

ETHICAL IMPLICATIONS & PROFESSIONAL RESPONSIBILITY

KATHRYN GABHART
EXECUTIVE DIRECTOR
EXECUTIVE BRANCH ETHICS COMMISSION

&

CARMINE IACCARINO
EXECUTIVE DIRECTOR
OFFICE OF LEGAL SERVICES
PUBLIC PROTECTION CABINET

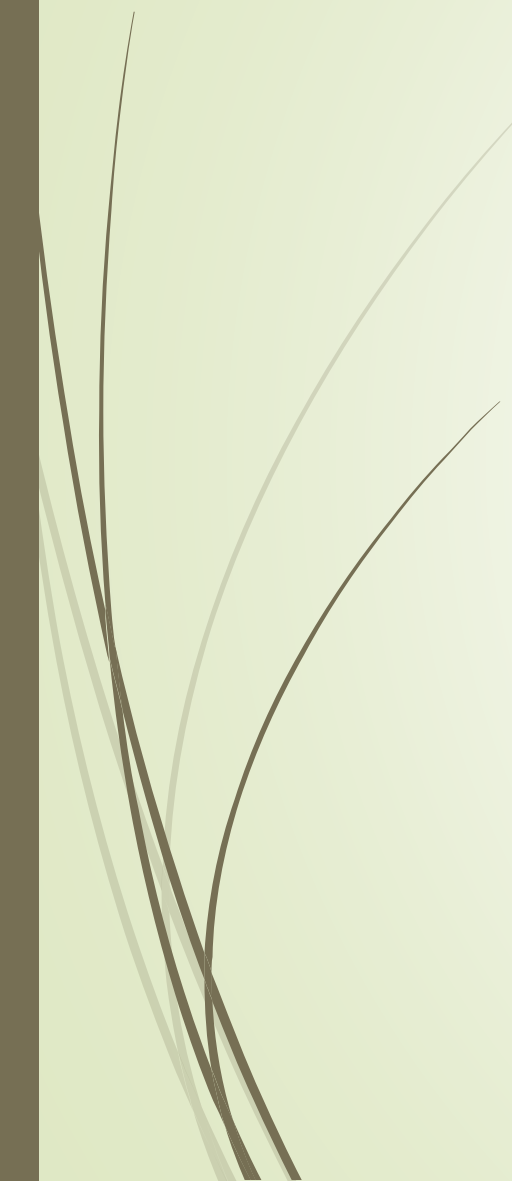


SUPREME COURT RULES OF PROFESSIONAL CONDUCT, SCR 3.130

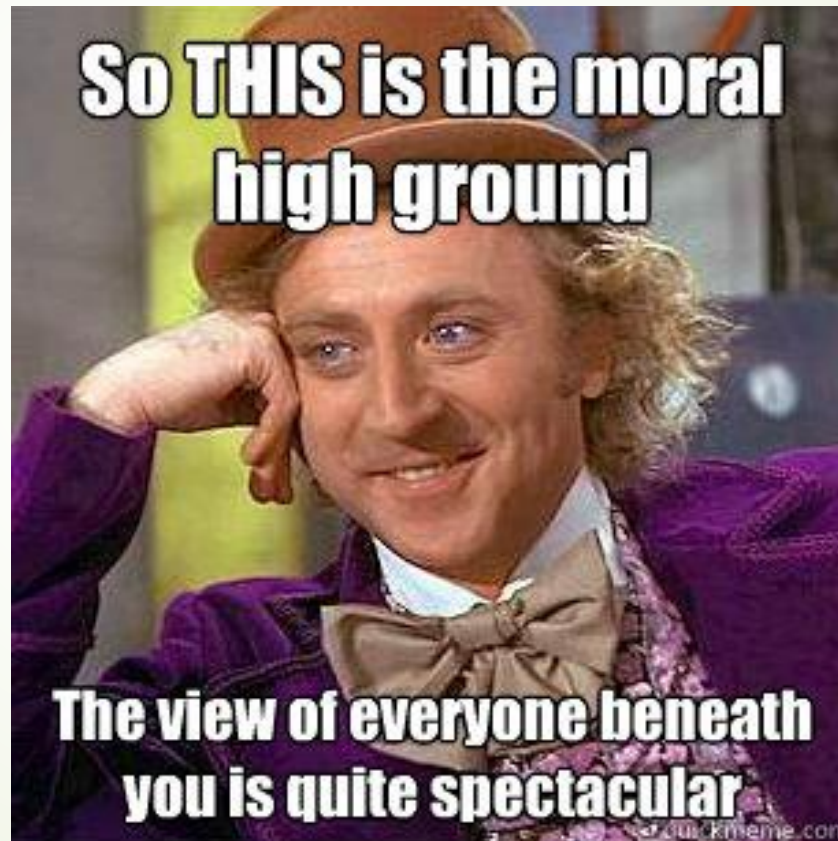
- ▶ KBA ETHICS HOTLINE (502) 564-3795
- ▶ WWW.KYBAR.ORG
- ▶ ETHICS HOTLINE OPINION CAN SERVE AS A DEFENSE TO A LATER COMPLAINT OF MISCONDUCT WHICH ARISES FROM THE SAME FACTS



