All in the Municipal Family:
Concurrent Conflicts, Model Rule 1.7, and the Government Lawyer

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The "municipal family doctrine," as it is called in New Jersey, "generally provides that, in order to avoid the appearance of impropriety, a lawyer or law firm may not contemporaneously represent two public agencies, boards, or courts within the same public entity."[1] The doctrine grew out of interpretations of the ABA Model Code of Professional Responsibility of 1969 ("Model Code"), particularly Canon 9.[2] The Model Code had no rule specifically dealing with the problem of concurrent representation of multiple clients by government lawyers.[3] In contrast, however, the Model Code's successor,[4] the ABA Model Rules of Professional Conduct ("Model Rules"), has such a rule and makes it expressly applicable to government lawyers.[5]

As explained in a recent New Jersey opinion,[6] the adoption of a concurrent representation rule applicable to government lawyers, coupled with the decision not to carry forward the "appearance of impropriety" concept from the Model Code into the Model Rules, requires a re-examination of the municipal family doctrine. This paper considers some of the implications for the government lawyer of the shift to the more statute-like approach in the Model Rules.[7]

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[1] In re Supreme Court Advisory Committee on Professional Ethics Opinion No. 697, 911 A.2d 51, 53 (n. 2) (N.J. 2006), citing In re Opinion 452 of the Advisory Comm. on Prof'essional Ethics, 432 A.2d 829 (1981). The doctrine also prohibits the concurrent representation of a public entity or its agencies, boards, or courts and private clients before that public entity, or its agencies, boards, or courts. *Id.* citing In the Matter of Inquiry to the Advisory Comm. on Professional Ethics Index No. 58-91(B), 616 A.2d 1290 (1992).

[2] Perillo v. Advisory Committee on Professional Ethics, 416 A.2d 801, 803 (N.J. 1980). Canon 9 stated, "A Lawyer Should Avoid Even the Appearance of Professional Impropriety" and Disciplinary Rule ("DR") 9-101 was captioned "Avoiding Even the Appearance of Impropriety." See, generally, Edward C. Brewer, III, *Some Thoughts on the Process of Making Ethics Rules, Including How to Make the Appearance of Impropriety Disappear*, 39 IDAHO L. REV. 321, 323-28 (2003) (tracing the history of the appearance of impropriety concept).

[3] N.Y.C. Assn. B. Comm. Prof. Jud. Eth. Op. 2004-03, *Topic: Organization as Client: Special Considerations for a Government Lawyer*, 2004 WL 3241602.

[4] To date, California, Maine, and New York are the only states that do not have professional conduct rules that follow the format of the ABA Model Rules of Professional Conduct. New York follows the predecessor ABA Model Code of Professional Responsibility, and California and Maine developed their own rules. ABA Center for Professional Responsibility, http://www.abanet.org/cpr/mrpc/model_rules.html.

[5] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 governs concurrent representation of multiple clients. Rule 1.11(d) provides, "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...."

[6] In re Supreme Court Advisory Committee on Professional Ethics Opinion No. 697, 911 A.2d 51 (N.J. 2006).

[7] Brewer, *supra* note 2, at 325-6.

I. Background

The concept of legal ethics is deeply embedded in the notion of law as a learned profession.[8] The injunction against representing conflicting interests has long been a basic ethical principle for lawyers.[9] It is no surprise then that it found expression in the works of nineteenth century American writers on legal ethics and in the earliest American codes of professional ethics for lawyers.[10] When the American Bar Association finally turned its attention to the task of drafting a national model code of professional ethics, it relied heavily on those sources.[11] Thus, in the original 1908 Canons of Professional Ethics, Canon 6 imposed upon a lawyer the duty "at the time of retainer to disclose to the client any interest in or connection with the controversy, which might influence the client in the selection of counsel."[12] Canon 6 declared it "unprofessional" to represent conflicting interests "except by express consent of all concerned, given after a full disclosure of the facts.[13] Later, Canon 36 supplemented Canon 6, adding that a lawyer "having once held office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ."[14]

The Model Code of Professional Responsibility, adopted by the ABA in 1969 in place of the Canons of Professional Ethics, dealt with conflicts more thoroughly. It devoted all of Canon 5 and part of Canon 9 to conflicts of interest.[15] Disciplinary Rule 5-101 required the client's informed consent to a conflict with the lawyer's personal interests, DR 5-102 regulated the dual role of the lawyer-witness, DR 5-103 regulated

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[8] Jonathan R. Macy and Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation,* 82 IOWA L. REV. 965, 965 (1997).

[9] William Josephson and Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients are in Conflict?,* 29 HOWARD L.J. 539, 541 (1986); Henry S. Drinkler, LEGAL ETHICS 103 (1953) ("The injunction against being on both sides of a case goes back to the earliest times, being contained in the London Ordinance of 1280.").

[10] See, e.g., Resolution VI in David Hoffman's *Fifty Resolutions in Regard to Professional Deportment,* written in 1831, paragraph 25, Code of Ethics, Alabama State Bar Association (1887), reprinted in Henry S. Drinkler, LEGAL ETHICS 338-351 and 352-363 (1953). The other well-known treatise on legal ethics was George Sharswood's *Legal Ethics* (1854). See Developments in the Law – Conflict of Interest in the Legal Profession, 94 HARV. L. REV. 1244, 1247 (1981); Geoffrey C. Hazard, Jr. and W. William Hodes, THE LAW OF LAWYERING 3d. § 1.9 (2001).

