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"Who's Your Client?" An Ethical Challenge—and Opportunity—For the Government Lawyer

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"Who's Your Client?" An Ethical Challenge —and Opportunity—For the Government Lawyer

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I. Introduction

Imagine you are Assistant Corporation Counsel to a large city. Your highest court has just held that denying marriage rights to same-sex couples violates the state constitution. Although the court provided a date for when its ruling would take effect—six months after the decision—it offered scant guidance regarding implementation of the ruling. Who is left to fill in the legal gaps? The cities and towns, of course. After all, the city and town registrars or clerks are the people who accept marriage applications and issue marriage licenses. Your registrar already is getting more than 30 calls and e-mails a day from people across the country asking who can marry and when and how they can do so. Clearly your registrar needs your legal assistance. The Mayor— a supporter of gay and lesbian rights—is aware that an old statutory law exists prohibiting the city from issuing marriage licenses to out-of-state couples whose marriages would be invalid in their home states needs analysis as to who can legally marry. And the citizens of your city need answers also. Who's your client? Is it the City Registrar and her employees? Yes. Is it the Mayor? Yes. Is it the people of your city? Yes, again.

That question—who's your client—is a no-brainer for most attorneys. In private practice your client is the person who retains you, the person who pays your bills, the person who needs your counsel. But for government lawyers, particularly municipal lawyers, the answer to this question is not so clear-cut and, instead, is multifaceted. The lack of a readily apparent client stems from the fact that many, if not all, municipal law

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issues carry political overtones. As Thomas P. "Tip" O'Neil, longtime Speaker of the United States House of Representatives, famously pronounced, "all politics is local." Surely O'Neil was correct in that most every important political issue develops and gets played out at the local government level. From public schools to housing to law enforcement, the basic needs and activities of most Americans are provided for and organized by city and town governments. Describing the inevitable political dimensions of work as an appointed government lawyer, Judge Jack Weinstein, former County Attorney for Nassau County, New York, explained:

> The chief government law officer must and should attempt to please some politicians: he is, by virtue of his position, a political or policymaking figure, a member of government administration which achieved office by a political-governmental program. He has a responsibility to consider what effect his actions will have in developing and executing what he conceives to be sound public policy, in inducing confidence of the public in government, and in strengthening elected officials so that they can continue to control the government's machinery in achieving the end he supports.[2]

Accordingly, local government lawyers have the awesome responsibility of representing cities or towns, and their citizens and employees, all the while working—at least to some extent—as political lawyers for elected officials.

Municipal lawyers' clients can be described as falling into three categories: (1) the elected leaders of the city or town; (2) the political appointees or elected officials in charge of the department or commission where the legal issue arises, including the municipal employees who work therein; and, (3) the city—the public at large. Although this tri-client model is overly-simplistic, it is a useful way to think of the unique attorney-client relationships city and town lawyers confront. Describing the difficult balancing

[2] Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 ME. L. REV. 155, 158 (1966).

act inherent in attending to all three client communities, a lawyer from the United States Department of Justice Civil Division noted:

> As the "government's law firm," the Civil Division must seek to protect the legitimate interests of the agencies it represents. At the same time, the Justice Department is charged with protecting the interests not merely of any one agency, but of the United States. And it is charged with the responsibility for litigation in ways that differ markedly from the role of the private attorney.[3]

Juggling the needs of these intersecting and overlapping clients in complicated local government issues is, arguably, the most challenging and rewarding aspect of working as a municipal lawyer.

For most legal issues faced by the city, all three clients have an interest and stake in how the issue is resolved. Municipal lawyers have a duty to keep all three clients in mind as they provide legal advice, advocate, and endeavor to solve the problem posed. Rendering good decisions for all three clients simultaneously can be difficult, however, especially when the clients appear to champion inconsistent interests. Nonetheless, as explained below, the apparent tension between clients can be transformed into a shared interest, leaving municipal attorneys well-equipped to serve their professional and ethical commitments.[4]

This paper provides a methodology for local government lawyers to employ in working through the ethical problems posed when their clients appear to be in conflict.[5]

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[3] Mark B. Stern, Alisa B. Klein, *The Government's Litigator: Taking Clients Seriously*, 52 ADMIN. L. REV. 1409, 1410 (2000).

