Model Rule 1.13 Representing the Organization – issues for the Local Government Lawyer



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Almost daily, local government lawyers face a number of interesting ethical questions. While the issues range broadly, the most basic question rests with a determination of whom does the City or County Attorney represent:

> The identity of the lawyer's client is a critical threshold 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]

On its face, seemingly easy to determine, this question can test the ethical and moral resolve of a saint. Ascertaining who the client really is can be a complex affair when a governmental entity is involved. The definition of 'client' may differ depending on whether the lawyer is representing an individual or an agency, and whose interests are being served by the legal advice.[2]

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[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] Brown & Williamson Tobacco Corp. v. Pataki, 152 F. Supp. 2d 276, 282 (D.N.Y. 2001), citing *Gray v. Rhode Island Department of Children, Youth and Families*, 937 F. Supp. 153, 157-58 (D.R.I. 1996).

Consequently, as noted by Professor Patricia E. Salkin, local government lawyers tackle the question of client identity almost daily:

> Government lawyers constantly grapple with the issue of who is their client. For example, is the client of a county attorney the county, the county legislative body, individual county commissioners, department heads, or the taxpayers of the county? [3]

City and County Attorneys come in many descriptions - some are elected, some are appointed; some are full-time, while others are part-time and have private clients in addition to their public entity client. Indeed the ABA's Model Rules of Professional Conduct for Lawyers recognize that, in the government context, client identification and the resulting obligations can be quite difficult to gauge.[4]

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[3] Patricia E. Salkin, Municipal Ethics Remain a Hot Topic in Litigation: A 1999 Survey of Issues in Ethics for Municipal Lawyers, 14 BYU J. PUB. L. 209, 217 (2000).

[4] ABA Model Rule 1.13 (Organization as Client) provides:

> (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
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> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.
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> (c) Except as provided in paragraph (d), if
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> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
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> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such

Regardless of the employment category into which a City or County Attorney falls, questions of client identity affect each in a myriad of different ways, including:

- Does the attorney represent the County Commission or the City Council?
- What issues of conflict arise in representing various agencies of the City or County?
- What issues of conflict arise in representing officers and employees of the City or County?

While answers to these questions will most likely turn on the law in each jurisdiction, ethics opinions and judicial decisions in some states can help to provide some semblance of direction to those faced with their challenge.

Some City and County Attorneys believe that public service means that their client is "the public." (Indeed, most public servants assume that their ultimate responsibility rests with the public they serve.) Thus, they conclude that their representational responsibility rests not with the board of county commissioners or city

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disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

council, but with the amorphous assemblage, the public. Nevertheless, characterizing the public as the client allows broad discretion in determining which causes to pursue, and can produce chaotic policy conflicts in governance.

Presented with the question of client identification, the Maryland Attorney General has advised that the County Attorney represents the corporate entity, and not the "citizens" of the county.[5] The Attorney General went on to conclude that, while "the county attorney should act with due regard for the public interest, an attorney-client relationship as such does not ordinarily exist between the county attorney and the citizens of the county."[6] In analyzing this issue, the Attorney General relied on Maryland statutory law creating counties as corporate entities,[7] and discussed Rule 1.13 of the Maryland Lawyers' Rules of Professional Conduct:[8]

> Under Rule 1.13(a), "a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." As the comment to the rule points out, "an organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents." In this rule, the term "constituents" does not have the political meaning of those who elect the governing officials. Rather, the term "constituents" refers to those who, in the structure of the organization, are entitled to act for it. When the corporation is a county, these "constituents" include the county commissioners, appointed officials, and employees and agents of the county.[9]

The Montana Bar Ethics Committee reached a similar conclusion on the question of whether a staff attorney for a state administrative agency represented the state agency or its members:

> Under the agency approach and in accordance with Rule 1.13, it appears that a staff attorney for a state government administrative agency represents the agency as a discrete entity. The attorney must proceed as is reasonably necessary in the best interest of the organization and owes a duty of confidentiality to the agency as a whole, not to its individual members.[10]

Similarly, the State Bar of California's Standing Committee on Professional Responsibility and Conduct analyzed the client identification problem under California law:

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[5] 82 Op. Att'y Gen. 15. (Md. 1997).
[6] *Id.*
[7] MD. CODE ANN. Art. 25 § 1; MD. CODE ANN. Art. 25A, § 1.
[8] Maryland Rule 1.13(a) is patterned after the ABA Model Rule 1.13(a) cited earlier at note 4, and was adopted without substantive change.
[9] 82 Op. Att'y Gen. 15, 16 (Md. 1997).
[10] State Bar of Montana Ethics Committee Opinion 940202.