[11] Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons,* 24 LAW AND SOCIAL INQUIRY 1, 7-10 (1999).

[12] CANONS OF PROFESSIONAL ETHICS Canon 6 (1908).

[13] *Id.*

[14] CANONS OF PROFESSIONAL ETHICS Canon 36. See *Report of the Special Committee on Supplements to the Canons of Professional Ethics,* 53 Rep. A.B.A. 495, 497 (1928) cited in Developments in the Law – Conflict of Interest in the Legal Profession, 94 HARV. L. REV. 1244, 1247 n. 4 (1981). "The duty of one while in public office to refrain from representing persons involved in matters within the scope of his duties is not specifically covered by Canon 36, but obviously comes within its spirit." Henry S. Drinkler, LEGAL ETHICS 131 (1953).

[15] Developments in the Law – Conflict of Interest in the Legal Profession, 94 Harv. L. Rev. 1244, 1247 (1981). "The Code had a tripartite structure: broad general 'axiomatic principles ("Canons"), aspirational and explanatory provisions ("Ethical Considerations," referred to as "ECs"), and black letter rules ("Disciplinary Rules," referred to as "DRs")." Geoffrey C. Hazard, Jr. and W. William Hodes, THE LAW OF LAWYERING 3d. § 1.11 (2001).

acquisition of interests in litigation, DR 5-104 regulated business relations with a client, DR 5-105 required consent of both clients to conflicts between them, DR 5-106 regulated conflicts arising from settling multiple claims, and DR 5-107 regulated conflicts arising from sources other than the client.[16] Disciplinary Rule 9-101 somewhat relaxed the rule of Canon 36 under the caption of "Avoiding Even the Appearance of Impropriety."[17] However, except as to the revolving door problem, DR 9-101 did not specifically address conflicting interests of government lawyers. The Model Code also failed to take account of the fact that many lawyers practiced in complex organizations and that many clients consisted of complex entities.[18] Thus, even though the focus of Canon 9 was elsewhere, courts were left to address these concerns in part through the concept of the appearance of impropriety.[19]

The Model Code was amended several times in the ensuing years and ultimately replaced. In 1983 the ABA adopted the Model Rules of Professional Conduct. There the conflict of interest rules of Canon 5 of the Model Code became Rules 1.7 through 1.13, which also have been amended several times.[20] The drafters of the Model Rules dispensed with the appearance of impropriety concept, considering that it had a two-fold problem –it was overbroad and "question-begging."[21] Professor Rotunda explains that "it is too vague and too *ad hominen* to be a real rule itself."[22] Still, a few remain who assert that "the normative precept that doctrine embodies retains its vibrancy as an ethical concept."[23]

New Jersey preserved the appearance of impropriety concept longer than most.[24] New Jersey's shift to a standard concerned with actual conflicts[25] presents an appropriate occasion to consider the ethical obligations of a government lawyer when dealing with

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[16] MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969).
[17] The code used the same standard in Ethical Consideration 5-6 with respect to a client's naming the lawyer as executor, trustee, or lawyer in an instrument.
[18] Geoffrey C. Hazard, Jr. and W. William Hodes, THE LAW OF LAWYERING 3d. 1-20 (2001).
[19] *Id.* at 1-64, note 3 (2001).
[20] *See generally,* American Bar Association Center for Professional Responsibility, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 (2006).
[21] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 cmt 5 (1982). See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5, cmt c (2000).
[22] Ronald D. Rotunda, *Alleged Conflicts of Interest Because of the Appearance of Impropriety*, 33 HOFSTRA L. REV. 1141, 1145 (2005).
[23] *In re Supreme Court Advisory Committee on Professional Ethics Opinion No. 697,* 911 A.2d 51, 55 (N.J. 2006). See also Edward C. Brewer, III, *Some Thoughts on the Process of Making Ethics Rules, Including How to Make the Appearance of Impropriety Disappear*, 39 IDAHO L. REV. 321, 327 (2003) (discussing continued use of the concept). *But see* Bruce A Green, *Conflicts of Interest in Legal Representation: Should the Appearance of Impropriety Rule be Eliminated in New Jersey - Or Revived Everywhere Else?*, 28 Seton Hall L. Rev. 315 (1997) (arguing against preservation of the appearance of impropriety standard).
[24]New Jersey deleted all appearance of impropriety language from its rules in amendments adopted on January 1, 2004. *In re Supreme Court Advisory Committee on Professional Ethics Opinion No. 697,* 911 A.2d 51, 54 (N.J. 2006),
[25] *Id.* at 56.

conflicts of interest among government agency clients and between a government agency and its constituents represented by the government lawyer.[26]

II. Conflicts among Government Agency Clients

Primarily, private lawyers write the ethical rules for private lawyers.[27] As Macy and Miller discuss, ethical rules are one of at least two techniques by which the bar can enhance its profits.[28] Since profit is not a motivation for government, the law of legal ethics as constituted for the private lawyer is not necessarily a reliable and effective guide for the public lawyer.[29] As Professor Patterson explained, "The ultimate source of the rules of legal ethics is the lawyer-client relationship. The paradigm of that relationship is one lawyer, one client and the lawyer's first duty is to serve and protect the interests of that client…. The structure of the lawyer's relationship to the government client is not so simple."[30]

