The Government Organization as Client – Rule 1.13 Maryland Lawyers' Rules of Professional Conduct

By Marc P. Hansen



Overview

Who is my client? The government lawyer, whether representing a state, county, municipality, or one of a host of other governmental entities must be able to answer this question.

> The identity of the lawyer's client is a critical issue, since, as a core professional principle, the lawyer's professional duties to safeguard his or her client's confidences and to avoid conflicts of interest are owed only to clients.[1]

Identifying the client in the context of a governmental organization can be a complex—even stressful—exercise. As Chuck Thompson noted in a paper on Rule 1.13 and its application to the government lawyer, "On its face, seemingly easy to determine, the question [of who is the government lawyer's client] can test the ethical and moral resolve of a saint."[2]

To identify the client, the government lawyer must first identify what body or individual may make a final decision for the governmental organization. Identifying the final decision maker requires the lawyer to understand the organic documents creating the government entity and the laws assigning duties to various government officials and bodies. Depending on the matter to be decided, the decision maker will vary within the same governmental body.

Identifying the decision maker helps the lawyer determine the individuals in the government organization with whom the lawyer may share information and who may invoke and waive attorney-client privilege. Identifying the government's decision maker also helps (but cannot always resolve) how the government lawyer must act when faced by wrongful or illegal conduct by a board, commission, official or employee of the government. Deciding what action to take to rectify a wrongful act can "test the ethical and moral resolve of a saint."

Any analysis of this problem begins with the Rules of Professional Conduct. Except for California, every State and the District of Columbia has adopted some version of the ABA Model Rules of Professional Conduct. Although this article uses the Maryland version of the ABA Model Rules and relies, in part, on Maryland cases and Maryland Attorney General Opinions, the analysis should have broad applicability. The applicable Maryland Rule of Professional Conduct is Rule 1.13, which is in relevant part substantially similar to the current ABA Model Rule 1.13.

Rule 1.13 - Organization as Client

Rule 1.13 declares that a lawyer employed by an organization represents the organization, acting through its duly authorized "constituents". The comment to the Rule notes that an organization's officers, directors and employees are "constituents."

Rule 1.13(b) addresses the difference between the obligation the lawyer owes to the organization as the client and the lawyer's obligation to the organization's constituents. For example, if a constituent acts in violation of a legal obligation owed to the organization or engages in wrongful conduct that could result in substantial injury to the organization, the lawyer must proceed "as is reasonably necessary in the best interest of the organization." This may include bringing the wrongful conduct to the attention of the organization's highest authority or revealing confidential information that might otherwise be protected under Rule 1.6.

Rule 1.13(d) admonishes the organization's lawyer that in dealing with a constituent, the lawyer should explain the identity of the client (i.e., the organization) when the lawyer should know that the organization's interests could be adverse to those of the constituent.

Comment [3] to the Rule illustrates this issue by citing the example of a lawyer asked to investigate allegations of wrongdoing by employees of the organization. The lawyer may interview the client's employees in the course of the investigation.[3] The comment

notes "This does not mean, however, that constituents of an organizational client are the clients of the lawyer." The comment warns that, "The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation. . . ."

Comment [8] declares that the Rule applies to governmental organizations. The comment gives government lawyers a somewhat troubling warning: "Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these rules." Comment [8]'s most sobering passage suggests that government attorneys may have both greater leeway and greater responsibility in taking action to rectify misdeeds of government officials. The comment states:

> Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.

In Maryland, there is little case law that explores the responsibilities of government attorneys under Rule 1.13. A 1975 Maryland Court of Appeals decision concluded that, under the Montgomery County Charter, the County Attorney's client is the "County and its instrumentalities . . . not individual County employees."[4] Two Maryland Attorney General opinions discuss Rule 1.13 in the context of St. Mary's County, Maryland:

In a well-reasoned 1997 Attorney General Opinion, Jack Schwartz, Chief Counsel for Opinions and Advice, explored Rule 1.13 as applied to the duty a County Attorney owed to St. Mary's County, the County Commissioners, and the citizens of the County.[5] In that opinion, the Attorney General concluded that St. Mary's County was the client of the St. Mary's County Attorney—not the individual County Commissioners. The opinion noted that the County Attorney, however, was entitled to view the Commissioners—as a body—as authorized "to speak for" the client. [6] Although the County Attorney should act with due regard for the public interest, the Attorney General reasoned that the citizens of the County were not the client of the County Attorney. Finally, the opinion noted that many documents prepared by the County Attorney were entitled to protection from disclosure under the attorney-client privilege and Rule 1.6 (Confidentiality of Information). The County Attorney's legal advice may be withheld, therefore, from the public as privileged.