> There appears to be no case or statutory authority which provides a definitive test for determining if and when a constituent or official of a main governmental entity ought to be characterized a client of the attorney for the main entity. However, taken together, rule 3-600 and the case of *Civil Service Com. v. Superior Court (1984,)* 163 Cal.App.3d 70 … are instructive. They are authority for two propositions: (1) that an attorney for a governmental entity usually has only one client, namely, the entity itself, which acts through constituent sub-entities and officials; and (2) that a constituent sub-entity or official may become an independent client of the entity's attorney only if the constituent sub-entity or official possesses the authority to act independently of the main entity and if the entity's attorney is asked to represent the constituent sub-entity or official in its independent capacity. [Citations omitted.][11]

The Maryland State Bar Association Committee on Ethics faced a similar challenge on a question of whether the Department of the County Attorney could represent the County Board of Zoning Appeals in a matter pending before it where another of its attorneys represented the County's Planning Commission and its Board of County Commissioners. As in California, the question evolved into a determination of client identity – if each agency was a separate client, a conflict existed, but if each agency was just a component part of the county as a whole, there could be no conflict.[12]

The Utah Supreme Court faced an even more troubling aspect of the issue in a case involving the County Attorney and the Board of Commissioners for the County. The County Attorney held an elected position under the Utah Constitution, representing the County government, and also acted as the local prosecutor and as an arm of the State. As fate would have it, the County Attorney concluded that the Board of County Commissioners had acted improperly under Utah law by appropriating money to several charities. Utah law required the County Attorney to represent the County and, also, to bring suit for recovery against individual county commissioners who improperly spent public money. The County Attorney described this responsibility in an opinion to the Commission, which responded by filing suit for a declaratory judgment. In the Commission's complaint, the Commission relied on an August 22, 1996, opinion letter from the County Attorney as setting out their dispute over their relationship and respective roles. In that letter, the County Attorney asserted that he was the legal counsel only for the County, not for the Commission or its individual Commissioners, and, therefore, owed a professional duty only to the County.[13]

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[11] Formal Opinion No. 2001-156 (Sept. 1, 2002).

[12] MSBA Committee on Ethics, Ethics Docket 2003-15. The Committee concluded that the issue involved a question of law outside its ambit in interpreting the Rules of Professional Conduct; i.e., whether the local laws created each of the agencies as units of County government or as distinct entities.

[13] Salt Lake County Commission v. Salt Lake County Attorney, 985 P.2d 899, 901 (Utah 1999).

In determining the matter, the trial court ruled that "that the County Attorney is the adviser to the County, to the Commission, and to each individual Commissioner and that the County Attorney has an attorney-client relationship with the Commission and each individual Commissioner."[14] On appeal, the Utah Supreme Court reversed. The court discussed the applicability of Rule 1.13 to the relationship:

> We first look to Rule 1.13 of the Utah Rules of Professional Conduct, which directly addresses the issue. Subpart 1.13(f) states that any "lawyer elected . . . to represent a governmental entity shall be considered for the purpose of this rule as representing an organization. The government lawyer's client is the governmental entity except as the representation or duties are otherwise required by law." Subpart 1.13(a) of this rule states that "[a] lawyer employed or retained by an organization represents the organization through its duly authorized constituents." Under these ethical provisions, and in the absence of any contradictory statutes, the County Attorney is the legal adviser only to the County as an entity. The County Attorney represents the County, which acts through the County Commissioners, agents of the County. Critical to the correctness of this analysis is whether there are any statutes that alter the relationship of the County Attorney to the County or add duties beyond those set out in the rules.[15]

Having determined that the County Attorney represented the government entity, the court concluded that the County Attorney's duties as an elected official precluded easy classification under the Rules of Professional Conduct:

> . . . [I]t is apparent that the County Attorney has a dual role. One is to act as the attorney for the County. The second is to carry out his statutory duties as an elected official. The duties given to the County Attorney may create a conflict among him, the Commission, and the Commissioners that would not usually exist through an attorney-client relationship.[16]

As it happens, the Utah State Bar Ethics Advisory Committee had reached a conclusion substantially similar to this ruling about a year before the State Supreme Court rendered its decision.[17] Notably, both the court and the Committee stressed an important axiom within Utah Rule 1.13:

> When the County Attorney finds that he is legally charged to bring an action pursuant to section 17-5-206, we remind him that he is still bound by the ethical obligations under Rule 1.13(b), which dictate how the lawyer for an organization should handle a situation where he has discovered that there may be a violation of law. The County Attorney should take note that "any measures taken shall be

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[14] *Id*. at 903, citing to the District Court, Salt Lake County's unreported ruling.
[15] *Id*. at 904.
[16] *Id*. at 907.
[17] Utah State Bar Ethics Advisory Opinion Committee, Opinion No. 98-06 (Oct. 30, 1998).

> designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization."[18]

In Indiana, its Legal Ethics Committee considered a question by a city attorney as to whether the attorney could provide advice to city councilpersons who participate in the political caucus of a city council on issues involving open meetings while they were in caucus. The Committee did not address Rule 1.13 and formulated the question as whether the attorney could represent both the Caucus and the Council.

> The initial question, then, is who is the attorney's client? In the facts presented, it appears to the Committee that the client is the City Council and not the Caucus. The Committee has also concluded that the Caucus is separate from the City Council and not a subpart, as would be the case, for example, with a committee of the City Council. The attorney is being requested to render legal advice to a separate party, namely the Caucus, which is not his client.[19]

This conclusion seems to rest on the Committee's determination that city councilpersons by meeting together as party members somehow form a new entity. If that is correct, then the opinion may be correct, but that reasoning seems flawed. In the context of the question presented, the city attorney was asking whether the rules allowed the city attorney to advise certain council members on an issue important to the city; i.e., the open meetings law and a law the council members could only violate as members of the council. Assuming for purposes of discussion that the Caucus was a separate entity, wouldn't the city have an interest in whether council members attending were violating the open meetings law? If so, the council members appropriately sought the advice of the city attorney on that issue and the city attorney was representing the city by formulating and giving that advice.