Conflict of interest rules are nearly always cast in terms of the attorney's responsibilities to the client.[31] Thus, for the government lawyer, the difficulty in the application of conflict of interest rules relates directly to the difficulty in identifying the client.[32] Some government lawyers perform narrowly defined functions with few internal

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[26] Many government lawyers serve part-time. The related problem of the concurrent representation of both a governmental body and private clients is outside the scope of this paper. For a discussion of a lawyer's ethical obligations in those circumstances, see Bruce W. Kent, *Ethics and the Government Lawyer*, J. KANSAS B. ASSOC. 30, 32-34 (Feb/Mar 1993). The successive representation of government and private client is likewise outside the scope of this paper. As to that subject, see Grant Dawson, *Working Guidelines for Successive Conflicts of Interest Involving Government and Private Employment*, 11 Geo. J. Legal Ethics 329 (1998).

[27] "To the extent that the rules are based on judgments about public policy and effective government rather than professional regulation alone, such choices are more appropriately made within the government as a part of the normal public policymaking process." Developments in the Law – Conflict of Interest in the Legal Profession, 94 HARV. L. REV. 1244, 1443-44 (1981). The inability to recognize this point may account for decisions such as *Shaulis v. Pennsylvania State Ethics Com'n*, 833 A.2d 123 (Pa. 2003), that strike down the applicability of government ethics codes to the conduct of lawyers. Similarly, where an issue arises that could endanger the integrity of the trial process, the concern should be regulated by the courts. Developments in the Law – Conflict of Interest in the Legal Profession, 94 HARV. L. REV. 1244, 1444 (1981).

[28] Jonathan R. Macy and Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 IOWA L. REV. 965, 966 (1997). The other technique is limiting supply of legal services in the marketplace. *Id.*

[29] L. Ray Patterson, LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY, Pt.III-4 (1982).

[30] *Id.* at Pt.III-3 (1982).

[31] Developments in the Law – Conflict of Interest in the Legal Profession, 94 HARV. L. REV. 1244, 1413 (1981).

[32] Many writers have struggled with the identity of the government lawyer's client. See, e.g., Robert P. Lawry, *Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 FED. BAR. J. 61 (1978); Elise E. Ugarte, *The Government Lawyer and the Common Good*, 40 S. TEX. L. REV. 269, 270 (1999); Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 296 (1991); J. Rosenthal, *Who is the Client of the Government Lawyer?* in ETHICAL STANDARDS IN THE PUBLIC SECTOR (P. Salkin, ed. 1999).

conflicts; other government lawyers perform several functions at one time.[33] Sometimes these functions involve different "clients" within the government.[34]

That a government lawyer can have different clients within the government follows from Model Rule 1.13(a): "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Within the meaning of the rule, an organization includes a government.[35] But while every government is an organization, so, too, are each of the many agencies, boards, commissions and other units that make up government.[36] This necessarily complicates the identification of the government lawyer's client.[37]

The Restatement of the Law Governing Lawyers takes the position that the preferable approach is to regard the agency as the client of the lawyer.[38] Doubtless, this simplifies matters and lessens the potential for conflicts. However, particularly as the size of government shrinks and as the force of separation of powers diminishes,[39] it may make more sense to regard the government as a whole as the client.[40] Statute may even require that result. For example, reservation of litigating authority to a specific law department is common at all levels of government.[41] There are any number of other circumstances in

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[33] Developments in the Law – Conflict of Interest in the Legal Profession, 94 HARV. L. REV. 1244, 1417 (1981).
[34] *Id.* at 1421.
[35] MODEL RULE OF PROFESSIONAL CONDUCT Rule 1.13, cmt 9.
[36] John M. Burman, *Ethical Considerations When Representing Organizations*, 3 WYO. L. REV. 581, 643 (2003).
[37] "Defining precisely the identity of the client and prescribing the resulting obligations of [government] lawyers may be more difficult in the government context and is a matter beyond the scope of these rules. Although in some circumstances 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." MODEL RULE OF PROFESSIONAL CONDUCT Rule 1.13, cmt 9.
[38] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt c (2000). *See also* Fed. Bar Assoc. Op. 73-1, 32 FED. BAR J. 71 (1973) (client of the federally employed lawyer is the agency where the lawyer is employed). *But see* In re Lindsey, 148 F.3d 1100, 1108 (D.C.Cir. 1998) (federal executive branch attorney's loyalties cannot lie solely with the attorney's agency because of the attorney's duty to faithfully execute the laws of the country).
[39] See Joshua Panes, Note, *The Miguel Estrada Confirmation Hearing and the Client of the Government Lawyer*, 17 GEO. J. LEGAL ETHICS 541, 554 (arguing that treating the entire government as the client is inconsistent with notions of separation of powers). The doctrine of separation of powers does not always apply at the local government level, although many local governments are structured to reflect the tripartite structure of state and federal governments.
[40] MODEL RULE OF PROFESSIONAL CONDUCT Rule 1.13, cmt 9 ("Although in some circumstances the client may be a specific agency, it may also be a branch of government ... or the government as a whole.").
[41] See, e.g., 28 U.S.C. § 516 reserving to attorneys in the Department of Justice, under the direction of the attorney general, "the conduct of litigation in which the United States, and agency, or officer thereof is a party." State attorneys general often have similar authority. *See, e.g.*, Chun v. Board of Trustees, 87 Hawaii 152, 952 P.2d 1215 (Haw. 1998); D'Amico v. Board of Med. Exam'rs, 11 Cal.3d 1, 112 Cal.Rptr. 786, 800, 520 P.2d 10, 20 (1974); Attorney General v. Michigan Public Service Com'n, 243 Mich.App. 487, 625 N.W.2d 16 (Mich.App. 2000). At a local level, see, e.g., New York City Charter § 394 ("corporation counsel shall be attorney and counsel for the city and every agency thereof, and shall have charge and conduct of all the law business of the city"); Ky. Rev. Stat. 69.210 (county attorney shall institute, defend, and conduct all civil actions in which the county or consolidated local government is interested before any of the courts of the Commonwealth.").

