FUNDAMENTAL PRINCIPLES OF ETHICS

FOR

LOCAL GOVERNMENTAL LAWYERS

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Introduction

The subject is, first, ethics; then, ethics for lawyers; then, ethics for government lawyers; then, ethics for *local* governments lawyers, meaning, if you are a city attorney, ethics for city attorneys; or, if you are a county attorney, ethics for county attorneys, and so forth. Finally, the subject is ethics for *you* as the lawyer in your specific situation. Within the subject, we are looking for fundamental principles.

The first question is where to begin. The logical answer is to begin with the first principle. What is the first principle? To some, the answer might be the First Principle, meaning that their practice of ethics flows from spiritual beliefs. Others might cite the Golden Rule, or other principles they accept as fundamental. Others might choose to reflect before committing themselves to an answer. Some might question whether there are such first principles, or, if there are, whether it is necessary to begin with them. I will return to this question in a moment.

Accountants often begin by defining their assumptions. Accounting has assumptions, law has presumptions. For example, the law presumes people innocent until proven guilty. It presumes lawyers ethical until proven unethical, even if the general public sometimes presumes otherwise. The law presumes everyone to know the laws that apply to them, and thereby presumes all lawyers to know the law governing lawyers. As Thomas Jefferson put it: "Ignorance of the law is no excuse in any country. If it were, the laws would lose their effect, because it can always be pretended."[1]

So, in addition to the presumptions inherent in the law generally, one might begin with the presumptions that are built into the law of ethics for lawyers, commonly referred to as "the law governing lawyers,"[2] or "the law of lawyering."[3]

A moment ago I referred to the question of whether there are certain first principles of personal ethics that dictate many of a lawyer's ethical decisions, and, if so, whether it is necessary to begin a discussion of fundamental principles of legal ethics with them.

I believe the law presumes that there are such first principles, that you have already decided which ones will most influence your decisions, and that you can identify

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[1] Letter to André Limozin, December 22, 1787, in *Papers of Thomas Jefferson*, Julian P. Boyd ed., 1955, Vol. 12, p. 451.

[2] *E.g.,Restatement of the Law: The Law Governing Lawyers*, St. Paul, MN, 2 volumes, American Law Institute Publishers, 2000.

[3] *E.g.*, Geoffrey C. Hazard and W. William Hodes, *The Law of Lawyering*, Third Edition, N.Y., Aspen Law & Business, 2000.

them if you choose to. The principles may be different for different people, and they may be different at different times for the same person, but they are there, and they form part of the foundation of every lawyer's ethical practice.

Hazard and Hodes describe why this is true:

> Many legally binding rules incorporate an element of discretion that permits a lawyer to choose what to do or how to do it. Within these zones of discretion, lawyers make choices free from control by legal sanctions such as criminal prosecution, lawyer discipline, or a suit for legal malpractice. Since these choices are by hypothesis not based upon legal compulsion, lawyers perforce must fall back upon personal notions of morality and proper conduct in deciding what to do. Thus, lawyers are governed by moral and political considerations, including peer pressure, not simply the positive commands of law.[4]

The discretionary dimensions that are involved in most ethical decisions of lawyers are governed primarily by personal principles. This is of practical significance, because, as the Model Rules point out, "No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion."[5] Sometimes when lawyers speak of ethics, they are referring to these principles, which I describe as "the ethics of ethics," to distinguish them from the law of ethics. The Preamble to the American Bar Association's Model Rules of Professional Conduct acknowledges this distinction:

> Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers.[6]

The Texas version of the Rules of Professional Conduct quite explicitly states why this distinction is so important:

> Each lawyer's own conscience is the touchstone[7] against which to test *the extent to which his actions may*

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[4] Hazard and Hodes, *op. cit.*, §1.2. See Bruce Green, *The Role of Personal Values in Professional Decision-making*, 11 Geo. J. Legal Ethics 19 (1997) for a discussion of how moral views of individual lawyers affect their ethical decisions.