In Alaska, its bar association Ethics Committee was asked if a city attorney from a small community having only four lawyers could staff various city boards and commissions with attorneys from the city attorney's office while having other attorneys from the office appear in front of the boards advancing other city interests if each was screened by an "ethical barrier". The Committee concluded that the city attorney could do so, but only with the informed consent of each board and commission and of the city. The Committee went further to suggest that it believed that each attorney needed to consider if the representation was "materially limited" by the attorney's obligations to

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[18] *Id*. at 3; *Salt Lake County Comm'n*, 985 P.2d at 906 n 7. The Committee essentially had the same admonishment:

> We emphasize that Rule 1.13(b) also imposes an ethical duty on county attorneys and deputy county attorneys to assure that measures taken are designed to minimize disruption of the county organization and the risk of revealing information relating to the representation of the county to persons outside the county organization, except as required by law or other Rules of Professional Conduct.

[19] Indiana State Bar Association Legal Ethics Committee Opinion No. 1, 1992.

one or the other agencies or the city. It concluded that the attorneys had an obligation to maintain public confidence in the legal system and should be cognizant of the public perception the dual representation might cause.[20] The opinion ante-dated Alaska's adoption of Rule 1.13, so the opinion may be worthy of that state's reconsideration under the new Rule particularly given the Comments to Rule 1.13.

In the Comments, Rule 1.13 reminds us that government attorneys may be treated differently under the Rules and refers us to the *Scope*. There the drafters recognize that government lawyers may be authorized, if not required, to represent multiple agencies in internecine conflicts that might preclude private practitioners representing private clients.

> [18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intra-governmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

Part-time local government attorneys, and attorneys who represent local governments as clients in their private practices, face similar issues. Sometimes, these issues arise when the attorney seeks to represent a private client against the entity (or an agency of the entity) that he or she may also represent from time to time.

In New York State, a federal district court addressed the question of who a law firm represented in dealing with a motion to disqualify a firm in a high-profile case.[21] The case involved tobacco litigation where attorneys represented Brown & Williamson Tobacco Corp., an entity that challenged a statute barring certain sales of tobacco products. The law firm, however, had also acted for the State in other matters. The State attempted to disqualify the firm on the basis that it had a conflict, because Rule 1.13 required a conclusion that the firm represented the State as a unit, and not its individual agencies; thus, Rule 1.13 should be construed to mean that the law firm represented the State as a whole. The State relied on Rule 1.13 of the ABA Model Rules of Professional Conduct and Comment 6 to argue that the law firm owed a duty of loyalty to the entire executive branch of the State government. That Comment provides:

> Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole.

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[20] Alaska Bar Association Ethics Committee Opinion No. 99-2.

[21] Brown & Williamson Tobacco Corp. v. Pataki, 152 F. Supp. 2d 276, 282 (D.N.Y. 2001).

However, an American Bar Association Formal Ethics opinion concluded generally that a lawyer representing the government "may represent a private client against another government entity in the same jurisdiction in an unrelated matter, as long as the two government entities are not considered the same client."[22] The district court agreed, concluding that:

> The State's argument must fail. ... the State concedes that the two representations are not substantially related. Therefore, information gained from [the firm's] representation of the State is irrelevant to its representation of Brown & Williamson. In addition, the State does not dispute [the firm's] statement that no [firm] attorneys or State employees working on the State issues are involved or will be involved in the Brown & Williamson matter. [23]

In another case, a Connecticut court was asked to disqualify an attorney for a town on the basis that the attorney had represented different town agencies; thus, the attorney's present representation of the town's code enforcement officer was in conflict with the attorney's prior representation of the town's various agencies. The court recognized the potential for mischief if it reached the conclusion that the attorney had a disqualifiable conflict:

> Admittedly, Rule 1.13 refers back to Rule 1.7, "Conflict of Interest. General Rule," but these two rules must be read together and it can't be appropriate to say that a town attorney "represents" a particular agency and all officials at all times and at the same time he or she represents the town. Such a result would present impossible problems even short of litigation. Town governments are rife with disputes between agencies, between officials and agencies, between elected and appointed officials, etc. An important role of a town attorney is to give advice to the governing authority of the town regarding these disputes and perhaps at times to disputants. A rule saying a town attorney represented each agency or official, at all times, so as to bring into play Rule 1.7 would require towns to employ different sets of lawyers in many situations.[24]

Another case involved a question asked of the Standing Committee on Professional Responsibility and Conduct of the California State Bar - whether a city attorney could advise both the Mayor and the Council on pending legislation. The Committee reviewed several California cases and prior opinions before concluding that the attorney could advise both. In so doing, the Committee noted that one of the key distinguishing factors was whether a constituent agency of the entity could act independently of the entity. The Committee offered this guidance to city attorneys faced with a potential conflict:

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[22] Op. 97-405 (Apr. 19, 1997) (a lawyer representing the government "may represent a private client against another government entity in the same jurisdiction in an unrelated matter, as long as the two government entities are not considered the same client, and as long as the requirements of Model Rule 1.7(b) are satisfied.")

