The Government Lawyer's Conundrum: Who is My Client, Who Do I Represent, Who Thinks She or He's My Client, and Who Do I Really Have to Listen to?

By Jeffrey D. Lester



Unlike most attorneys in private practice, government attorneys often find themselves in the midst of an identity crisis upon accepting employment with a governmental entity. That is, these legal representatives have to make a determination about who they are before they can begin adequate representation of their new client. Are they the lawyer for the government as an organization? Are they the lawyer for the Board or Council that calls the shots for the rest of the City? What about the City Manager? Do they represent her? Or maybe they're the lawyer for staff or directors? Or, as a government attorney acting in the public interest, does the attorney represent the public at large? This article reviews and analyzes where the client relationship begins, and provides a few helpful questions attorneys should ask upon undertaking representation of a local government.

In private practice, the identity of the client (oftentimes distinguished from the person paying for the client) is very ascertainable: it is the person who receives the legal service rendered, and its attendant benefits. The private practitioner simply asks: "For whom am I performing the service?" In contrast with the private practitioner, the first question for most government lawyers is, "Who is my client?" The answer to this becomes an extremely important link in the chain of ongoing representation: Given that an attorney's ethical responsibilities derive largely from the attorney's duty of loyalty to the client, identification of the client is necessarily primary.[1]

Rule 1.13

Many scholarly undertakings begin analysis of this subject by reference to the American Bar Association (ABA) Model Rules of Professional Conduct, specifically Rule 1.13,[2] governing the client-lawyer relationship and titled "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.

(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.[3]

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Initially, then, one should note that the Rule provides that the lawyer representing an organization represents the *organization.* In the case of a municipal corporation, the corporation itself is the organization, and the lawyer represents the corporation and not the individual officers.[4] The Rule goes on to provide, however, that the representation of the organization takes place with the entity "acting through its duly authorized constituents." Therein lies the rub: who are the "duly authorized constituents" doing the "acting" in the government context? Figuring out these "constituents" will aid in determining the identity of the client, but even determining these constituents is not a simple exercise.[5] It is a multifaceted process and varies given the circumstances surrounding the representation and the constituency.[6]

Identifying a Client

Among the possible results when attempting to identify the lawyer's governmental client are: (1) the public; (2) the government as a government; (3) the particular agency for which the particular attorney works; or (4) individual officers (agents) within the agency.[7] Although it may seem that every citizen who is angry at local government believes that he or she has an individual right to legal services from local government counsel, the concept of "the public" as the governmental client is nebulous, at best, and fraught with dangerous possibilities for the local government practitioner. If "the public" is the client, who, then, properly directs the actions of the attorney? Who makes the decisions and who pays the bills? What happens when the public does not have a uniform stand on a particular issue? How does the local government lawyer go about her representation? What if the public's stand on the issue changes during the course of the representation? Such difficulties in qualifying representation point directly away from the imprecise "public" as the client of the local government practitioner. There remains a duty on the part of the government lawyer to take the public interest into account, but there is no general attorney-client relationship with members of the public "for they are neither the corporate entity that is the client nor agents of the [local government] authorized by law to act on its behalf."[8]

This still leaves the question of the individual officers as agents of the organization. As noted, the Rule contemplates that the organization will have to act through flesh and blood humans acting on behalf of the organization.[9] A board of directors makes policy decisions which have far-reaching impact on the organization; a chief executive officer and other officers and employees make still more decisions and follow the directives of the board. The attorney facilitates performance by all of these constituencies to the greater good of the organization. This utopian business model works like a well-run symphony when everyone

continued on page 26



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The Government Lawyer's Conundrum *continued from page 25*

follows the same temporal beat: the organization meets goals and objectives, performs the way it should, and all is right with the corporate world. So long as everyone is on the same page with the conductor, the organizational orchestra performs without a hiccup or the need for change of conductor. But smooth, consistent performance rarely leads to malpractice litigation or ethical complaints. It is when the organization hits sour notes that complaints about the lawyers hit the fan.