[4] This paper focuses on the ethical dilemmas faced by chief appointed municipal lawyers. It assumes, however, that attorneys who are assistants to the head government attorney, although they must defer to the decisions of their superiors, face the same ethical dilemmas and can benefit equally as their bosses from the methodology proposed herein.

[5] This paper does not purport to address those situations in which there is a true conflict of interest between parties, such as a civil rights suit against the City and an individual police officer where the parties' interests genuinely conflict and outside counsel must represent one of them. Rather, this paper focuses on

Section II explores the two traditional views regarding who, or what, government lawyers represent; Section III uses a case study to expose the gaps in the models; and Section IV provides a roadmap for resolving apparent conflicts of interests between municipal lawyers' clients in order to reach the optimal result in each case.

II. Competing Client Models For Local Government Lawyers

Ethics are "a system of moral principles" or "that branch of philosophy dealing with values relating to human conduct, with respect to the rightness and wrongness of certain actions and to the goodness and badness of the motives and ends of such actions."[6] For the legal profession in the United States, ethical rules govern the practice of law. Perhaps the best-known tenet of American legal ethics is that lawyers cannot represent clients with conflicting interests,[7] and compliance with this rule is ensured via disciplinary rules.[8]

Notwithstanding the multiple client relationships municipal lawyers face, they remain subject to the prohibition against representing conflicting interests. Two schools of thought have emerged as to how government lawyers should navigate between attorney-client relationships when presented with multiple, often conflicting, interests. One model posits the elected government official or administration as government

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those instances where multiple parties share an interest or a stake in the outcome of the given legal problem, but, at least superficially, do not appear to have the same concerns.

[6] Websters Encyclopedic Unabridged Dictionary of the English Language, Random House Value Publishing, (1996).

[7] See ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983) ("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."); *see also*, Note, *Developments in the Law: Conflicts of Interest in the Legal Profession*, HARV. L. REV. 1244, 1413-46 (1981).

[8] ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY D.R. 5-105(A) (1979).

lawyers' client. Under the other model, the public interest is the client.[9] The dichotomy posed by these two views of the government lawyers' client is a useful tool for understanding the different approaches, but, as explained in Section III infra, it ignores the more common and subtle ethical questions municipal lawyers face.

A. The Elected Government Official Model

Pursuant to the "elected government official" model, head government officials are always the government lawyers' client. This model rests on the following assumptions: (1) the chief government lawyer represents the interests of the elected government official who appointed her or for whose administration she works; [10] (2) when client conflicts exist, the appointed chief government lawyer should bring the dispute to the attention of the elected government official for resolution; (3) the failure to regard the elected government official as the client would leave the government without a lawyer.[11] The contention that the elected official is the client—or at least, is the person who should determine which client (or position) to represent in the event of a conflict—reflects the belief that "the appointed government lawyer serving at the pleasure of a particular official represents that official."[12] Some proponents of the elected government

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[9] William Josephson and Russel Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict*? 29 HOW. L.J. 539, 1986; Bruce Green, *Symposium: Legal Ethics for Government Lawyers: Straight Talk for Tough Times: Must Government Lawyers "Seek Justice" in Civil Litigation*? 9 WIDENER J. PUB. L. 235 265-271 (noting the model of elected official–as-client, but advocating a view of government-as-client as the means to seek social justice).

[10] *See e.g*., Bruce Fein, *Promoting the President's Policies Through Legal Advocacy: An Ethical Imperative of the Government Attorney*, 30 FED. B. NEWS & J. 406, 408 (1983) (arguing for deference to the elected administration); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective From the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1317 (2000) (noting that the "President is responsible for his own decisions, and in fact has the authority either to make his own legal determinations without consulting any particular lawyer or to proceed in the face of contrary advice from any lawyer he does consult").