[23] 152 F. Supp. 2d at 288-89.

[24] Wise v. Lowery, 1995 Conn. Super. LEXIS 2400, 6-7; 1995 WL 506071 at *3 (Conn. Super. Ct. Aug. 16, 1995).

> The following two-part test is a tool that can assist in determining whether a city attorney faces a potential conflict of interest governed by rule 3-310(C)(1) when asked to advise different bodies or officials within the city government regarding a matter: Do constituent sub-entities or officials (a) have a right to act independently of the governing body of the entity under the city charter or other governing law so that a dispute over the matter may result in litigation between the agency and the overall entity and (b) have contrary positions in the matter. Both elements must be present to create a potential conflict of interest governed by rule 3-310(C)(1). Even when both elements are present, the result for disqualification purposes is not always predictable under current law. *People v. Christian and Civil Service Commission*, as well as other cases cited above, suggest that a court might be less rigorous in interpreting the scope of the Rules of Professional Conduct relating to conflicts of interest when applied to governmental attorneys than to other attorneys.[25] [Citations omitted.]

In Arkansas, the Rules and court decisions seem to lead to a much more limiting interpretation. First, unlike most jurisdictions that have adopted the model rules, Arkansas has retained prohibitions against acts that constitute the "appearance of impropriety."

> [37] As an integral part of the lawyer's duty to prevent conflict of interests, the lawyer must strive to avoid not only professional impropriety, but also the appearance of impropriety. The duty to avoid the appearance of impropriety is not a mere phrase. It is part of the foundation upon which are built the rules that guide lawyers in their moral and ethical conduct. This obligation should be considered in any instance where a violation of the Rules of Professional Conduct are at issue. The principle pervades these Rules and embodies their spirit.

Rule 1.7, Comment 37. With this amorphous standard to maintain, many of the principles applicable in other jurisdictions cannot clearly be said to apply in Arkansas. Thus, the Professional Ethics Committee of the Arkansas Bar Association has concluded that an attorney in private practice cannot represent a city while at the same time appearing before a board or commission of the city and seeking relief for a private client. Ark. Bar. Assoc. Ethics Op. 06-01.

In part, the Arkansas Bar Association's Professional Ethics Committee based its determination on Comment 37, but also recognized the Arkansas jurisprudence that, unlike many states, continues to constrain governments from consenting to conflicts. *City of Little Rock v. Cash*, 277 Ark. 494, 644 S.W.2d 229 (1982). In *Cash*, the court resolved an issue involving the legality of certain taxes in a suit brought by several residents of Little Rock. The attorney who represented the residents had been an attorney for the City of Little Rock and was asked to continue handling a case for the city after the attorney moved into private practice. When the agreement was made to continue handling the case, apparently there was a discussion regarding whether the engagement would prevent the attorney from handling other matters against the city and the attorney and city agreed that the attorney would not be prevented from handling other matters. The court concluded that it did not matter what the understanding might have been.

[25] CA Eth. Op. 2001-156, 2001 WL 34029610 (Cal. State Bar.Comm. Prof. Resp.).

Dual representation is particularly troublesome where one of the clients is a governmental body. So, an attorney may not represent both a governmental body and a private client merely because disclosure was made and they are agreeable that he represent both interests. As Mr. Justice Hall said in *Ahto v. Weaver*, 39 N.J. 418, 431, 189 A.2d 27, 34 (1963), "Where the public interest is involved, he may not represent conflicting interests even with consent of all concerned. Drinker, Legal Ethics, 120 (1953); American Bar Association, Opinions of the Committee on Professional Ethics and Grievances 89, 183 (1957)." Mr. Chief Justice Weintraub in a "Notice to the Bar," 86 N.J.L.J. 713 (1963), stated:

> "Because of some matters called to its attention, the Supreme Court wishes to publicize its view of the responsibility of a member of the Bar when he is attorney for a municipality or other public agency and also represents private clients whose interests come before or are affected by it. In such circumstances the Supreme Court considers that the attorney has the affirmative ethical responsibility immediately and fully to disclose his conflict of interest, to withdraw completely from representing both the municipality or agency and the private client *with respect to such matter*, and to recommend to the municipality or agency that it retain independent counsel. Where the public interest is involved, disclosure alone is not sufficient since the attorney may not represent conflicting interests even with the consent of all concerned. (Emphasis added.)
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> *Re A. and B.*, 44 N.J. 331, 209 A.2d 101, 102-03, 17 ALR 3d 827 (1965).

City of Little Rock v. Cash, 277 Ark. 494, 509-510, 644 S.W.2d 229 (1982). The New Jersey Rule, while still applicable, applies to direct conflicts and may not be applicable in situations similar to those that arose in Cash, nor to the question posed to the Committee in its opinion 06-01. Thus, where in some jurisdictions distinctions might be made as to whether a person seeking a zoning variance is in conflict with a city so as to prevent the city's bond lawyer from representing that person, in Arkansas, the combination of Rule 1.7, Comment 37 and the jurisprudence of *Cash* may well conspire to find conflict.