A 2002 Attorney General Opinion explored whether it would be a conflict of interest for one attorney from the St. Mary's County Attorney's Office to represent a County agency before the County Board of Appeals while another attorney from the same office advised the Board of Appeals.[7] The Attorney General concluded that one attorney in the County Attorney's Office could represent the County Planning Director before the Board of Appeals, while another attorney from the office served as counsel to the Board.

The Opinion noted that the Planning Department was an agent of the County and so was not a distinct client for conflict of interest purposes under Rule 1.7. But the Board of Appeals was a distinct client, because it had been vested with quasi-judicial decision making authority that could only be overturned by a court. The opinion appears to assume that the law office's representation of both government agencies would likely create a conflict of interest under Rule 1.7.[8] Nevertheless, the Attorney General concluded that dual representation could be provided, despite Rule 1.7, because "other law creating a government law office or describing its duties may authorize or require dual representation."[9]

To avoid potential due process challenges that could arise from this arrangement, the Attorney General advised that the County Attorney's Office should require attorneys to follow a firewall policy when one attorney in the office acts as an advisor to a quasi-judicial board while another represents a County agency in an appeal before that board. The Attorney General advised that an appropriate firewall policy should proscribe *ex parte* communications between the two attorneys regarding issues of law or facts related to the matter pending before the board, should require each attorney to maintain separate files, and should ensure that support staff takes reasonable actions to maintain this firewall between attorneys.

In sum, the government lawyer must attempt to sail safely like Odysseus between two perils spawned by Rule 1.13—the many headed monster Scylla and the whirlpool Charybdis:

1. Scylla represents the challenge of identifying the officials or boards that speak for the lawyer's government client. Who speaks for the government

Continued on page 20



Marc P. Hansen was appointed to the position of County Attorney in December 2010. In that capacity, he provides leadership to the county attorneys in litigation, transactional and general counsel services. Prior to his appointment, he served in various positions in the Office of the County Attorney. His areas of concentration are government operations, procurement, legislation, and ethics.

Mr. Hansen is a former mayor of Washington Grove, Maryland (1987-90), and Chair, Board of Zoning Appeals of Washington Grove. He was Vice-chair of the General Government Section, International Municipal Lawyer's Association. He was previously in private practice (1975-1984). He is admitted to the Maryland Bar (1975), and is also admitted to practice in the U.S. District Court for Maryland (1976), the Fourth Circuit Court of Appeals (1977), and the U.S. Supreme Court (1980). Mr. Hansen is a member of the Maryland and Montgomery County Bar Associations.

may shift depending on the matter being decided. The correct answer to this question helps determine who the attorney may share information with inside the government (Rule 1.6, Confidentiality of Information); whether a conflict of interest exists (Rule 1.7, Conflict of Interest: General Rule); and whether the attorney-client privilege has been appropriately protected.[10]

2. Charybdis represents the whirlpool the government lawyer encounters when trying to determine the appropriate remedial action to take in the face of inappropriate conduct by a constituent of the government.

Hypothetical Case Study

The following hypothetical case study will hopefully assist in exploring some of the knotty issues raised by Rule 1.13:

FACTS: You are the City Attorney. The City Attorney is appointed by the Mayor and serves at the pleasure of the Mayor. You are called into a meeting with the Mayor, who informs you that an FBI agent has met with him to ask about a non-competitive contract award by the City to a major contributor to the Mayor's recent election campaign. The Mayor also shares with you that this contributor has done landscaping work for the Mayor at a price some might see as significantly below fair market value. The Mayor tells you that this contributor/contractor is also a long-time personal friend. The Mayor presents you with the procurement file and asks if the contract award complied with City procurement laws. A quick review of the file indicates to you that there is insufficient justification for a sole-source contract award to this individual; moreover, there is a note in the file that the Mayor has personally requested the contracting officer to make an award to the contributor. What do you do?