[11] Elisa E. Ugarte, *Post Conference Reflections: The Government Lawyer and the Common Good*, 40 S. TEX. L. REV. 269, 271, 272, (1999).

[12] Josephson and Pearce, *supra* note 8, at 564; *see also*, Fein, *supra* note 9, at 408.

official-as-client approach proudly refer to it as "the ethical approach."[13] Under their view, not only must government lawyers exclusively represent the elected official, but they also must appoint independent counsel when an agency or department within the government disagrees with their client: the head elected official.

Advocates of the elected government official model contend that it reflects democratic principles. Only by implementing the elected government official model, they argue, can local government lawyers realize the promise of the pluralistic republic.[14] Furthermore, the view that the elected government official is the client lends itself easily to analogy with private legal practice. As one government lawyer explained:

> If a lawyer is to function effectively as counselor and advisor to elected and appointed officials, those officials must not view the lawyer as some independent actor, liable at any time to arrive at some individualistic perception of the "public interest" and act accordingly. The governmental client seeks to advance, and not be influenced by some unique and personal vision of the "public interest". [15]

Thus, the elected government official-as-client model provides reasonably bright lines defining the attorney-client relationship.

But, when counsel introduces herself to the court as "attorney for the city," isn't something more meant than that she simply represents the head elected official? An answer in the affirmative, even intuitively derived, leads to the second model.

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[13] Josephson and Pearce, *supra* note 8, at 541, ("government lawyers are subject to the same ethical rules on conflicts of interests as are private lawyers. Indeed, not only as an ethical matter but also as a policy matter, we conclude that this result is consistent with our republican and pluralistic system of independent sources of government authority and our adversarial system of dispute resolution.).
[14] Fein, *supra* note 9, at 408; *see also*, Josephson and Pearce, *supra* note 8, at 565-569.
[15] Keith Donahoe, *The Model Rules and the Government Lawyer, A Sword or Shield? A Response to the D.C. Bar Special Committee on Government Lawyers and the Model Rules of Professional Conduct*, 2 GEO. J. LEGAL ETHICS 987, 990, footnote 6 (1989) (quoting Report by the District of Columbia Bar Special Committee on Government Lawyers and The Model Rules of Professional Conduct).

B. The Public Interest Model

The second view of who or what government lawyers' represent posits the public or the public interest as the client.[16] Under this approach, because government lawyers are striving to represent the public, they will not necessarily represent elected and appointed officials who they determine are acting outside the bounds of the "public interest." By doing so, government lawyers are not acting mercurially or insouciantly. Instead, "[t]o inspire confidence, it is required that public legal positions shall be conducted and opinions rendered according to law and not to please politicians."[17] In part, this approach stems from the notion that lawyers employed by the government and paid by taxpayers have a higher ethical duty than private attorneys whose sole aim is to achieve success for their individual clients. The ethical duties of government lawyers, so the argument goes, charge them with a responsibility not merely to win, but to seek justice. [18] As the American Bar Association's Model Code of Professional Responsibility instructs, "a government lawyer in a civil action or administrative proceeding" has "the responsibility to seek justice" and to "refrain from instituting or continuing litigation that is obviously unfair."[19]

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[16]Ugarte, *supra* note 10, at 271, 272; Josephson and Pearce, *supra* note 8, at 554-555.
[17]Murray Seasongood, *Public Service by Lawyers in Local Government*, 2 SYRACUSE L. REV. 210, 222 (1951) (quoting an American Bar Association Report, The Survey of the Legal Profession).
[18] H*Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935)H (holding, "A government lawyer "is the representative not of an ordinary party to a controversy," the Supreme Court said long ago in a statement chiseled on the walls of the Justice Department, "but of a sovereignty whose obligation ... is not that it shall win a case, but that justice shall be done.") (quoted in *Freeport-McMoRan Oil & Gas Co. v. F.E.R.C.*, 962 F.2d 45 (D.C. Cir.) (1992) "The Supreme Court was speaking of government prosecutors in *Berger*, but no one, to our knowledge (at least prior to oral argument), has suggested that the principle does not apply with equal force to the government's civil lawyers.").
[19] MODEL CODE OF PROFESSIONAL RESPONSIBILITY ETHICAL CONSIDERATION 7-14 (1980) (providing that a government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use