which a government lawyer may represent more than one agency client in a given matter. The Model Rules recognize this, noting that government lawyers "may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients."[42]

The issue came up tangentially in a recent case from Hawaii, *County of Kauai v. Baptiste*.[43] One of the parties asserted that a county attorney was "enmeshed in an insoluble conflict of interest" owing to his dual representation.[44] Describing the county attorney as the counterpart to the state attorney general charged to represent the county in all legal proceedings, the Hawaii Supreme Court agreed with the county that concurrent representation by the county attorney of county agencies in intra-government controversies is proper.[45] Following the lead of the Hawaii Supreme Court, we turn to the cases involving state attorneys general for instruction on the ethical obligations of the government attorney who represents multiple government clients.[46]

There are, of course, differences between a state's principal attorney, the attorney general, and a local government's principal attorney. The office of attorney general is commonly a constitutional office; the office of city or county attorney is more commonly a statutory or charter office, if an office at all. The attorney general is elected in the majority of states; far less than a majority of county and city attorneys is elected. An attorney general frequently retains common law powers office in addition to powers expressly conferred;[47] the offices of city and county attorney are not known to common law. Despite the differences, when considering the ethical obligations with respect to concurrent representation, the similarities abound.

In *State v. Klattenhoff*,[48] the case relied upon by the Hawaii Supreme Court in *County of Kauai*, Klattenhoff appealed his conviction on two counts of theft. The Hawaii Attorney General (AG) prosecuted the matter when the local prosecutor anticipated that he would be called as a witness in the case. Unbeknownst to the prosecutors in the criminal division of the AG's office, lawyers in the litigation and administrative division of the AG's office had been defending and were continuing to defend Klattenhoff in two unrelated civil actions.[49]

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[42] MODEL RULES OF PROFESSIONAL CONDUCT Scope, par. 18.
[43] County of Kauai v. Baptiste, ___ P.3d ___, 2007 WL 2234612 (Hawaii 2007).
[44] 2007 WL 2234612 at *15 (footnote 17).
[45] *Id.*
[46] *See also* Steven K. Berenson, *The Duty Defined: Specific Obligations that Follow from Civil Government Lawyers' General Duty to Serve the Public Interest*, 42 Brandeis L.J. 13, 47-50 (2003).
[47] *See, e.g.*, Attorney General v. Michigan Public Service Commission, 625 NW2d 16, 23 (Mich. Ct. App. 2000) ("The Attorney General's duties and powers are not exhaustively defined by statute and constitution, but include those exercised at common law.").
[48] State v. Klattenhoff, 801 P.2d 548 (Haw. 1990).
[49] 801 P.2d at 549. For a case holding that it was not *per se* improper to serve as city attorney and defense counsel for an indigent defendant in a county where jurisdiction overlapped, see *Hendricks v. State*, 128 P.3d 1017, 1023 (Mont. 2006) ("[W]e hold that there is nothing in the record supporting a conclusion that Spencer's work as a city attorney in the same jurisdiction in which he defended Hendricks resulted in an actual conflict that adversely affected his representation of Hendricks.").

At trial, Klattenhoff moved to disqualify the AG from prosecuting him. Initially, the trial court granted the motion holding that the AG would be in violation of Canons 5 and 9 of the Code of Professional Responsibility, but subsequently reversed itself. On appeal, Klattenhoff contended the AG's functions as chief legal officer in civil cases, and chief law officer in criminal cases, did not exempt the AG from application of the Code of Professional Responsibility and prohibited the AG from concurrently representing him in the civil suits and prosecuting appellant in the criminal suit. The Hawaii Supreme Court disagreed.

> The AG is mandated, by law, to administer and render legal services to the governor, legislature and to the State departments and offices as the governor may direct…. In addition, the AG is mandated to represent the State in all criminal and civil matters where the State is a party, or may be an interested party…. Thus, the AG was clearly mandated by law to both defend appellant in his civil suits and prosecute him in the criminal action….
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> The Code of Professional Responsibility provides:
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> > A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by [Except] ... a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.
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> However, due to the AG's statutorily mandated role in our legal system, we cannot mechanically apply the Code of Professional Responsibility to the AG's office….
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> A majority of states have similarly permitted the AG to concurrently represent conflicting interests when the AG can ensure independent representation for the competing parties….
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> We recognize, as do the majority of states, that due to the multiple duties statutorily imposed upon the AG's office, the ethical rules for private law firms are not necessarily applicable, in all cases, to the AG's office.
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> The practical reality is that every employee, appointee or elected official in state government who may be advised by the AG, or receive some legal service from the AG is a potential client of the AG. Thus, there is a potential conflict whenever the AG exercises his statutory duty to