COMMENT: Again, the initial question is: Who is the client? Awarding contracts is an executive function. Moreover, let us assume that City law provides that the Mayor is responsible for the administration of the procurement system. Therefore, under normal circumstances, the Mayor speaks for the client in this matter. You are aware that Comment [8] to Rule 1.13 indicates that a government lawyer "may have authority under applicable law to question . . . [inappropriate] conduct more extensively than that of a lawyer for a private organization in similar circumstances." You also recall that the comment indicates that a government lawyer may have a special obligation to take action to rectify inappropriate conduct.

You are called into a meeting with the Mayor, who informs you that an FBI agent has met with him to ask about a non-competitive contract award by the City to a major contributor to the Mayor's recent election campaign.

Accordingly, you would be well-advised to explain to the Mayor during your meeting that your client is the City government and that the interest of the government might be adverse to that of the Mayor in this matter. Moreover, you should advise the Mayor that he consult his personal attorney on these matters. Preferably, that advice would come at the early stages of your conversation with the Mayor.

FACTS: The afternoon after your meeting with the Mayor, you receive a telephone call from an FBI agent inviting you to headquarters for an interview. Do you decline?

COMMENT: You might rationalize that, as a government attorney, you had a higher duty to "rectify" the likely wrongdoing by the Mayor by cooperating with law enforcement officials. Your client, the City government, cannot be held criminally liable for any wrongdoing by the Mayor. On the other hand, you might feel more comfortable receiving a court order requiring you to testify in order to make clear that you have fulfilled your professional responsibility not to divulge confidential information of a client. Prudence would dictate that you require the U.S. Attorney to subpoena you to a grand jury and then file a protective motion to quash, allowing the court to rule on the matter.

Interestingly, there is a split in the federal circuits regarding whether the type of communication set out in this hypothetical would be protected under the attorney-client privilege.

The United States Court of Appeals for the Seventh Circuit addressed whether an Illinois government attorney could refuse, on the basis of attorney-client privilege, to disclose communications with the Secretary of State when faced with a grand jury subpoena.[11] The chief legal counsel to the Secretary of State, George Ryan, was subpoenaed to appear before the grand jury. He was asked to provide the substance of the legal advice he gave Ryan in connection with the "licenses for bribes" scandal that surrounded Ryan's tenure as the Secretary of State. Ryan, who was then Governor of Illinois, opposed all efforts to obtain information from the government attorney.

The Seventh Circuit refused to quash the subpoenas. The court agreed with the government's argument that the attorney-client privilege between a government attorney and the government's client does not extend to criminal proceedings.[12] The court noted that Illinois had not abrogated the traditional understanding that an organizational attorney's client is the organization. The court further noted that a state agency cannot be held criminally liable either by the state itself or by the federal government. The Circuit Court concluded "In the final analysis, reason and experience dictate that the lack of criminal liability for government agencies and the duty of public lawyers to uphold the law and foster an open and accountable government, outweigh any need for a privilege in this context."[13]

The Eighth Circuit and the District of Columbia Circuit have agreed with the Seventh Circuit. In the Eighth Cir-

cuit case, the Court rejected President Clinton's assertion that attorney-client privilege and attorney work product prevented a government attorney from testifying before a grand jury investigation concerning the possible commission of criminal offenses within the government. *In Re: Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997), *cert. denied* 521 U.S. 1105 (1997). In the District of Columbia case, the court concluded that the President's government attorney could be compelled to give testimony to a grand jury where the government attorney contributed legal advice to the discussions between President Clinton and his personal attorney. *In Re: Bruce R. Lindsey (Grand Jury Testimony)*, 158 F.3d 1263 (D.C. Cir. 1998), *cert. denied* 525 U.S. 996 (1998).