From the local government's perspective, a government should no more be constrained in consenting to a conflict than any other corporation. While the Rules make clear that some conflicts are so direct that there can be no consent, the archaic rule that the public cannot consent to a conflict imposes judicial paternalism that is reminiscent of Dillon's Rule. Similarly, the prohibition fails to recognize the evolution and growth of state and local governments into multi-faceted corporations that need able legal assistance without the constraints of artificial barriers. In short, there are likely few conflicts between an attorney's representation of a local government's bond issues and its individual employment decisions or code enforcement decisions.

Client Identification and Privilege

Once the client is identified, subsidiary questions arise. One of the more challenging involves privilege. For example, as a government lawyer must represent an entity through its officers and directors, which conversations in the course of that representation are privileged?

In the context of a case involving the request for disclosure of the city attorney's opinion to the county council on a matter pending before it, the California Supreme Court discussed the attorney-client privilege before holding that the document fell within that privilege:

> The attorney-client privilege applies to communications in the course of professional employment that are intended to be confidential. . . .Under the Evidence Code, a client holds a privilege to prevent the disclosure of confidential communications between client and lawyer. . . . "Confidential communication" is defined as including "a legal opinion formed and the advice given by the lawyer in the course of that [attorney-client] relationship." . . . There is no dispute that the letter at issue in this case meets this definition. And, under the Evidence Code, the attorney-client privilege applies to confidential communications within the scope of the attorney-client relationship even if the communication does not relate to pending litigation; the privilege applies not only to communications made in anticipation of litigation, but also to legal advice when no litigation is threatened. [Citations omitted.][26]

In another case, a high-profile one involving a federal investigation into corrupt practices by the Governor of Illinois while he was the Illinois Secretary of State, the U.S. Court of Appeals for the Seventh Circuit sought to address the question of whether communications between a government lawyer and employees of a government agency were protected by the attorney-client privilege. "The central question . . . is whether a state government lawyer may refuse, on the basis of the attorney-client privilege, to disclose communications with a state officeholder when faced with a grand jury subpoena."[27] As noted by the Seventh Circuit, the question of privilege is an old one; yet, despite this, few cases analyze the question of a government's right to assert attorney client privilege, and whether a government client can assert the attorney-client privilege in a civil matter:

> One of the oldest and most widely recognized privileges is the attorney-client privilege, which protects confidential communications made between clients and their attorneys for the purpose of securing legal advice. . . . It is well established that a client may be either an individual or a corporation. . . . . But here, we have a special case: the client is neither a private individual nor a private corporation. It is instead the State of Illinois itself, represented through one of its agencies. There is surprisingly little case law on whether a government agency may also be a client for purposes of this privilege, but both parties here concede that, at least in

[26] Roberts v. City of Palmdale, 5 Cal. 4th 363, 371 (Cal. 1993).
[27] In re Witness Before the Special Grand Jury 2000-2, 288 F.3d 289, 290 (7th Cir. 2002).

> the civil and regulatory context, the government is entitled to the same attorney-client privilege as any other client. [Citations omitted.] [28]

The basis upon which the attorney-client privilege rests has historically been linked to the need for an attorney, while representing a client, to be accorded a full and frank factual description of the client's case which the privilege induces. Whether that same foundation exists for cases involving the government may not be so clear, and, more importantly, government lawyers are charged differently than their private counterparts - with duties not only to the client, but an even more robust duty to the public interest they serve:

> While we recognize the need for full and frank communication between government officials, we are more persuaded by the serious arguments against extending the attorney-client privilege to protect communications between government lawyers and the public officials they serve when criminal proceedings are at issue. First, government lawyers have responsibilities and obligations different from those facing members of the private bar. While the latter are appropriately concerned first and foremost with protecting their clients--even those engaged in wrongdoing-- from criminal charges and public exposure, government lawyers have a higher, competing duty to act in the public interest. . . . . They take an oath, separate from their bar oath, to uphold the United States Constitution and the laws of this nation (and usually the laws of the state they serve when . . . they are state employees). Their compensation comes not from a client whose interests they are sworn to protect from the power of the state, but from the state itself and the public fisc. It would be both unseemly and a misuse of public assets to permit a public official to use a taxpayer-provided attorney to conceal from the taxpayers themselves otherwise admissible evidence of financial wrongdoing, official misconduct, or abuse of power. . . . Therefore, when another government lawyer requires information as part of a criminal investigation, the public lawyer is obligated not to protect his governmental client but to ensure its compliance with the law. [Citations omitted.][29]

Thus, in the context of a criminal proceeding, the Seventh Circuit concluded that the government lawyer represented the agency, not the individual, and that communications between the two were not privileged.