Because their client is, effectively, an abstraction of the public interest,[20] government lawyers under this model act independently of the elected administration. In a sense, this model treats government attorneys not as attorneys per se but as political officials seeking to serve their constituency, the public.[21] Government lawyers' decision-making under this approach is not purely subjective; they act with the same constraints faced by other government officials.[22] Furthermore, they cannot cabin their consideration by looking only to those members of the public who voted for their boss or belong to the same political party as they do. As former New York City Corporation Counsel Frederick A. O. Schwarz, Jr., framed it, "an elected or appointed government official has a duty to consider the interests of *all* his constituents, not just those of the majority that elected him."[23]

Taken to its extreme, the public-as-client approach would seem to endow government attorneys with awesome responsibility and unfettered discretion. Judge and former Solicitor General Charles Fahy observed, "where the client is the Government itself, he who represents this vague entity often becomes its conscience, bearing a heavier responsibility than usually encountered by the lawyer."[24] Moreover, the public-as-client formulation elides those conflicts often faced by government lawyers—i.e., disputes

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his position or the economic power of the government to harass parties or to bring about unjust settlements or results. This Consideration has not been adopted in the Model Rules.

[20] Role of Solicitor General, 1 Op. Off. Legal Counsel, 228 (1977). As former Solicitor General Francis Biddle stated, "He [the Solicitor General] determines what cases to appeal, and the client has no say in the matter, he does what his lawyer tells him, the lawyer stands in his client's shoes, for the client is but an abstraction . . . The total responsibility is his, and his guide is only the ethic of his law profession framed in the ambience of his experience and judgment."

[21] Moreover, this dynamic is even more pronounced or explicit if the chief government lawyer is elected.

[22] Green, *supra* note 8, at 268 (noting that the contention that the government lawyer who serves the public interest is free to make personal, subjective judgments is unpersuasive, given the constraints all government officials work under).

[23] F.A.O. Schwarz, Jr., *Lawyers for Government Face Unique Problems*, N.Y.L.J. 1, 38 (1984). (emphasis in original).

[24] Charles Fahy, *Special Ethical Problems of Counsel for the Government*, 33 FED. B. J. 331, 335 (1974).

between agencies or government authorities. If the public is the sole client, such intra-governmental controversies would not appear to give rise to a conflict of interest for government lawyers.

Given the "abstract" nature of the public-as-client model, and the wide-ranging discretion available to government lawyers representing the "public," critics contend that lawyers whose client is the public act with an individualistic perception of the public interest, ignore ethical rules, and usurp the proper role of elected government officials.[25] Advocates of the elected government official-as-client view argue: "[i]nevitably, the lawyer who decides for herself which conflicting point of view to represent decides what the public interest is."[26] They add, "[s]uch a lawyer is not a lawyer representing a client but a lawyer representing herself."[27] Highlighting the dangers of a amorphous "public" client, another commentator observed, "[a] response to the question of whether the people or the public interest is the government lawyer's client, is often answered, somewhat sarcastically, with the retort: 'And where do I go to ask the people's opinion?'"[28]

Although the public-as-client theory may stem from a heightened sense of awareness about and concern for justice, the approach suffers from a shortage of bright lines. Nevertheless, the public-as-client model has fared well in court. Many government lawyers are authorized by city charter, statute, or state constitution to conduct all of the law business of the city, state, or federal government for which they work.[29] Because the plain language of the operative law imbues government lawyers

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[25] *See* Ugarte, *supra* note 10, at 271-272; Josephson and Pearce, *supra* note 8, at 564; Note, *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1414 (1981).
[26] Josephson and Pearce, *supra* note 8, at 564.
[27] *Id*.
[28]. Ugarte, *supra note* 10, at 271-272.
[29] *See e.g.*, City Council of Boston v. Mayor of Boston, 58 Mass. App. Ct. 542, 791 N.E. 2d 370, (2003) (Mayoral appointed Corporation Counsel is the sole law department for the Mayor and City Councilors

with sole authority to organize the legal matters of the city or town, courts often decline to apply traditional conflict of interest analysis to government lawyers.[30]

The useful juxtaposition between the view that the elected official is the government lawyers' client and the view that the public interest is the client oversimplifies the issues at play in working through ethical dilemmas. The thorniest disputes over client conflicts demonstrate that an either/or choice between these two models is untenable.

