

Ethics for Port Lawyers

2023 Washington Public Ports Association
Annual Meeting -Continuing Legal Education

Frank J. Chmelik – CSD Attorneys At Law, P.S.

TUESDAY, DECEMBER 5, 2023



Outline

- Who is the Client
- Decisions of the Organization
- Communication
- Attorney Client Privilege
- Misconduct at the Port
- Disclosures to Protect the Port and Disclosure to Protect Others
- Conflicts of Interest
- Lawyer as Advisor
- What is “Competency”
- Dealing with Person not Represented
- Ethical Issues with Remote Work

Who Is the Client?

- The port district is the client
 - **RPC 1.13** – “(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”
- Who are the “duly authorized constituents”
- Port districts – the commission
 - **RCW 53.12.010** – “(1) The powers of the port district shall be exercised through a port commission consisting of three or, when permitted by this title, five members.”
- The executive director – the delegation of powers resolution
 - **RCW 53.12.270** – “(1) The commission may delegate to the managing official of a port district such administrative powers and duties of the commission as it may deem proper for the efficient and proper management of port district operations. Any such delegation shall be authorized by appropriate resolution of the commission, which resolution must also establish guidelines and procedures for the managing official to follow.”

The Decisions of the Municipal Government

- Comment to RPC 1.13
 - *When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province.*
- But with regards to a government the comment to RPC 1.13 notes that:
 - *Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.*
- There are no specific statutes in Washington that would apply.

Communication

- RPC 1.4 requires lawyers to;
 - Promptly inform client about any issue needing informed consent
 - Reasonably consult with the client about the means by which the client's objectives are to be accomplished
 - Keep the client reasonably informed about the status of the matter
 - Promptly comply with reasonable requests for information
 - Inform the client on any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law
- And explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation

Communication Practice Tips

- Communicate early and often with the client
 - Follow up with a quick phone call or with an email
 - **Avoid a violation of the Open Public Meetings Act – Do Not Reply All**
 - Answer all phone calls and emails in a timely manner
- Communicate early and often with the law firm
 - Keep the attorney managing the port client relationship informed so the advice is consistent
 - Always immediately raise any malpractice concerns with the senior managers of the firm early and before talking with client
- Separate out business and legal advice
 - Tell the client “you ought to follow my legal advice – my business advise can be disregarded and is frequently disregarded because we lawyers are paid paranoids”
- Understand that once fully informed, the decision of the port commission is by definition “the correct decision.”

- Do not get caught up in commission politics
 - Always play it down the middle
 - Remind everyone that it is a lawyer's job to play it down the middle
 - Generally, inform all the commissioners of a question and your answer
- Give the port official requesting work a cost estimate or hours estimate even if they do not ask
- Provide your advice in a standard written format (memo)
 - Recite the facts known to you
 - Provide the issues in the form of a question
 - Provide the short answers
 - Provide a legal analysis
- Be confrontable with saying “My initial impression is X but I don’t know – I will get back to you on that issue”

Attorney-Client Privilege

- It is the client's privilege
 - The Commission owns the privilege
 - Staff information is privileged except to the Commission or individual commissioners
 - Each commissioner information is privileged except to the other commissioners
 - This can be a delicate situation and therefore consider setting the ground rules before the discussion
 - Can you share the information with other commissioners?
 - Can you share the information with the executive director?
 - Are you willing to take in the information?
- General Rule – RPC 1.6(a) The general rule is no disclosure unless client provides informed consent or impliedly authorized to carry out the representation of the client

Practice Tips -Attorney-Client Privilege

- Check the delegation of powers resolution to see if the executive director has the power to authorize a release of information – otherwise it goes to the commission unless an exception applies
- Confirm course of action in an email before the release
- Consider the Public Records Act and the cases that have held that agents of a government are holding public records (RCW 42.56)
- Do not use the attorney-client privilege as a sword – it is a shield
 - Parking records at the attorney's office
 - Copying attorneys on emails where no advice is provided

Misconduct (or at least perceived misconduct) at the Port

- RPC 1.13(b) - Misconduct or conflicts of interest must be reported to the municipal governments “duly authorized constituents”. For example, the commission
- Involve the municipal government auditor
 - RCW 43.09.185 - State agencies and local governments shall immediately report to the state auditor's office known or suspected loss of public funds or assets or other illegal activity
- Very difficult situation
 - No requirement for the lawyer to report outside the organization
 - Do not jump to conclusions
 - Encourage self-reporting
 - Roundtable these issues and include the port auditor
 - Consult the WSBA Ethics Hotline at 206-727-8284
 - Tell everyone involved what you must do so they can do the right thing

Disclosure to Protect the Port

- RPC 1.13(c) provides discretionary disclosure if:
 - Disclosure to highest authority in organization, and;
 - Refusal or failure to act in a timely and appropriate manner that is clearly a violation of the law (see RCW 43.09.185), and;
 - The lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then;
 - The lawyer may disclose to the extent necessary to prevent the substantial injury.