However, shortly thereafter and in a similar context, the U.S. Court of Appeals for the Second Circuit reached the opposite conclusion. The case involved a federal government investigation into the alleged bribery of state public officials and employees. As part of the investigation, the government moved to compel a former chief legal counsel in the Governor's Office to reveal, to a federal grand jury, the contents of private conversations she had had with the governor and various staff members for the purpose of providing legal advice. The Second Circuit held that the governor's office could invoke attorney-client privilege against the government's inquiries:

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[28] *Id*. at 291.
[29] *Id*. at 293.

> 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 seek 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, and even indispensable part of conducting public business. Abrogating the privilege undermines that culture and thereby impairs the public interest.[30]

In *Ross v. City of Memphis*,[31] the Sixth Circuit concluded that municipalities were entitled to raise privilege to protect against the disclosure of communications between municipal officers/employees and the municipal attorney. In reaching that conclusion, the court found that municipalities had even more reason to assert privilege than state or federal governments based on their greater exposure to civil liability:

> The civil context presents different concerns because government entities are frequently exposed to civil liability. The risk of extensive civil liability is particularly acute for municipalities, which do not enjoy sovereign immunity. Thus, in the civil context, government entities are well-served by the privilege, which allows them to investigate potential wrongdoing more fully and, equally important, pursue remedial options.[32]

Assuming that local governments can assert attorney client privilege in civil litigation, what other limitations arise to restrict its use? The Second Circuit, in *In re County of Erie*,[33] addressed the question of the extent to which privilege applies in the context of a local government attorney's advice to a client. The plaintiffs brought class action challenging constitutionality of the County's purported strip-search policy for detainees, and sought discovery of certain e-mails between the offices of the county attorney and the county sheriff that the County claimed were protected by attorney-client privilege. These e-mails reviewed the law concerning detainee strip searches, assessed the County's current search policy, recommended alternative policies, and monitored the implementation of these policy changes. The courts below held that the communications did not involve legal advice or analysis; rather, they addressed administration and policy, including the drafting of regulations to change existing policy.

The Second Circuit construed the critical inquiry to be whether the attorney was providing legal advice -- which would be protected -- or business advice, which would not. In its opinion, the court gave a wonderful description of what was expected of an in-house lawyer in today's world:

> The complete lawyer may well promote and reinforce the legal advice given, weigh it, and lay out its ramifications by explaining: how the advice is feasible

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[30] United States v. Doe (In re Grand Jury Investigation), 399 F.3d 527, 534 (2d Cir. 2005). An Arizona Court of Appeals also accepted this line of reasoning in *State ex rel. Thomas v. Schneider*, 212 Ariz. 292 (Ariz. Ct. App. 2006).

[31] 423 F.3d 596, 601 (6th Cir. 2005).

[32] *Id*. at 603.

[33] In re County of Erie, 473 F.3d 413(2d Cir. 2007) (*Pritchard I*).

> and can be implemented; the legal downsides, risks and costs of taking the advice or doing otherwise; what alternatives exist to present measures or the measures advised; what other persons are doing or thinking about the matter; or the collateral benefits, risks or costs in terms of expense, politics, insurance, commerce, morals, and appearances. So long as the predominant purpose of the communication is legal advice, these considerations and caveats are not other than legal advice or severable from it. The predominant purpose of a communication cannot be ascertained by quantification or classification of one passage or another; it should be assessed dynamically and in light of the advice being sought or rendered, as well as the relationship between advice that can be rendered only by consulting the legal authorities and advice that can be given by a non-lawyer. The more careful the lawyer, the more likely it is that the legal advice will entail follow-through by facilitation, encouragement and monitoring.[34]

The County had argued that the assistant county attorney who gave the advice was limited by the county laws to only giving legal advice, and that her client, the sheriff, was specifically directed by law to establish policy. Thus, it claimed the court did not need to inquire further into whether the communications involved legal advice or policy advice. The Second Circuit quickly discounted these arguments; nevertheless, in reversing the lower court, it concluded that the advice given was within the ambit of what was expected from a lawyer rendering legal advice and counsel. The court provided this constructive advice for government lawyers seeking to protect their communications with their clients:

> It is to be hoped that legal considerations will play a role in governmental policymaking. When a lawyer has been asked to assess compliance with a legal obligation, the lawyer's recommendation of a policy that complies (or better complies) with the legal obligation--or that advocates and promotes compliance, or oversees implementation of compliance measures--is legal advice. Public officials who craft policies that may directly implicate the legal rights or responsibilities of the public should be "encouraged to seek out and receive fully informed legal advice" in the course of formulating such policies. To repeat: "The availability of sound legal advice inures to the benefit not only of the client . . . but also of the public which is entitled to compliance with the ever growing and increasingly complex body of public law." This observation has added force when the legal advice is sought by officials responsible for law enforcement and corrections policies.
>
> We conclude that each of the ten disputed e-mails was sent for the predominant purpose of soliciting or rendering legal advice. They convey to the public officials responsible for formulating, implementing and monitoring Erie County's corrections policies, a lawyer's assessment of Fourth Amendment requirements, and provide guidance in crafting and implementing alternative policies for compliance. This advice--particularly when viewed in the context in which it was

[34] *Id*. at 420-21.