> investigate and prosecute violations of state law committed by people in state service. Carried to its logical end, appellant's argument would mean that every time a state employee, appointee or elected official became the subject of a criminal investigation, that party could disqualify the AG from prosecuting based upon an alleged conflict-of-interest. Thus, the AG would constantly be prevented from performing his legal duties as the State's chief law enforcement officer.
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> We hold that the AG may represent a state employee in civil matters while investigating and prosecuting him in criminal matters, so long as the staff of the AG can be assigned in such a manner as to afford independent legal counsel and representation in the civil matter, and so long as such representation does not result in prejudice in the criminal matter to the person represented.
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> The facts indicate that the deputy AG representing appellant in the civil suits was from a different, separately located division. There is nothing in the record which indicates the AG obtained information from appellant, or otherwise in his representation of appellant during the civil cases, for use in prosecution of the criminal case. Furthermore, the civil cases were completely unrelated to the criminal prosecution and appellant received favorable results in both civil cases. Based on the foregoing, it is clear that appellant received sufficiently independent legal counsel from the AG. It is also clear that the civil representation resulted in no prejudice to appellant in this criminal prosecution.[50]

In the preceding passage, the Hawaii Supreme Court observed that a majority of states permits their attorneys general to concurrently represent conflicting interests when they can ensure independent representation for the competing parties. However, where independence is in doubt, it may be necessary to appoint a special assistant attorney general or independent counsel as in *Attorney General v. Michigan Public Service Commission.*[51]

Like the Hawaii Supreme Court, the Michigan Court of Appeals recognized the "unique status" of the office of attorney general.[52] "However," said the court, "in this capacity, the Attorney General is not immune from the application of the rules of professional conduct."[53] Nevertheless, "the Attorney General's unique status *requires accommodation, not exemption, under the rules of professional conduct.*"[54] The question for the court, then, was how far to extend the accommodation. The Michigan attorney general cited numerous cases from several jurisdictions in support of her position that she could carry on the dual representation in this instance. In the end, however, the court

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[50] 801 P.2d at 550-51.
[51] Attorney General v. Michigan Public Service Commission, 625 N.W.2d 16 (Mich. Ct. App. 2000).
[52] 625 N.W.2d at 27.
[53] *Id.*
[54] *Id.* at 28 (emphasis in the original).

rejected the attorney general's position because she was a party to the case. That fact necessitated that the attorney general provide the public service commission with independent counsel.[55] Courts in other states had reached the same conclusion.[56]

The Michigan court observed that "Illinois courts have been perhaps the most prolific in addressing the ethical constraints of dual representation by an attorney general."[57] It cited with approval *People ex rel. Sklodowski v. State:*

> We believe that the Attorney General in this case properly represents the interests of the State defendants acting in their official capacities. In the role of counsel to the State, the Attorney General may represent the three retirement systems as entities of the State, which receive State moneys for the payment of pension benefits to State employees. *However, that is not to say that the Attorney General is representing the interests of the participants in and beneficiaries of the five retirement systems; clearly, plaintiffs and their counsel are representing the interests of the persons for whom the funds were established.* While there is an apparent conflict between the interests of the State defendants (to divert the pension funds to other uses) and the responsibilities of the retirement systems (to regain financial stability in order to meet current and future pension obligations), we do not believe that the Attorney General's legal representation of three of the retirement systems will result in prejudice to any of the parties to this litigation. Plaintiffs are seeking relief on behalf of themselves and the class of people who are participants in or beneficiaries of the five retirement systems. *To the extent plaintiffs' interests are coextensive with that of the nominal defendants, the retirement systems, plaintiffs are capable of continuing their advocacy unaffected by the Attorney General's representation.* If plaintiffs prevail in their lawsuit the recovery would run to the retirement systems.[58]

Of particular importance to the Michigan court was the *Sklodowski* court's observation that in that case two of the retirement systems were represented by independent private counsel appointed as special assistant attorneys general. This said the Illinois court, "clearly removes the taint of perceived conflict."[59]

The *Sklodowski* case of which the Michigan court of appeals approved factored in the resolution of another question pertinent here: What is the right to representation of an elected official when his opinion of the law applicable to his office is in conflict with the opinion of the lawyer whose statutory duty is to represent that elected official? In

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[55] *Id.* at 31.
[56] *Id.* at 29-30.
[57] *Id.* at 31.
[58] *Id.* at 32, citing People ex re. Sklodowski v. State, 642 N.E.2d 1180 (Ill. 1994) (emphasis added).
[59] *Id.*

Suburban Cook County Regional Office of Education v. Cook County Board,[60] the State's Attorney obligated to represent both agencies took the position that his was the final word on all legal questions that might arise in the operation of county government and that the only recourse available to any other elected official who disagreed with him and sought to litigate was to litigate at that official's own expense.[61] Describing the situation as even stronger than the facts of *Sklodowski*, the Illinois court of appeals said that a conflict existed between the interests of the two agencies such that the court's appointment of independent counsel "would remove the taint of a real and not just a perceived conflict."[62] Court appointment was proper, the opinion said, to "insure that the official could not arbitrarily seek representation from a private attorney; nor seek private representation to advance a frivolous legal position."[63]

Failure to follow the proper appointment procedure led the Tennessee Court of Appeals to criticize the trial court in *Commissioner of Transportation v. Medicine Bird*.[64] On appeal, the court determined that one of the two agencies was not entitled to participate in the litigation, thus removing the conflict. However, the court said that had there been a basis for its participation there would have been no reason to disqualify the attorney general based on dual representation.