There is an additional reason for identifying the client early on: the lawyer may be called upon to explain the identity of the client if he or she knows the organization's interests are adverse to the pesky constituents with whom the lawyer is interacting.[10] How can the lawyer possibly explain this identity if the lawyer hasn't yet made such an identification in his or her own mind, at the time when the adverse situation arises? And, even though it is almost as easy to dismiss non-client constituents as to just ignore them in the first place, consider this: these people often think that the organizational attorney is also *their* attorney and they are counting on *their* attorney to protect them, look out for them, and advise them. Being dismissive in such a situation creates ill-will for the profession, and may cause an actual avoidable injury—an injury, moreover, which could have been avoided had the lawyer simply known, and communicated, the reality of the client identity. For example, an unsuspecting constituent of the corporation who thinks of the municipal corporation attorney as his own attorney may provide what ought to be considered confidential information to the local government attorney, thereby waiving the privilege that he would have been able to assert if he'd confided the information to his private counsel instead. Many times this is done because the ill-informed constituent doesn't understand—or is even aware of—the general rule of corporate representation.[11] In other words, the lawyer must do his or her level best to inform the constituents of the organization that they are merely "agents" of the client, they themselves are not his clients, and, depending upon the particular circumstances involved, they may have no reasonable expectation of confidentiality or privilege in their communications with the government attorney.[12]

For Example...

When these constituents act to further the best interests of the organization, the attorney's job is relatively easy, but what does the lawyer do when the constituent is not acting in the interests of the organization? An in-house lawyer, representing a local government, is contacted by the director of the human resources department of that local government. The director asks for help in investigating a sexual harassment claim filed by an employee against a vendor of the local government. The director gives a detailed explanation of her understanding of the complaint, and states that the complainant has indicated he will only talk to in-house counsel. Accordingly, counsel makes herself available to assist in interviewing the complainant. The complainant, speaking directly with in-house counsel, provides a lengthy soliloquy on the evils of the vendor's conduct and his boss's complicity. He tells counsel how much he appreciates her help and guidance, and how he trusts no one in the organization but her.

Following these disclosures and as part of the investigation, the employee's departmental director is next brought in for questioning. This person also speaks directly with the in-house counsel, and provides what he considers to be confidential information on a number of subjects, many of which could be potentially incriminating or, at the very least, debilitating to his career.

Afterwards, the human resources director confides to the attorney that she has been complicit in the treatment of the complainant: he had complained to her about the vendor and his director previously, but she'd forgotten all about it and never followed up. She also knows that the departmental director had ignored the matter, but has never mentioned it to him or anyone in the government hierarchy. She tells the attorney that she trusts her to help her and not get her "in trouble" after all of their years working together.

At this point, three constituents of the organization likely feel as if they've provided confidential or maybe even "privileged" information to the attorney. All three—because of the attorney's disarming style and ease of questioning—feel as if the attorney is, at the very least, acting as that person's attorney and will keep confidential everything disclosed to her. If the attorney does nothing in the first instance to counter such expectations, they may be justified.

So what's a competent municipal attorney to do? In most instances of a potential conflict of interest, the attorney must communicate, clearly, to *each* constituent, that it is the organization, and not the constituent, that is the actual client to whom the lawyer's duty of confidentiality will be owed. It is the corporation to whom any attorney-client privilege will apply in the first instance.[13] When the corporation is a municipality, it is safe to assume that the privilege will attach to the municipality as the client.[14] In those circumstances where there are conflicts, that communication is wisely put in writing for the benefit of the constituent and the organization. If the government official is the client as well as the constituent, communicate that as well. If the government official is neither represented by the government attorney individually, nor as an organization official, communicate that, too, or be prepared to face the consequences of an unnecessary conflict of interest.[15] In such circumstances, it is best to communicate that privilege or confidence is unlikely to be maintained for government attorneys who receive information related to criminal investigations or allegations of criminal wrongdoing.[16] This is especially true when the information received by the lawyer was made by the employee or officer in his or her corporate capacity and related only to corporate—as opposed to personal—matters.[17]

Note, though, that it is not uncommon in municipal law departments to refer to every individual related to the

particular local government as the "client;" similarly, routine practice finds the local government attorney referring to a board as the "client board." Be warned that separate perils await the innocent—but careless—practitioner in such cases. In fact, if the practitioner pushes forward in representing every board or employee indiscriminately, she may find herself—and her department—unable to represent anyone in later litigation. Although by no means exhaustive or exclusive, the following questions will help point an attorney in the right direction to initiate his or her local government practice.