III. What About the Gaps? A Case Study

The ferocity with which defenders of the two traditional models approach their task may stem, in part, from the fact that disputes about "clients' interests" are often disputes over policy. In other words, an argument about who or what government lawyers represent may have less to do with conceptualization of attorneys' roles—including concerns about justice-seeking, serving the public, etc. –and more to do with partisan feelings regarding the issue under consideration. Ethical questions usually arise in subtle ways for government lawyers, because they, as Judge Weinstein explained, "deal with conflicting duties to the law, clients, the public, and ultimately to his or her own sense of self and the independent role of each of us in assuring fairness and justice wherever we can decently do so."[31] In that vein, this section explores the experience of the City of Boston in navigating the uncharted legal terrain of same-sex marriage. To be sure, this issue raised different policy concerns for the Mayor, the City Registrar, and the people of Boston. The City of Boston Law Department also had to confront the multiple duties

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alike); *see also*, N.Y. City Charter § 394 ("Except as otherwise provided in this chapter or other law, the 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 for the city and its agencies and in which the city is interested.").

[30] *Id*.

[31] Jack Weinstein and Gay A. Crosthwait, *Some Reflections on Conflicts Between Government Attorneys and Clients*, TOURO L. REV. 1, 2 fn 4 (1985) (describing the ethical dilemmas public lawyers face as subtle yet weighty).

Judge Weinstein invoked, forcing it to ask "Who's my client?" to find a workable and ethical resolution to the problem.

In November 2003, the Massachusetts Supreme Judicial Court (SJC) held that the practice of denying marriage licenses to same-sex couples violated the state constitution.[32] The Court held that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution."[33] To allow the state time to come into compliance, the SJC stayed its decision for 180 days.[34] Following the SJC's ruling, lawmakers and activists on both sides of the issue scrambled to stake out their ground. First, the state Attorney General asked the SJC for an advisory opinion as to whether it would be constitutional to provide same-sex couples with civil unions in lieu of marriage licenses.[35] The SJC squarely rejected the proposal, issuing a second opinion holding that civil unions "would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits."[36] Next, a constitutional amendment defining marriage as a relationship between a man and a woman and also authorizing civil unions was proposed in the legislature. After a massive lobbying effort on both sides, the amendment passed by a few votes on March 29, 2004.[37] Before becoming law, however, it had to pass in the legislature by a second vote in the 2005-2006 term and then gain

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[32] Goodridge v. Dept. of Public Health, 440 Mass. 309, 798 N.E.2d 941 (2003).
[33] *Id*. at 344, 969.
[34] *Id*. at 344, 970, "to permit the Legislature to take such action as it may deem appropriate in light of this opinion." For a description of the Goodridge litigation and the related events that occurred between the ruling and the lifting of the stay, see Mary Bonauto, *Goodridge In Context*, 40 HARV. C.R.-C.L. L.REV. 1, 55-60 (2005).
[35] Frank Phillips, *Attorney General Suggests Bill: Same-Sex Benefits Without Marriage*, BOSTON GLOBE, November 11, 2003, at A1.
[36] Opinions of the Justices to the Senate, 440 Mass. 1201, 802 N.E. 2d 565 (2004).
[37] Yvonne Abraham, *National and Local Lobbying Efforts Ratcheted Up*, BOSTON GLOBE, Feb. 11, 2004, at B6; *see also*, Editorial, A Step Back, BOSTON GLOBE, March 30, 2004.