> Like the majority of courts, it recognized
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> > a need for studied application and adaptation of the ethics rules in the Code of Professional Responsibility to the Attorney General and his or her staff in recognition of the uniqueness of the office, the Attorney General's obligation to protect the public interest, and the Attorney General's statutory obligation to represent the various and sometimes conflicting interests of numerous state agencies.[65]

Unlike the situation in the Michigan case, however, here the attorney general was not a party. In the court's opinion assistant attorneys general could have appropriately represented the two agencies even though their interests were adverse. Accordingly, the trial court erred when it concluded that the Code of Professional Responsibility required the disqualification of the attorney general.[66]

As noted earlier, courts apply these principles to conflicts involving government lawyers other than attorneys general.[67] For example, in *Sammamish Community Municipal Corporation v. City of Belleview*,[68] a case involving common representation

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[60] Suburban Cook County Regional Office of Education v. Cook County Board, 667 N.E.2d 1064 (Ill. Ct. App. 1996).
[61] *Id.* at 1071.
[62] *Id.* at 1073.
[63] *Id.* at 1074.
[64] State ex rel. Commissioner of Transportation v. White Bird et al., 64S.W.3d 734 (Tenn. Ct. App. 2001).
[65] *Id.* at 773.
[66] *Id.* at 774.
[67] Berenson, *supra* note 46, at 59.
[68] 27 P.3d 684 (Wash. Ct. App. 2001).

by a city attorney's office, the court said

> Washington courts have recognized the "difference between the relationship of a lawyer in a private law firm and a lawyer in a public law firm such as a prosecuting attorney, public defender, or attorney general" with respect to compliance with the conflict of interest rules. *State v. Stenger*, 111 Wash.2d 516, 522, 760 P.2d 357 (1988). *Thus, it is accepted practice for different attorneys within the same public office to represent different clients with conflicting or potentially conflicting interests so long as an effective screening mechanism exists within the office sufficient to keep the clients' interests separate*.
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> The community councils correctly point out that this case involves two independent governmental entities. However, in the context of this case and considering the interrelationship of the parties, this is a distinction without a difference. Similar relationships exist in situations involving entities with independent authority within larger governmental bodies, including civil service commissions, ethics review boards, and the Attorney General's representation of particular government entities in cases involving other government entities….
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> Here, East Bellevue and Sammamish have produced no evidence to indicate the existence of an actual conflict of interest in the City's representation of the community councils in reviewing City zoning ordinances. Instead, the record indicates that the City has provided the community councils with independent representation whenever an actual conflict has appeared imminent.
>
> Because the arrangement for legal representation between the City and the community councils has proven acceptable in similar cases involving other public entities, we find the City's representation of the community councils to be consistent with the Rules of Professional Conduct.[69]

As reflected in the passage above, it may be possible to continue the representation by screening or separation between two offices.[70] This alternative to contracting out one advocate's function reflects another distinction between government practice and private practice. Most courts would reject the approach for resolving conflicts of interest involving lawyers in a private firm.[71]

A situation similar to intra-agency conflicts arises in suits against government agencies and public officers in their official capacities. While such actions are in form

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[69] 27 P.3d at 688 (emphasis added).
[70] Developments in the Law – Conflict of Interest in the Legal Profession, 94 Harv. L. Rev. 1244, 1422 (1981). (See the sources collected at note 32).
[71] Berenson, *supra* note 46, at 60.

against a named officer, they are in essence against the government or agency the officer represents. However, a different situation arises where the government lawyer is called upon to represent a government and individual employees. A common example might be a city attorney called upon to represent a city, its police department, and individual police officers in a suit brought under 42 U.S.C. § 1983.

III. Conflicts between a Government Agency and its Constituents

A. Representing Government and Constituent in the Same Action

The question arises whether it is proper for an attorney simultaneously to represent a government entity and any of its officials or employees when they are co-defendants in a civil rights action in a civil rights action. In *Opinion 552* the New Jersey Advisory Committee on Professional Ethics answered that it is never proper for an attorney to do so. In *Petition for Review of Opinion 552 of the Advisory Committee on Professional Ethics*, the New Jersey Supreme Court concluded that the committee's *per se* ban was too broad.[72]

In its opinion the New Jersey Supreme Court recognized the potential for conflicts.

> In a § 1983 suit against both the governmental entity and individual government officials, the governmental entity, in an effort to shift liability, may claim that the assertedly wrongful conduct of the individuals was unauthorized and outside the scope of the employment. Conversely, in his or her defense, an employee-defendant may claim that the alleged offending conduct was taken pursuant to an official governmental policy or directive and that the governmental entity is the party properly responsible and ultimately liable. Thus, under the defenses asserted or available, one party-defendant may seek to avoid or lessen its exposure at the expense of the other.[73]

However, the court recognized that not every § 1983 suit will give rise to such a conflict.