EXECUTIVE BRANCH CODE OF ETHICS KRS CHAPTER 11A


- ▶ ENFORCED BY THE EXECUTIVE BRANCH ETHICS COMMISSION
 - ▶ WWW.ETHICS.KY.GOV
 - ▶ 502-564-7954
 - ▶ ADVICE FROM THE STAFF OF THE ETHICS COMMISSION WILL NOT SERVE AS A COMPLETE DEFENSE, BUT WILL BE TAKEN INTO ACCOUNT BY THE COMMISSION IF THE STAFF GIVES YOU INACCURATE ADVICE
 - ▶ FORMAL ADVISORY OPINIONS ISSUED BY COMMISSION
- 

EXAMPLES OF VIOLATIONS –
BE A STUDENT OF HISTORY





RULE 2.1 – Lawyer as Advisor

- ▶ 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.
- 



RULE 1.13: ORGANIZATION AS CLIENT

- ▶ If a lawyer for an organization knows that an officer is engaged in action that is 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.
- ▶ If the lawyer reasonably believes that it is necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization.
- ▶ If the highest authority in the organization refuses to act, then the lawyer may reveal the information outside of the organization to other authorities to prevent substantial injury to the organization.



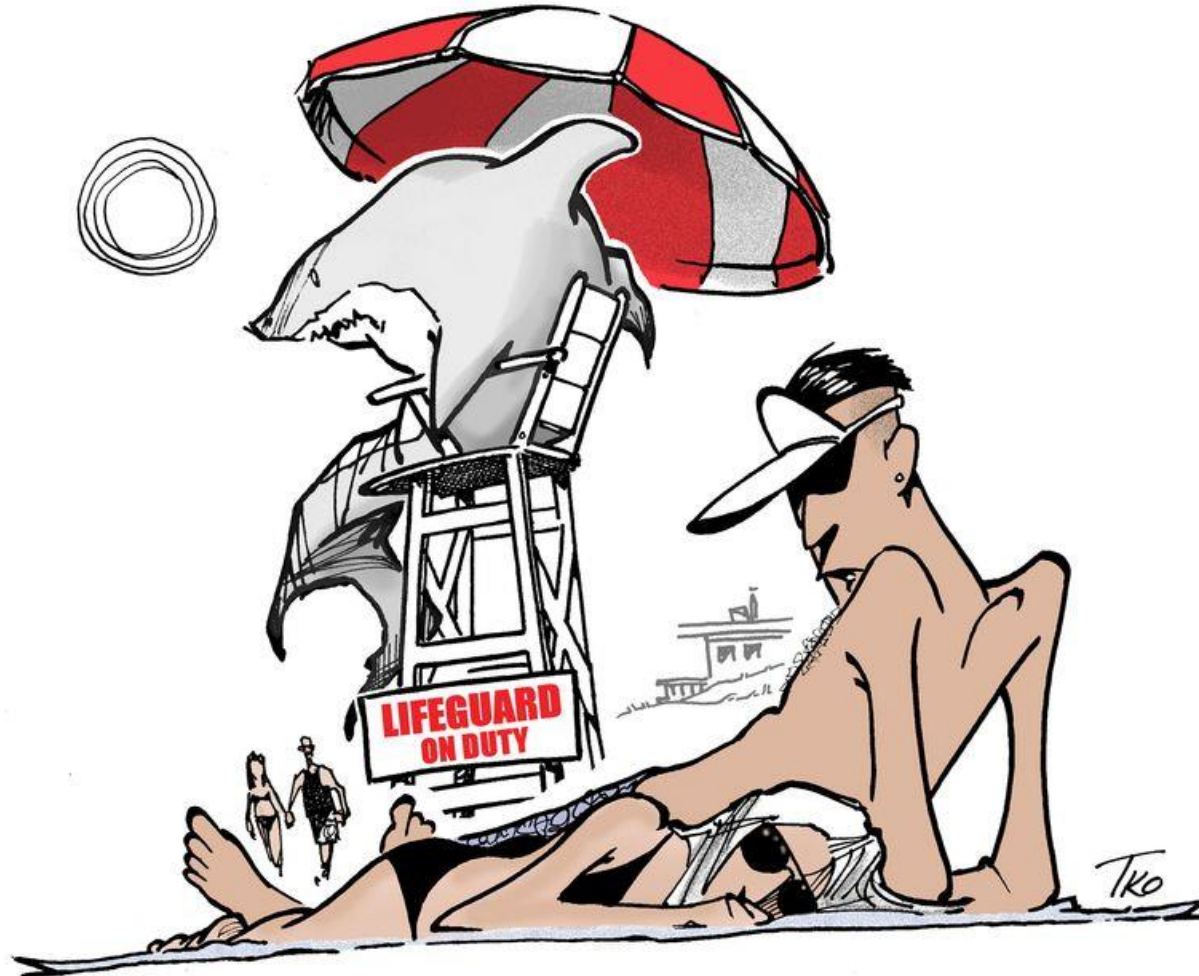
RULE 1.13: ORGANIZATION AS CLIENT

- ▶ Supreme Court Commentary, Comment (9): Government Agency
- ▶ 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.
- ▶ 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.
- ▶ 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.

DUTY OF LOYALTY



CONFLICTS OF INTEREST



“So, I’m the only one who sees a conflict of interest here?”



RULE 1.7: CONFLICTS OF INTEREST – CURRENT CLIENTS

- ▶ A lawyer shall not represent a client if the representation involves a concurrent conflict of interest, which exists when
 - ▶ The representation of one client will be 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, a third person, or by a personal interest of the lawyer.



Organization as Client (1.13)

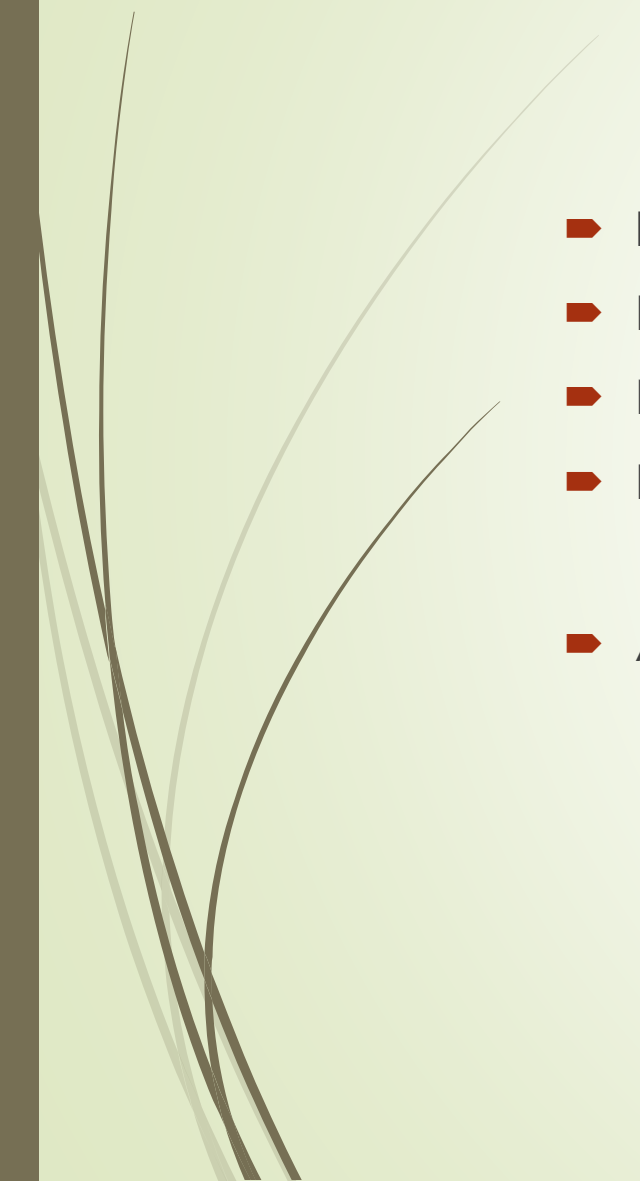
VS.