voter approval via public referendum.[38] While the legislature continued to debate the constitutional amendment, the Governor openly stated his opposition to the SJC's decision and had issued a statement on March 7, 2004, indicating that the administration would not provide guidance to city and town clerks regarding implementing the decision.[39] After the legislature voted on the constitutional amendment, the Governor requested the Attorney General to seek a stay of the SJC decision until the 2006 amendment was voted on again in 2005-2006.[40] The Attorney General declined.[41]

Against this backdrop, the 180-day clock continued to tick. As the May 17, 2004, deadline for beginning to issue marriage licenses to same-sex couples approached, the state had not made any adjustments to its marriage applications, nor had the Governor—through the Executive Department of Public Health ("DPH")—answered the questions of city and town clerks about how to proceed. The central issue posed to the Governor was whether DPH would enforce a law enacted in 1913 ("the 1913 law") to prevent mixed-race couples, and even divorced individuals, from obtaining marriage licenses in Massachusetts.[42] This law, obsolete and never enforced, prohibited any city or town clerk in Massachusetts from licensing a couple's marriage if that marriage would be void had it been contracted in the couple's home state.[43] Specifically, the 1913 law provided, "no marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void had it been

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[38] Mass. Const. Amend. XLVIII, pt. IV §4. The second constitutional convention is scheduled to vote on the constitutional amendment in the fall of 2005. Accordingly, if the amendment passes the legislature again it will be on the ballot in 2006 or 2007.
[39] Raphael Lewis, *Clerks Ask Ruling on Marriage Law*, BOSTON GLOBE , March 7, 2004 at B1.
[40] *See* Elisabeth J. Beardsley, *Same-Sex Marriage Debate; Chaos Reigns as Wedding Ban OK'd*, BOSTON HERALD, Mar. 30, 2004, at 6.
[41] Frank Phillips & Kathleen Burge, *Reilly Gives Governor A Hurdle, Reilly Rebuffs Romney on Possible SJC Appeal*, BOSTON GLOBE, Mar. 30, 2004, at A1.
[42] Editorial, *An Obsolete Marriage Law*, BOSTON GLOBE, May 6, 2004, at A22.
[43] Massachusetts General Laws Chapter 207, Sections 11 and 12.

contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void."[44] In late April, the Governor suggested that the 1913 law would require gay and lesbian couples to show tax returns or utility bills to prove they resided in Massachusetts before they could be married in the state,[45] even though proof of residency was not and had never been a requirement to marry in Massachusetts, which would tend to explain why the 1913 law had never been enforced.

Because no other state issued marriage licenses to same-sex couples, the 1913 law potentially prohibited licensing the marriage of any same-sex couples who resided outside of Massachusetts. The Attorney General had suggested that only those 38 states with explicit prohibitions against same-sex marriages in their state constitutions or statutory law would deem a same-sex marriage "void" under the 1913 law.[46] Determining which jurisdictions would deem same-sex marriage licenses void became increasingly confusing when in the wake of the Massachusetts court decision, but prior to May 17, 2004, the mayor of San Francisco, the mayor of New Paltz, New York, officials in Multnomah County, Oregon, and a clerk in Sandoval County, New Mexico, all began issuing marriage licenses to same-sex couples.[47]

The 1913 law charged city and town clerks with the responsibility of enforcing its terms:

> Before issuing a license to marry a person who resides and intends to continue to reside in another state, the officer having authority to issue the

[44] Massachusetts General Laws Chapter 207, Section 11.
[45] Pam Belluck, *Romney Won't Let Gay Outsiders Wed in Massachusetts*, N.Y. TIMES, Apr. 25, 2004, at A1.
[46] Yvonne Abraham, *AG Asks End Of Out-Of-State Marriage Licenses*, BOSTON GLOBE, May 22, 2004, at A1.
[47] Robert Tanner, *State Attorneys General Coming Down Against Gay Marriages*, BOSTON GLOBE, March 5, 2004.