A Checklist

Here are the ten questions an attorney should ask upon beginning to represent a local government:

1. Who is my client?
2. Who are the constituencies acting for the client?
3. Do any of the constituents reasonably believe that the municipal attorney is acting on the constituents' behalf or otherwise representing the constituents?
4. Have any of them actually indicated such a belief?[18]
5. Have I explained that any privilege concerning corporate matters belongs solely to the municipal corporation and not to the individual and can be waived by the municipal corporation without the individual's concurrence?
6. Are there any conflicts currently between the constituencies *and* my client?
7. Are there any conflicts currently between the constituencies *of* my client?
8. If no current conflict exists, are conflicts likely to arise in the future, and under what circumstances?
9. Have I communicated clearly, and in writing, with the organization's constituencies to eliminate confusion about representation and avoid conflicts of interest?
10. Have I protected the confidences and privilege of my actual client?

Conclusion

As one writer notes about conflicts of interest cases, in "the real world what makes these types of situations difficult is that the facts of a given situation may not be clear."[19] While the Model Rules provide something of a roadmap, municipal counsel need to make sure they know who the organizational client is, and that the constituent actors of their client also have an appreciation of the attendant confidentiality and representational rules.

So what's a competent municipal attorney to do? In most instances of a potential conflict of interest, the attorney must communicate, clearly, to each constituent that it is the organization, and not the constituent, that is the actual client to whom the lawyer's duty of confidentiality will be owed.

Notes

1. Cathleen Cavell, *Public Interest: Government Lawyers, Confidences and Conflicts* (Sept. 1999) Ethical Lawyering in Massachusetts, Massachusetts Board of Bar Overseers. Available online at http://www.mass.gov/obcbbo/pub_sec.htm.
2. Model Rules of Prof'l Conduct R. 1.13. Many states follow Rule 1.13. *See, e.g.* Iowa Rules of Professional Conduct, Rule 32:1.13; Texas Disciplinary Rules of Professional Conduct, Rule 1.12; 2010 Illinois Professional Rules of Conduct, Rule 1.13; Montana Rules of Professional Conduct, Rule 1.13. *See also* California Rules of Professional Conduct, Rule 3-600(A).
3. Model Rules of Prof'l Conduct R. 1.13.
4. *See, e.g.* Ross v. City of Memphis, 423 F.3d 596, 605 (6th Cir. 2005); California Rules of Professional Conduct, Rule 3-600(A). *See also* Gregory W. Stepanicich, *City Attorney Ethics: The Client, Confidentiality and Misconduct, Paper presented at California League of Cities, 2011 Spring Conference,* May 5, 2011 ("Although the City Attorney regularly advises individual officers and employees in the City, the client is the City as an organization").
5. Cathleen Cavell, *supra* note 1 ("The task of identifying the government lawyer's client is not straightforward. Is it the lawyer's supervisor? The division head? The agency itself? The public interest? Without conclusively identifying the client, the government lawyer cannot conform his or her conduct to the preservation of client confidences required by [the Rules of Professional Conduct].").
6. *See, e.g,* Gray v. Rhode Island Dept. of Children, Youth & Families, 937 F. Supp 153, 157-58 (D.R.I. 1996) ("Ascertaining who the client really is can be a complex affair when a governmental entity is involved. The definition of 'client' may differ depending on whether the lawyer is representing an individual or an agency, and whose interests are being served by the legal advice.").
7. Charles W. Wolfram, Modern Legal Ethics, § 13.9.2 (1986). *See also* Anna P. Hemingway, *The Government Attorney's Conflicting Obligations*, 9 Widener J. Pub. L. 227 (2000) ("Is the client the government, an agency official, the agency itself or the public interest?' noting that this dilemma becomes increasingly complex when the complicated and even conflicting responsibilities of the government practitioner are involved.").
8. 82 Op. Att'y Gen. 15, 16 (Md. 1997).
9. Model Rules of Prof'l Conduct R. 1.13(a).
10. Model Rules of Prof'l Conduct R. 1.13(f).
11. *See, e.g.*, In re Grand Jury Subpoena, 274 F.3d 563, 571 (1st Cir. 2001) ("The default assumption is that the attorney only represents the corporate entity, not the individuals within the corporate sphere.").
12. *See* Anna P Hemingway, *supra* note 7 at 232.
13. Upjohn Co. v. United States, 449 U.S. 383, 389-90 (1981) (complications in the application of the privilege arise when a corporation is involved, but assumes the privilege applies when the