Disclosure to Protect Others

- General Rule – RPC 1.6(a) The general rule is no disclosure unless client provides informed consent or impliedly authorized to carry out the representation of the client
 - Some exceptions
 - **Shall** reveal information to “prevent reasonably certain death or substantial bodily harm”
 - **May** reveal information to prevent client committing a crime (note violation of law vs. crime)
 - **May** reveal information to prevent substantial injury to financial or property interests of another from client's commission of a crime or fraud of which the client used the lawyer's services
 - **May** reveal to seek legal advice about compliance with the RPCs
 - **May** reveal in a claim or defense of a controversy with the client (fees and malpractice)
 - **May** reveal to comply with Court order

Conflicts of Interest – Current Clients

- RPC 1.7(a) - General Rule – no concurrent conflict of interest permitted.
- The test is:
 - Representation of one client directly adverse to another client; or,
 - There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- But experience shows that municipal clients understand this rule in a much narrower sense
 - The (the firm) are our lawyers
- RPC 1.7(b) – After providing informed consent get a written waiver from each client giving informed consent if:
 - Reasonable belief will be able to provide competent representation
 - Allowed by law
 - No claim of one client against another in litigation or tribunal

Common Issues

- Interlocal agreements between two municipal clients
 - Explain the issue to both clients
 - Written waiver
 - Act as a scribe
 - After drafting see if each client wants an independent lawyer
- Construction company client bids on port work
 - Low bidder with a bid protest?
 - The protester?
- But see RPC 4.3

Conflicts of Interest – Former Clients

- RPC 1.9 – different rule for “former clients”
 - Representation test:
 - Same or substantially related matter; and,
 - In which that person’s interests are materially averse to the interests of the former client; and,
 - This extends to previous employment where the old firm represented a client; and,
 - Whose interests are materially averse to current client; and,
 - That lawyer had acquired protected information (limited imputation); and,
 - Use of information
 - relating to the representation to the disadvantage of the former client (unless generally known)
 - reveal information relating to the representation

Practice Tips

- Plan your practice – think ahead
 - Avoid taking on clients that may conflict with a port client
 - No port client tenants
 - Vendors
 - Contractors
- Perform conflicts checks (it's a big firm)
- Disclose early and often – actual, perceived and potential conflicts
 - If you see even a potential conflict, explain it to the client and propose a solution
 - Experience shows that ports want to know that you are not representing the other side either
 - Have another port experienced lawyer ready to go
 - Consider an isolation procedure
- For interlocal consider RPC 4.3
- When in doubt get a waiver – the clients appreciate the attention to the issue
- Watch for unforeseen developments
- Roundtable the issue
- Take the lead in hiring outside counsel
- Consider a preemptive waiver when accepting a client that may have a conflict with the port

The Lawyer As Advisor

- RPC 2.1

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

- The comments to the rule recognize

- Need for honest advice even if unpleasant or unwelcome
- Advice couched in narrow legal terms is of little value
- Technical legal advice only for clients “experienced in legal matters”
- Consider RPC 1.4

Competence

- RPC 1.1

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

- What is Competence

- A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar
- Can rely on expertise in a law firm
- Can acquire the competence through “necessary study”
- Emergency situation exception

Practice Tips for Competence in Representing Municipal Governments

Most work is statute based

- Read the statutes on your own time. For example,
 - Title 52 RCW for fire districts and regional fire protection service areas
 - Title 53 RCW for port districts
 - Title 54 RCW for PUDs
- Develop a topic list with statutory references
- Consult and collaborate with other lawyers
 - Everybody is busy
- Develop a plan for large projects or litigation
- Describe your or the firms experience in the area to the client
 - Have a plan to hire outside counsel
- The “big development” example

- Think carefully about:
- Defending the port in an employment or personal injury case
 - Can you be as objective as another insurance defense counsel?
 - You know the folks involved at the port (in an employment case maybe both parties)
 - Firing executive directors or senior managers

Dealing With Person Not Represented

- RPC 4.3 Limitations
 - Cannot indicate that the lawyer is disinterested
 - Must clarify whom you represent
 - Do not give legal advice to an unrepresented person, other than the advice to secure the services of another legal practitioner, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client
- This can occur more often with a municipal client
 - Members of the public
 - Tenants

Practice Tips for Dealing with Unrepresented Persons

- Be extremely careful to make clear who your client is
- Explain the opposing interests
- Always encourage them to seek the services of a lawyer
- Never say “you don’t need a lawyer”
- Recognize this can be the basis of a bar complaint

Issues Working Remotely – Group Discussion

- Working remotely may impact your representation
- RPC 1.1 Competence
 - Can you effectively collaborate?
- RPC 1.6 Confidentiality of Information
 - Can you maintain confidentiality with a Zoom call at your kitchen table?
 - Even the fact you are representing a client is confidential
 - The “small town” problem
- Can you maintain the confidentiality of files?

QUESTIONS?

CSD | ATTORNEYS
AT LAW