The court distinguished between "personal capacity" suits and "official capacity" suits, noting that an "official capacity" suit was in effect a suit against the government entity itself. In such an instance, no real conflict of interest exists.[74] Even in personal-capacity suits, the court observed, there may be situations where no conflict of interest exists. Examples include suits for injunctive relief or claims for compensatory damages alone or together with injunctive relief.[75] Nevertheless, the potential for conflicts is real,

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[72] Petition for Review of Opinion 552 of the Advisory Committee on Professional Ethics, 507 A.2d 233 (N.J. 1986).
[73] *Id.* at 235.
[74] *Id.* 235-36.
[75] *Id.* at 236.

particularly where the suit seeks money damages from both classes of defendants.[76] The potential is all the greater where the individual defendant faces liability for punitive damages. This is what prompted the authors of Opinion 552 to adopt the *per se* rule.[77]

Recognizing the complexity of the conflict of interest problems that can arise in such instances, the court nevertheless concludes that Rule 1.7 can adequately protect the interests of all parties.

> We believe that the appropriate rule for dealing with potential conflicts of interests in the context of a § 1983 action must be grounded upon common sense, experience, and realism. These considerations forcefully suggest that the joint representation of clients with potentially differing interests is permissible provided there is a substantial identity of interests between them in terms of defending the claims that have been brought against all defendants. The elements of mutuality must preponderate over the elements of incompatibility.[78]

In an obvious understatement, the court admitted "it will not be easy to apply this rule in all cases."[79] The court went on to elaborate.

> In every such case the attorney will have to be satisfied based on objective reasonableness that there is no direct adversity between the defendants and that joint representation will not adversely affect the relationship of either class of defendants, RPC 1.7(a), nor materially limit his or her professional responsibilities towards any such client-defendant, RPC 1.7(b). Although this case-by-case approach cannot guarantee that ethical problems will not arise, the danger is not of sufficient weight to warrant a *per se* prohibition.
>
> We are additionally moved by the severe financial strains the *per se* rule imposes on local governments and those individual employees who are forced to obtain independent counsel. Such burdens are not justified in the absence of a demonstrable, albeit potential, conflict of interests realistically militating against effective representation and lawyer-client fidelity. Moreover, as noted by the Committee itself, the blanket prohibition of *Opinion 552* will also encourage plaintiffs to name numerous officials solely to improve their bargaining position with the government defendant by forcing defendants to engage separate independent counsel. As a result, the administration of justice will suffer from the increased litigational burden, as will the dispensation of justice,

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[76] *Id.*
[77] *Id.* at 237.
[78] *Id.* at 238.
[79] *Id. See* Berenson, *supra* note 46, at 62 (eschewing an extended discussion because "the variations on the [§ 1983] scenario are endless, as are the possible approaches to the potential and actual conflicts created therein").

since government defendants could be bludgeoned by the rule into settling cases for reasons wholly unrelated to the merits of any liability claim.

> It is of some significance that in a given case a government body may affirmatively remove any potential conflict of interest.… If the governmental body chooses to reduce its legal costs by providing joint representation, it then will be necessary that the entity to take steps to reduce or eliminate any potential conflict of interests that may otherwise exist. For example, the government body could in an appropriate case agree that the officials or employees were acting within the scope of their duties, and waive any claim it may have against the employee for reimbursement of legal expenses and agree to indemnify the employee for the amount of any individual judgment.
>
> In the event that a municipal attorney represents co-defendants in a § 1983 action involving possible conflicts of interests, the administration of justice could be affected. To that end the attorney will be required to alert the defendants at the earliest opportunity that the case may present problems in terms of joint representation. The attorney will also be charged with bringing conflicts of interest matters to the attention of the court, which should take steps to assure that notice of any potential conflict of interests is provided to affected litigants and that the ethics problem is resolved satisfactorily and made a matter of record. In that way lawyers will be encouraged to act reasonably and responsibly, the essential interests of clients will be protected, and the interests of justice will be secured.[80]

Some courts, however, have reached a different result. In *Barkley v. City of Detroit*[81] the Michigan Court of Appeals adopted the *per se* rule rejected by the New Jersey Supreme Court. "[B]ecause all attorneys in the department represent the city …, none of them are free to also represent an individual employee once a conflict arises…. For this purpose, we find that the department should be considered a law firm…. We, therefore, hold that, assuming that the city law department is representing the city in the underlying suit, no attorney from the city law department may also represent plaintiffs in the same suit."[82]

Similar issues arise in the administrative context. In *Quintero v. City of Santa Ana*,[83] city attorneys represented both an employee facing discharge before a personnel board also advised by the city attorney's office. Without rejecting concurrent representation of the board and city employees, the court invoked the principle of

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[80] *Id.* at 239-40.

[81] 514 N.w.2d 242 (Mich. Ct. App. 1994). We, therefore, hold that, assuming that the city law department is representing the city in the underlying suit, no attorney from the city law department may also represent plaintiffs in the ***209*** same suit

[82] *Id.* at 248.

[83] Quintero v. City of Santa Ana, 114 Cal.App.4th 810, 7 Cal.Rptr.3d 896 (Cal. Ct. App. 2003)

administrative law that "to permit an advocate for one party to act as the legal adviser for the decision maker creates a substantial risk that the advice given to the decision maker will be skewed, particularly when the prosecutor serves as the decision maker's adviser in the same or a related proceeding."[84]

B. Representing Government and Constituent in Separate Actions

The discussion in Part II of conflicts among agency clients did not sharply differentiate between agencies' interests in the same action and agencies' interests in separate actions. Given the peculiar role of the government lawyer in such circumstances – be it an attorney general, a state's attorney, a county attorney, or a city solicitor – the lesson is the same in either instance: the rules of professional conduct need to be adapted to the circumstances.