continued on page 39

2011 U.S. LEXIS 5204 (U.S. Sept. 27, 2011) (No. 10-1018), on the question of whether outside counsel, retained to work with city employees to conduct an internal affairs investigation, was precluded from asserting qualified immunity solely because of his status as a private lawyer and not that of a government employee. In that case, the attorney, Filasky, acting on the instructions of the fire chief, ordered the plaintiff firefighter to produce certain items at his home for inspection. The plaintiff alleged this was a violation of his Fourth and Fourteenth Amendment rights. The Ninth Circuit found Delia's constitutional right under the Fourth Amendment, to be protected from a warrantless, unreasonable compelled search of his home, was violated. However, because this right, under these or similar facts, was not clearly established at the time of the constitutional violation, it affirmed the district court's order granting qualified immunity to the individual City defendants, but reversed the grant of qualified immunity to Filarsky and remanded. The appellate court stated it was bound by circuit precedent, *Gonzalez v. Spencer*, 336 F.3d 832 (9th Cir. 2003), where the Ninth Circuit had ruled a private attorney representing a county was not entitled to qualified immunity. M.

Lawyer's Conundrum

cont'd from page 27

client is a corporation); MacKenzie-Childs LLC v. MacKenzie-Childs, 262 F.R.D 241, 248 (W.D.N.Y. 2009) (privilege attaching to communications on corporate matters between corporate employees and corporate counsel belongs to the corporation and not to the individual employee).

14. Hopper v. Frank, 16 F.3d 92, 96 (5th Cir. 1994) ("There is no logical reason to distinguish partnerships from corporations or *other legal entities* in determining the client a lawyer represents.") (emphasis added).

15. Geoffrey C. Hazard, Jr, *Symposium: Legal Ethics for Government Lawyers: Straight Talk For Tough Times: Conflicts of Interest in Representation of Public Agencies in Civil Matters*, 9 WIDENER J. PUB. L. 211, 215-217 (2000).

16. There is a general duty in public service calling upon government employees and agencies to favor disclosure over concealment. In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 920 (8th Cir. 1997) ("We believe the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials. We also believe that to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets.").

17. United States v. Norris, 722 F. Supp. 2d 632, 637 (E.D. Pa. 2010). *Norris* lays out in excellent detail the five-part test from *In the matter of Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 123 (3d Cir. 1986), for determining whether or not a private individual can claim attorney-client privilege, noting that the person claiming the privilege has the burden of proving the existence of each element of it.

18. For an individual to claim a privilege based on communications with corporate counsel, the individual corporate officer must indicate to the attorney that the advice sought is sought in his individual capacity. United States v. Dakota, 197 F.3d 821, 825 (6th Cir. 1999) ("Absent an indication that the lawyer should act in a capacity other than that of the company's lawyer, a corporate officer will not have a privilege"). *See also*, In re Grand Jury Proceedings, 570 F.2d 562, 563 (6th Cir. 1978), *aff'g* 434 F. Supp. 648, 650 (E.D. Mich. 1977) (court requires that the individual officer seeking a personal privilege clearly claim that he is seeking legal advice in his individual capacity).

19. Gregory W. Stepanicich, *supra* note 4. M.

Inside Canada

cont'd from page 28

indicating changes to that Act. A preamble was needed to set out "broad overarching principles;" the Act should be extended to include "private interests" beyond the existing "pecuniary interests" covered by the Act; and the MCIA should be extended beyond the legislative and deliberative functions of a municipal council (for example, to apply to all meetings attended by council members in their official capacities). In addition, the conflict of interest sanctions in the MCIA needed to include lesser sanctions: suspensions and a form of probation for an elected member, a reprimand publicly made by a judge, and a requirement for a formal apology by the member. Standing to being action under the MCIA should be broadened, and, in the interest of procedural fairness, the Act should explicitly state that members were able to make submissions regarding findings in integrity commissioners' reports or a recommendation that a penalty be imposed under a municipality's own code of conduct. "I make these findings with a measure of regret, having regard to the mayor's unique history of public service," Justice Cunningham noted, but he concluded that all of Ontario's municipalities require "a better ethical infrastructure."

It remains to be seen to what extent the Ontario legislature (and that of any other province) incorporates these or similar recommendations into amended municipal legislation. Copies of the 386-page Report are available online at http://www.mississaugainquiry.ca. M.