> license shall satisfy himself, by requiring affidavits or otherwise that such person is not prohibited from intermarrying by the laws of the jurisdiction where he or she resides.[48]

Thus, as written, the statute placed the onus on the city or town clerks to gather sufficient evidence to satisfy them that marriage applicants' home states would recognize their marriage. Another section of the Massachusetts marriage licensing statute established a penalty for knowingly either issuing a "notice of intention" certificate or performing a marriage in violation of the laws of another state. Punishment for violating this section entailed a fine between one hundred and five hundred dollars, imprisonment for up to one year, or both.[49]

It is not unusual for couples to marry in states where they neither live nor intend to live. The prior practice of city and town clerks in Massachusetts was not to investigate the laws of marriage applicants' home states. This protocol may well have resulted in violation of the 1913 law, which, although it remained on the books, was not enforced. For example, the lawful age for marriage in Massachusetts is 18, whereas in some jurisdictions a person cannot marry until she is twenty years old. If a clerk issued a marriage license to an out-of-state 18 year old who resided in and intended to return to a state with a higher minimum age of marriage, the clerk thereby would have violated the 1913 law and, as a result, would be subject to fine or imprisonment if she knowingly issued the license. As the Boston Globe explained in an editorial:

> [F]or decades now the law has been rarely, if ever, enforced. Some states, for example, do not allow first cousins to marry, and others have higher minimum age requirements. Yet town clerks virtually never take it upon

[48] Massachusetts General Laws Chapter 207, Section 12.
[49] Massachusetts General Laws, Chapter 207, Section 50.

> themselves to investigate whether couples are cousins or demand proof of age. [50]

Prior to the same-sex marriage decision, when marriage applicants in Massachusetts swore under the pains and penalties of perjury that the information on their applications was true clerks accepted applications without further inquiry. The DPH had not previously required city and town clerks to investigate the marriage laws of applicants' home states; now, however, it appeared that clerks would be expected to make sure that the applicants' marriage would be valid in their domicile, be it Little Rock or Spain.

The problem, then, for the city and town clerks of Massachusetts was that because the 1913 law had never been enforced they were unsure how to proceed. Were they obligated to survey the position of every state and country regarding the validity of same-sex marriages? Such a Herculean task seemed unfeasible in the dwindling time available, and fielding calls and e-mails from couples around the world eager to marry in Massachusetts only added to their anxiety. In fact, by March 2004, the City of Boston Registrar was receiving over twenty calls and over ten e-mails a day inquiring about the City's same-sex marriage policy, but without the new marriage application forms from the DPH, the City had no answers. In an effort to gain clarity, the Massachusetts Clerks' Association requested opinions from the Attorney General and the Governor in February 2004. "Town clerks across the state would like this issue addressed with a sense of urgency," the clerks' representative, Stephen Roche, explained. He added, "[w]e think it's the fairest way to proceed, not just for municipal officials who oversee the process,

[50]Editorial, *An Obsolete Marriage Law*, BOSTON GLOBE, May 6, 2004, at A22.

but also for members of the general public, including individuals from outside of Massachusetts."[51]

With less than two weeks remaining before the SJC's stay expired, the Governor's office scheduled training sessions for city and town clerks across the state.[52] The 1913 law was printed on the back of the new "notice of intention" to marry forms promulgated by DPH. The new licensing forms required clerks to affirm that "no legal impediments" existed to the marriage being licensed. Furthermore, the revised marriage application form had a new provision, which read: "If not a Massachusetts resident, I intend to reside in_____". Although the Governor's administration no longer was going to require clerks to check tax returns or utility bills for proof of residence, it remained unclear whether a couple who were non-residents at the time of marriage, but "intended to reside" in Massachusetts, legally could marry in the state. Additionally, no guidance was offered regarding how a city or town clerk was to judge an applicant's intention regarding domicile.