The *Klattenhoff* case discussed in Part II was not, strictly speaking, a case about interagency conflicts. The conflict there arose out of the concurrent representation of a constituent in separate actions. The result was no different than had the attorney general represented an agency in separate actions or separate agencies in the same action (the exception being where the attorney general was himself a party). As to the situation involving government and constituent in separate actions, however, what result?

In *Madison County v. Hopkins*[85] employees of the sheriff's department sued the county and county officers, including the sheriff, seeking overtime pay. The county filed a third-party complaint against the sheriff on the theory that he, not the county, was the employer. The sheriff hired his own counsel in the federal case and filed an action in state court seeking reimbursement for his legal fees. In holding that the sheriff was not entitled to reimbursement, the court concluded that no conflict of interest resulted when lawyers representing the sheriff in his official capacity sued him in his individual capacity.[86]

IV. A Note about Government Consent to Conflict

Model Rule 1.7 provides that, notwithstanding the existence of a concurrent conflict of interest, a lawyer may represent a client if four conditions are satisfied.[87] First, the lawyer must reasonably believe that the lawyer will be able to provide competent and diligent representation to each affected client.[88] Second, the representation must not be prohibited by law.[89] Third, the representation may not involve a claim by one client against another client represented by the lawyer in the same litigation.[90] Fourth, each affected client must give informed consent, affirmed in writing.[91]

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[84] 7 Cal. Rptr. 3d at 901.
[85] 857 So.2d 43 (Miss. 2003).
[86] *Id.* at 49.
[87] MODEL RULES OF PROFESSIONAL CONDUCT 1.7(b).
[88] MODEL RULES OF PROFESSIONAL CONDUCT 1.7(b)(1).
[89] MODEL RULES OF PROFESSIONAL CONDUCT 1.7(b)(2).
[90] MODEL RULES OF PROFESSIONAL CONDUCT 1.7(b)(3).
[91] MODEL RULES OF PROFESSIONAL CONDUCT 1.7(b)(4).

In considering this fourth requirement, there are a few jurisdictions where governments may not consent to a conflict. Among them are New Jersey,[92] West Virginia,[93] Arkansas,[94] and Wyoming. [95]This may be true in other states, as well. The New Jersey Supreme Court explained the rationale this way:

> We recognize that under an exception to the consent-waiver rule, a public entity as a government client cannot consent to multiple representation that perpetuates or engenders a conflict of interests. *RPC* 1.7(a)(2). The nonavailability to government attorneys of the consent-waiver exception, which would otherwise allow dual representation of clients with conflicting interests, is dictated by special concerns over the appearance of impropriety in the public sector. In *In re Opinion 415, supra,* 81 *N.J.* at 324, 407 *A.*2d 1197, we stated the rationale for the closer scrutiny: "[w]hen representation of public bodies is involved, the appearance of impropriety assumes an added dimension. Positions of public trust call for even more circumspect conduct." Due to the sensitivity of their roles, attorneys for governmental bodies are subject to closer scrutiny under the appearance-of-impropriety standard than non-governmental attorneys….[96]

V. Conclusion

In the course of the development of Model Rule 1.7, the National Association of Attorneys General proposed that the rule be inapplicable to lawyers in government service.[97] The American Bar Association flatly rejected that approach.[98] Instead, the Model Rules make the provision expressly applicable to government lawyers. Nevertheless, government lawyers remain in a unique position. Courts and ethics opinions attempting to apply the rule conclude that the rule requires "adaptation" to the government lawyer.

Given the range of potential conflicts that may arise in the course of representing an organization as complex as government, it is no surprise that a consensus on how to adapt Model Rule 1.7 does not emerge. The preceding discussion reveals just a glimpse of the tip of the iceberg.

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[92] Matter of Petition for Review of Opinion 552, 507 A.2d 233 (N.J. 1986).
[93] *State of West Virginia v. MacQueen*, 416 S.E.2d 55 (W. Va. 1992).
[94] *City of Little Rock v. Cash*, 644 S.W.2d 229 (Ark. 1982).
[95] John M. Burman, *Conflicts of Interest in Wyoming,* 35 LAND & WATER L. REV. 79, 96 n. 76 (2000).
[96] Matter of Petition for Review of Opinion 552, 507 A.2d 233, 238 (N.J. 1986).
[97] American Bar Association Center for Professional Responsibility, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 147 (2006).
[98] William C. Tucker, *The Mangled Octopus: The Unitary Executive and EPA Enforcement Involving Federal Agencies,* 16 Vill. Envtl. L. J. 149, 172 (2005).

APPENDIX

ABA MODEL RULES OF PROFESSIONAL CONDUCT (2004)[**]

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) 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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.8. For definitions of “informed consent” and “confirmed in writing,” see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1)

[**] Legal Information Institute, Cornell University Law School, American Legal Ethics Library, http://www.law.cornell.edu/ethics/aba/current/ABA_CODE.HTM#Rule_1.7. The site offers state narratives comparing the state version of the rule to the model text and including commentary containing citations to relevant state cases.

clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1,16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to

the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed

financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1,10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph, some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.

See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a “tribunal” under Rule 1.0(m), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission).

If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or

the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to

comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right

to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might

not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.