> solicited and rendered--does not constitute "general policy or political advice" unprotected by the privilege. [Citations omitted].[35]

From the foregoing, one can conclude that the issue of whether the attorney-client privilege applies in the government context can be difficult. As murky as the law seems to be, the conclusion reached by the Second Circuit best serves the government lawyer and seems to rest on a more solid analytical foundation.

The Second Circuit was asked again to revisit the matter in a later ruling.[36] When the case was remanded by the Second Circuit, the lower court was asked to determine whether the distribution of the disputed ten emails to most, if not all, of the correctional staff acted as a waiver of the privilege, given its broad distribution. It found that the distribution did not waive the privilege because the people to whom the emails were distributed needed the information that they contained to do their jobs.[37] However, on reconsideration, the lower court concluded that the "qualified immunity" defense raised in the case put the advice "at issue" and concluded that privilege was thereby waived.[38]

On appeal, the Second Circuit reversed.[39] "At issue" waiver arises generally when a person who might otherwise assert a privilege raises a cause of action or defense based on the legal advice the person seeks to conceal. Courts find this tactic unfair, and the leading case on the issue is *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975). In *Hearn*, the court expressed the doctrine by requiring a positive response to three separate questions, namely: whether (1) assertion of the privilege was a response to some affirmative act, such as filing suit or a defense to a claim; (2) through the affirmative act the asserting party put the protected information at issue by making it relevant to the case; and (3) the application of the privilege would have denied the opposing party access to information vital to the defense.[40] After describing the emerging criticism of *Hearn* both in other circuits and by academics, the court concluded that a different analysis should apply by concluding that "rules which result in the waiver of this privilege and thus possess the potential to weaken the attorney-client trust, should be formulated with caution."[41] The court pointed out that virtually any information regarding protected information in the attorney-client context could be relevant to the case; thus, it felt obliged to modify that component of the test by holding that the "party must *rely* on the privileged advice from his (sic) counsel to make his (sic) claim or defense."[42] Further, and importantly for state and local governments, the court recognized that the qualified immunity defense does not, on its own, waive the privilege; rather, the defendant must raise the "state of mind" or "good faith" defense based on the advice of counsel before that advice is "at issue."[43]

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[35] *Id*. at 422-23.
[36] Pritchard v. County of Erie, 546 F.3d 222, 226 (2d Cir. 2008) (*Pritchard 2*).
[37] Pritchard v. County of Erie, 2007 WL 1703832 (W.D.N.Y. June 12, 2007).
[38] Pritchard v. County of Erie, 2007 WL 3232096 (W.D.N.Y. Oct. 31, 2007).
[39] In re County of Erie, 546 F.3d 222 (2d Cir. 2008).
[40] *Id*. at 226, quoting *Pritchard 1* and *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975).
[41] *Id.* at 228.
[42] *Id.* at 229.
[43] *Id.* at 230.

A more difficult problem arises in the context of open meeting and public records laws. While many states do not allow the public records laws to overwrite privilege, in Arkansas it is clear that privilege does not survive either the Public Records Law[44] or the Open Meetings Law[45] and in at least one state -- North Dakota -- the Attorney General has opined that the North Dakota Rules establishing privilege are "applicable only to proceedings in the courts of North Dakota and other related proceedings"[46] and thus, do not overwrite the state's public records laws. More recently, North Dakota's Attorney General opined, however, that the work product doctrine continued to apply, despite the public records laws, until the litigation giving rise to that privilege was concluded.[47] In Arkansas, even work product is not protected under its Freedom of Information law.[48] Without doing a survey of the states, the state of the law in Arkansas and North Dakota, at least, cautions that a public lawyer determine whether the public records or open meetings law in the applicable jurisdiction waives the privilege. In Indiana, that state's Court of Appeals has recognized attorney-client privilege to be excepted from the requirements of disclosure under its public records law.[49]

While somewhat off topic, but nevertheless important to remember, the attorney-client privilege can also be used as a sword against a local government. In the emerging jurisprudence of privacy of email (or text) communications two cases combine to caution attorneys in local government practice to understand the limits of the privacy of email communications and of their government's employees' rights to attorney-client privilege in email communications with their attorneys.

City of Ontario v. Quon, ___U.S. ____ (June 17, 2010), the Supreme Court assumed that employees suing their employer, the City of Ontario, for an illegal search had a reasonable expectation of privacy in text messages that they sent and received on their government messaging system, but found that the employer had a reasonable basis

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[44] *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990). In this case, the Arkansas Supreme Court concluded that even records held by outside counsel to the city were public records under the Arkansas Freedom of Information Act.

[45] *Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968). In *Laman*, the court determined that the Arkansas Open Meetings Law did not exempt meetings with the city's attorney from the requirement of being open.

[46] N.D.A.G. 95-l-1.

[47] N.D.A.G. 2007-O-07.

[48] *Edmark*, supra.