Thus, the City of Boston, like all cities and towns in Massachusetts that spring, faced difficult questions about how to implement the new law. When working outside the bounds of precedent, a government attorney needs to consider all of the various client relationships discussed above before acting. As one observer noted:

> One of the more challenging situations confronting the government lawyer exists when the lawyer is faced with circumstances in which the lawyer is asked to fashion a solution for which no prior guidance exists within the agency's policies or regulations. A critical question raised by this situation is: How does the lawyer craft a solution that is based on objective determinations of the [government's] mission as well as the proposed

[51] Raphael Lewis, *Clerks Ask for a Ruling*, BOSTON GLOBE, March 7, 2004, at B1.
[52] Scott S. Greenberger & Yvonne Abraham, *Gay-Marriage Rule Eased; Romney Aide Says Clerks Have Discretion on Residency Proof*, BOSTON GLOBE, May 5, 2004, at A1.

> solution's impact on the common good versus the subjective imposition of the lawyer's own morals?[53]

The Mayor, for his part, embraced the expansion of marriage rights to same-sex couples by the SJC.[54] Obligated to follow the law, but uncertain of the state of the law, Massachusetts clerks and registrars felt hamstrung: they wanted to avoid getting fined or imprisoned for violating the marriage licensing statute if they ran afoul of the 1913 law, but they were also concerned about violating applicants' constitutional rights. Furthermore, city and town clerks and registrars were flooded with calls from citizens who needed to know whether they could marry. Hypothetical questions—of the kind familiar from law school exams—were posed by the dozens: Would a Massachusetts resident whose fiancé lived out of state be able to marry? Did a couple who lived in Florida, but had a summer home on the Cape, qualify as Massachusetts residents? As the questions kept pouring in, the answers remained out of reach.

After the clerk training session, less than a week remained before the stay would be lifted. It was critical that Massachusetts cities and towns use this brief interval to reconcile the SJC decision legalizing same-sex marriage with the executive branch's gloss on the enforcement of the 1913 law. Couples obtaining marriage licenses needed to know whether their marriages would be valid, city employees charged with the responsibility of issuing marriage licenses lawfully—and risking imprisonment or a fine for failing to do so—had to be told what was required of them, and the public at large was entitled to settled expectations. Even though all three branches of state government

[53] Ugarte, *supra* note 10, 278.
[54] *For Mayor, Gay Rights Are Simply Civil Rights*, BOSTON GLOBE, February 29, 2004.

had touched upon the issue prior to May 17, 2004, gaps remained, and the cities and towns needed to weigh in and bridge them.

Five days before the stay lifted, the City of Boston announced that the city would accept marriage applications from everyone except partners who do not reside in Massachusetts, and neither one of which intends to reside in Massachusetts.[55] The City reached this decision for several reasons. First, the 1913 law would be enforced, and the City Registrar and Clerk, as well as their employees, needed protection from liability. It was clear that violating the 1913 law would invite serious exposure: the Governor's office had stated during the clerk training sessions that clerks who allowed same-sex couples who were non-residents and did not intend to reside in Massachusetts to marry would face fines or imprisonment as a penalty. Additionally, cities and towns that failed in the first instance to enforce the 1913 law potentially would be enjoined by the state to do so.[56]

Second, the state marriage licensing law established the DPH's role in creating and promulgating marriage applications and notices of intention to marry. Thus, the agency's authority to interpret the 1913 law derived from a lawful state statute which cities and towns were obligated to respect and obey.

Third, a close reading of the SJC's decision legalizing same-sex marriage revealed that the holding was limited to marriages within Massachusetts:

> We would not presume to dictate how another state should respond to today's decision. But neither should considerations of comity prevent us

[55]Joanna Weiss, *Boston Adopts Stricter Stand on Gay Outsiders*, BOSTON GLOBE, May 13, 2004, at A1.
[56] In fact, the Town of Provincetown opted to violate the state Public Health Department's interpretation and was enjoined from issuing marriage certificates to non-resident gay and lesbian couples who do not intend to reside in Massachusetts. Further, in the case of Cote-Whitacre v. Dep't. of Public Health, 18 Mass. L. Rptr. 190, (August 18, 2004), a group of nonresident Plaintiffs sued the Department of Public Health seeking to end the state of Massachusetts denial of marriage licenses to non-residents. The court squarely denied the plaintiffs' application for injunctive relief. Plaintiffs have appealed the case.