Conflict of Interest (1.7)

- ▶ Agency counsel must evaluate when a conflict of interest arises to such a level that the attorney cannot represent both the agency and an individual employee/official of that agency.
- ▶ Determine when the agency's interests and the individual employees/officials interest diverge:
 - ▶ Should the agency use one counsel to represent both the agency and employee in the same proceeding?
 - ▶ Should separate attorneys from the same agency represent the divergent interests?
 - ▶ Should the agency obtain outside counsel at additional expense to the Commonwealth?



GENERAL STANDARDS OF CONDUCT


- INDEPENDENT & IMPARTIAL
 - FOLLOW ESTABLISHED PROCESSES OF GOVERNEMENT
 - NOT USE PUBLIC OFFICE FOR PERSONAL BENEFIT
 - PROMOTE THE PUBLIC'S CONFIDENCE IN GOVERNMENT
 - "I'M FROM THE GOVERNMENT. I'M HERE TO HELP" AND MEAN IT!
 - AVOID CONFLICTS OF INTEREST
- 

PERSONAL BEHAVIOR



WHISTLEBLOWER ACT

- ▶ KRS 61.102
- ▶ NOTABLE CASE LAW:
 - ▶ **Davidson v. Commonwealth:** 4 elements to a whistleblower case.
 - ▶ **Workforce Development Cabinet v. Gaines:** A mere internal report to next line supervisor deemed sufficient to put employer on notice.
 - ▶ **Thornton v. Office of the Fayette County Attorney:**
 - ▶ “Suspected conduct” can be reported and implies a liberal interpretation
 - ▶ 2nd Hand Hearsay can be reported
 - ▶ **Moss v. Kentucky State University:** Workplace disagreements about internal job-related activities and how they should be conducted is not sufficient to report.
 - ▶ **Pennyrile Allied Comm. Servs., Inc. v. Rogers:** Merely complaining to boss about boss's own conduct is not a report.
 - ▶ **Kearney v. University of Kentucky:** (See Appendix A)



Give a Moment's Consideration

"I wasn't crazy!" – a homeless woman's long war to prove the feds owe her \$100,000. The Washington Post, August 22, 2016 (Appendix B)

- ▶ Don't immediately dismiss a report out of hand because the person reporting the conduct has a dubious history, seems hysterical, or the report sounds outrageous
- ▶ Sometimes it takes some patience to parse the facts from the paranoia
- ▶ A suspicious report can sometimes lead to a legitimate concern
- ▶ This is good government



BUZZ WORDS

HOSTILITY

vs.

“HOSTILE ENVIRONMENT”

PETTY GRIPE

vs.

DISCRIMINATION

ANGRY

vs.

DANGEROUS

PLAYFUL BANTER

vs.

SEXUAL HARASSMENT

WASTEFUL SPENDING vs.

UNETHICAL SPENDING



RESOURCES

- ETHICS ADVISORY OPINIONS
- KENTUCKY EMPLOYEES MEDIATION PROGRAM (KEMP)
- WORKPLACE MEDIATION
- KENTUCKY EMPLOYEES ASSISTANCE PROGRAM (KEAP)

IGNORING THE WARNING SIGNS, DISMISSING COMPLAINTS OUT OF HAND, OR TURNING A BLIND EYE CAN LEAD TO ETHICS VIOLATIONS, POLICY VIOLATIONS, AND POSSIBLE LITIGATION

WHO'S HURT? THE PEOPLE – TAXPAYERS WHO FOOT THE BILL



RULES 8.3 & 8.4

MISCONDUCT & REPORTING IT

- 8.4: Executive Branch Ethics Code violations have been found to be conduct demonstrating conduct involving “dishonesty, fraud, deceit, or misrepresentation.”
- 8.3: Requires lawyers to report their own or other’s conduct demonstrating “dishonesty, fraud, deceit or misrepresentation.”



Rule 1.9: DUTIES TO FORMER CLIENTS

- ▶ A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or **substantially related matter** in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
- ▶ However, former public servants cannot get informed consent within first six months or 1 year post-employment when Ethics Code provisions in KRS 11A.040(6) to (9) apply.



RULE 1.11: FORMER GOVERNMENT OFFICERS

- Confidential Government Information
- Conflicts of Interest for New Employer
- Negotiating for Employment

RUN THIS BY THE LEGAL DEPARTMENT, BUT RUN SUPER FAST SO THE ETHICS DEPARTMENT DOESN'T SEE IT.

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THANK YOU FOR YOUR ATTENTION