[49] *Board of Trustees of Public Employees' Retirement Fund of Indiana v. Morley*, 580 N.E.2d 371, 373(Ind.App. 4 Dist.,1991). "The communications sought are communications between a client (PERF) and its attorney (the Attorney General) discussing potential legal problems concerning the way in which PERF was carrying out its duties. These fall within exceptions to disclosure under the public records statute because they are protected by the attorney client privilege which makes them confidential under statute and supreme court rule. *See* IC 34-1-14-5; IC 34-1-60-4; Prof.Cond.R. 1.6(a)."

to search the messages thereby overcoming the Fourth Amendment prohibitions against unreasonable searches. Not every local government employer's policies and practices will protect it against a claim of an illegal search should the government seek to review its employees' messages. And, in New Jersey, its Supreme Court concluded in *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650 (NJ 2010), that "a policy that banned all personal computer use and provided unambiguous notice that an employer could retrieve and read an employee's attorney-client communications, if accessed on a personal, password-protected e-mail account using the company's computer system — would not be enforceable."[50] The New Jersey Supreme Court also concluded that the attorneys who attempted to use the recovered email messages between Stengart and her attorneys violated that state's version of Model Rule 4.4 and were subject to sanctions. Combined, these cases urge caution when examining an employee's computer messages.[51]

I wish you hadn't told me that!

A couple of years ago, a question was raised through the IMLA local government lawyers' listserv,[52] seeking help in handling the situation where a department director discussed a matter with agency counsel. The county's EEO was doing its own internal investigation, and the attorney wanted to know whether she could disclose the substance of the communication. This question may be typical of the issues that local government lawyers face in representing entities.

The U.S. Court of Appeals for the Tenth Circuit discussed similar issues in an employment lawsuit where Cole, the plaintiff, sought to disqualify counsel for her former employer because, during the course of employment, she had consulted counsel on sensitive personnel matters. In *Cole v. Ruidoso Municipal Schools*,[53] the court concluded that, in the context of applying Rule 1.13 to the facts, Cole could not have reasonably believed that the attorneys represented her, and not her employer:

> Cole asserts that an attorney-client relationship existed between [the law firm] and her because she believed that the law firm represented her individually when she consulted with its attorneys on "sensitive personnel issues" and acted on their advice. Although the alleged former client's subjective belief can be considered by the court, this belief is not sufficient to establish an attorney-client relationship. . . . In addition to having a subjective belief that there was an attorney-client relationship, the belief must have been reasonable. Here there was no reasonable basis for Cole's belief that [the firm] represented her individually. Cole ignores the fact that she consulted the law firm only for the purpose of carrying out her duties as principal. Rule 1.13 provides that a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. Although a lawyer is obligated not to disclose the information

[50] *Stengart v. Loving Care Agency, Inc.*, 990 A. 2d 650, at p. 665.
[51] *Stengart*, supra. at p. 666.
[52] The listserv is available to local government attorneys through the IMLA website at www.imla.org regardless of membership in IMLA.
[53] *Cole v. Ruidoso Mun. Schools*, 43 F.3d 1373 (10th Cir. 1994).

> revealed by the client's constituents or employees, "this does not mean, . . . , that constituents of an organizational client are the clients of the lawyer." . . . The information Cole communicated to the law firm on behalf of the School District was not protectable confidential communications of Cole's to the firm. It is the District which, as the client, holds the right to have those communications protected and which may decide whether and to whom that information may be disclosed. Therefore, it is clear that Cole is not a former client of [the firm] and that there is no danger of improper disclosure of client confidences. [Citations omitted.][54]

In the context of the listserv, we can all be guided by the sage advice from a scholarly member, who pointed out that "normally, the ideal way to begin a consultation with a department head is with a kind of Miranda warning somewhat along these lines":

> My attorney-client relationship is with the county, so any information you give me belongs to the county. The attorney-client relationship that exists between you and me only exists by virtue of our relationships with the county, so I do not represent you personally in any way. As to any potential personal liability you may have, you must consult your own attorney. If you understand that and still want to tell me anything, you may do so, but if you do, please understand that any county official who needs to know it will be entitled to know it. I cannot keep it confidential from them, and it will be up to someone other than me to decide whether the information will ever be released to someone else.

Practically, we are more likely to give a less formal and less specific greeting when we meet our government client as a more general warning repeated regularly to county staff, that "the office of law represents the county only and not individual employees unless specifically and expressly noted," can guide employees without chilling their interest in consulting with their government lawyer on matters that concern them. Indeed, in concluding its opinion on whether a city attorney could advise both the Mayor and Counsel on pending legislation, the California Standing Committee on Professional Responsibility and Conduct noted:

> [A] city attorney must not mislead constituent sub-entities or officials who have no right to act independently of the governing body of the entity and who are seeking advice in their individual capacity into believing that they may communicate confidential information to the city attorney in such a way that it will not be used in the city's interest if that interest is or becomes adverse to the constituent or official.[55]

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[54] *Id*. at 1384-85.

[55] CA Eth. Op. 2001-156, 2001 WL 34029610 (Cal.State Bar.Comm.Prof. Resp.).

Conclusion

Ethics questions arise frequently in municipal law offices. To the extent IMLA can act as a resource in answering those questions, we are available to serve our members. Not every ethics question has a precise answer, but the opportunity to discuss and find support in developing an answer can be invaluable. For our members, we offer a free, monthly ethics cracker barrel discussion of ethics issues that affect local government attorneys. For information on joining the International Municipal Lawyers Association or learning more about us contact me at cthompson@imla.org.