A contrary conclusion was reached by the Second Circuit.[14] That court addressed whether the former chief legal counsel to Governor Rowland of Connecticut could be compelled to testify regarding certain communications between Rowland and his chief legal counsel. The federal government was investigating gifts made to the Governor from private individuals in return for public favors. The legal counsel to the Governor had engaged in numerous conversations with the Governor regarding the receipt of gifts and the meaning of related state ethics laws. The government argued that the government attorney's loyalty to the Governor must yield to her loyalty to the public "to whom she owes ultimate allegiance when violations of the criminal law are at stake."[15] The Second Circuit, unlike the Seventh Circuit, concluded:

> We believe that, if anything, the traditional rationale for the privilege applies with special force in the government context. It is crucial that government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to speak out and receive fully informed legal advice. Upholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, even indispensable part of conducting public business. Abrogating the privilege undermines that culture and thereby impairs the public interest.[16]

The Supreme Court has not resolved the split between the Circuits, leaving ample opportunity for further clarification of the duties of government attorneys.

(Please feel free to contact the author by email at marc.hansen@montgomerycountymd.gov to share your observations or comments regarding this article.)

1. Richard C. Solomon, *Wearing Many Hats: Confidentiality and Conflicts of Interest Issues for the California Public Lawyer, 25 Sw. U. L. Rev. 265, 270 (1996).*
2. Charles W. Thompson, Jr. was the County Attorney for Carroll and Montgomery Counties and currently is the Executive Director and General Counsel for the International Municipal Lawyers Association. His paper is titled *How Rule 1.13 Affects Local Government Lawyers: Client Identification and Privilege.*
3. This is a situation where the organization's lawyer should consider "Mirandizing" the constituent by informing him or her that the lawyer represents the organization and that the information given by the constituent belongs to the organization. If the constituent is the subject of the investigation, the lawyer should advise the constituent to seek advice from his or her own lawyer to determine personal rights and liabilities.
4. *Montgomery County v. Walsh, 274 Md. 502, 527-28 (1975).*
5. 82 Op.Atty.Gen.Md. 15 (1997), 1997 Md. AG Lexis 32.
6. This article sometimes uses the phrase, "to speak for" as shorthand for "the authority to make a final decision on behalf of" the government. As noted, the identity of this official or body may vary depending on the matter being addressed.
7. 87 Op.Atty.Gen.Md.126 (2002); 2002 Md. AG Lexis 12.
8. This assumption may be questionable. As the Maryland Court of Appeals has noted, a county Board of Appeals "has no interest, personal or official, in the matters which come before it other than to decide them according to the law and the proved fact, and it is in no sense a party to the proceedings." *Board of Zoning Appeals v. McKinney, 174 Md. 551, 560-61 (1938). Hence, the Board has no interest in the proceedings. If anything, the interests of the Planning Department and the Board should be aligned–i.e. they should both seek to achieve the proper application of the law.*
9. 2002 Md. AG Lexis 12. For example, the Montgomery Charter § 213 provides, "The County Attorney shall be the chief legal officer of the County, conduct all the law business of the County, be a legal advisor to the Council, and be the legal advisor to the County Executive, all departments, and other instrumentalities of the County Government. The County Attorney shall represent the County in all actions in which the County is a party."
10. Disseminating information to constituents within the government who do not have a need to know the information will jeopardize the ability to protect the information from disclosure under the attorney-client privilege. *See E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc., 351 Md. 396, 420-21 (1998).*
11. *In Re: A Witness Before the Special Grand Jury, 2000-2, 288 F.3d 289 (7th Cir. 2002)*
12. The U.S. Attorney had obtained from the then-current Secretary of State a waiver of the Office's attorney-client privilege as to all of the government attorney's conversations with officials of the previous Secretary of State.
13. *Id. at 294.*
14. *United States v. John Doe, 399 F.3d 527 (2d Cir. 2005).*
15. *Id. at 533.*
16. *Id. at 534.* ML

IMLA's Mid-Year Seminar
Washington, DC | April 14-16, 2013

