suspect and the Suspect was convicted. You ask around and find out that Jones testimony was different than the facts he told you in your office. The new story appeared to be “modified” based on the conversation that you had with him.

- ▶ Q: Is your conversation with Officer Jones confidential?
- ▶ Q: Do you have a duty to report this to the Court?
- ▶ Q: Do you have a duty to report this to his supervisor?
- ▶ Q: Do you have a duty to report this to the prosecutor?
  - What about “Brady” implications?





*“The intricacies of attorney–client privilege are funny.  
But not ‘ha–ha’ funny ---  
more like ‘psych you’re not protected’ funny.”*



# Organization as a client

## ABA Rule 1.13 Organization As Client

- ▶ (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 to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then 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.
- ▶ (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 violation of law, and
  - (2) the lawyer reasonably believes that the violation 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.
- ▶ (d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.



# Organization as a client (cont.)

## ABA Rule 1.13 Organization As Client (cont.)

- ▶ (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.
- ▶ (f) In dealing with an organization's directors, officers, employees, members, shareholders 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.
- ▶ (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.



# Hypothetical– Organization as a client

Officer Smith responds to a prescription fraud call in City. He responds to the pharmacy and sees a female who matches the suspect description in a car in the parking lot of the pharmacy. The suspect attempts to flee by driving her car out of the parking lot. Officer Smith is close to the car as it begins to move. He issues commands to the driver/suspect to stop. The suspect does not stop. Officer Smith discharges his weapon three times at the car, striking and killing the suspect driver. In initial interviews, Officer Smith claims that he was in fear of the car when he discharged his weapon. Command staff, Internal Affairs staff and the local prosecutor all respond to the scene. Questions arise as to the reasonableness of Officer Smith's actions. The Legal Advisor for City chooses to question Officer Smith regarding the facts of the shooting as well as Officer Smith's perceptions at the time of the shooting.

- ▶ Q: Are the Legal Advisor's actions appropriate?
- ▶ Q: Does this create a conflict for the Agency?
- ▶ Q: Does this create a conflict for the Officer?
- ▶ Q: Was it ethical for the Legal Advisor to do this?
  - Does it matter if he did it on his own or at the behest of the Chief?
- ▶ Q: What about "walk-throughs"? Should Legal Advisors participate?



# Candor

## ABA Rule 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

- ▶ (a) make a false statement of material fact or law to a third person; or
- ▶ (b) 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.



# 'Liar Liar' Video



# Hypothetical- Candor

You are sitting in a staff meeting where the topic is an upcoming protest. The operational command states that they anticipate the protestors will be video recording the police response including individual officers giving commands and taking enforcement action. Op command states that officers will be instructed to arrest anyone recording them for violating the state 2 party consent wiretap law.

You are aware that several circuit courts of appeal have ruled that the public has a first amendment right to record the police in public.

- ▶ *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) “basic First Amendment principles” and federal case law “unambiguously” establish that private individuals possess “a constitutionally protected right to videotape police carrying out their duties.”
- ▶ *Smith v. Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) recognizing the “First Amendment right . . . to photograph or videotape police conduct.”
- ▶ *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) recognizing the “First Amendment right to film matters of public interest”.
- ▶ The First Amendment right to record police activity is limited only by “reasonable time, place, and manner restrictions.” *Glik*
- ▶ Q: Do you share this information with the Chief?
- ▶ Q: Does it matter if you firmly believe these arrests violate the 1<sup>st</sup> A?





But I followed all of the ABA's Model Rules.  
Who are you to question the ABA?



## 21<sup>st</sup> Century Ethics discussion topics

*Different ethics or different circumstances*

- ▶ E-mails
- ▶ Social media
- ▶ Cell phones
- ▶ Metadata
- ▶ Apple decision on encrypting phones







# Contact Information

Bill Amato

Tempe Police Department Legal Advisor

[bill\\_amato@tempe.gov](mailto:bill_amato@tempe.gov)

(480) 350-8610

Eric Edwards

Edwards & Ginn, P.C.

[ericbedwards@gmail.com](mailto:ericbedwards@gmail.com)

(602) 321-3249



# 10 of the “greatest” . . .



Atticus Finch  
*To Kill a  
Mockingbird*