[5] ABA Model Rule, Scope, [14].

[6] ABA Model Rule, Preamble [7].

[7] **touchstone** n 1 : a black siliceous stone related to flint and formerly used to test the purity of gold and silver by the streak left on the stone when rubbed by the metal *2 :* a test or criterion for determining the quality or genuineness of a thing.

> *rise above the disciplinary standards* prescribed by these rules.[8] [Emphasis added.]

The key concept here is that in distinguishing between ethics and law, ethics is *the extent to which a lawyer's actions rise **above** the disciplinary standards*, which are, as the Texas Rules put it, "minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action."[9] For the most part, lawyers must look inside themselves, and not to the external norms of the law, to find the motivation to elevate their practice to its highest potential levels. True, the Rules include a few aspirations. For example, the Preamble to the Model Rules says that a lawyer "should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service."[10] However, the motivating factors that will impel a lawyer to actually do these things will rarely, if ever, come solely from the law.

Another way to illustrate the distinction between law and ethics is to observe the differences among the laws governing lawyers in the different states. In many instances the same circumstances are regulated in different ways in different states. For example, ethics committees in State A may answer a question in a way that is opposite to the answer to the same question in another state. Or, State A may adopt a version of Model Rule 1.13 (Organization as Client), while State B expressly declines to adopt any version of that provision. As long as lawyers comply with the laws of their states, a lawyer in one state is not more or less ethical than one in the other state, even though they are required or permitted to handle a certain situation in opposite ways. In this sense, the law is whatever it is. Ethical lawyers are expected to comply with the law, but ethics, as distinguished from law, is the extent to which their behavior rises above the disciplinary standards established by the law. The law, then, simply provides a foundation, or a framework, upon which an ethical lawyer can build. For that reason, it is *essential* for each lawyer to know the law governing lawyers in any state in which the lawyer is practicing. At the same time, it is *useful* for the lawyer to know how lawyers in other jurisdictions have addressed similar circumstances ethically, even though the lawyer is not legally bound to follow those examples.

A Preliminary Comment on State Rules of Professional Conduct

Generally, state rules are written from the perspective of private practitioners who have relationships with individual clients. Although there are a few rules and comments that expressly address government lawyers or lawyers with multiple clients, most of the rules are written in language that contemplates a single, human client, and not an entity. Government lawyers are generally accustomed to this language, and have little difficulty finding ways to construct their own corollaries to apply in the governmental context. It is important for governmental lawyers to understand from the beginning that in reading their state rules, they must interpolate, or interpret, their application to a governmental

[8] Texas Disciplinary Rules of Professional Conduct, Preamble, 9.
[9] Texas Disciplinary Rules of Professional Conduct, Preamble, 7.
[10] ABA Model Rule, Preamble [7].

client. Because this reality introduces an additional layer of imprecision into the state rules, the personal ethics of the government lawyer, or the extent to which she chooses to rise above the imprecise standards set by the rules, are highly significant. They must supply the precision that is lacking in the rules.

A Preliminary Comment on the Local-Government-Attorney—Client Relationship

In one sense, the attorney-client relationship is something like marriage. It has legal definitions, but what it means to those who are actually engaged in it varies greatly. As any healthy relationship, its success depends on certain elements: communication, competence, understanding, dedication, loyalty, trust, honesty, diligence and so forth. The attorney-client relationship is very much what its members make of it. It often begins on the basis of a wide range of assumptions. When you are appointed or elected to your position as a government lawyer, the people you are going to serve already have their own ideas about what they expect from a person in your position. You also have your ideas. The two probably differ in some respects, but are generally compatible. The prospects for government lawyers' success are enhanced to the extent they can anticipate differences in perspectives about their roles, and prevent those differences from having serious consequences.

There are Rules of Professional Conduct that are a helpful starting place for thinking about how to prevent serious consequences.

For example, there is Model Rule 1.2.[11] This rule, like most of the others, is written in terms of "a client." Government lawyers, naturally, ask: "who is the client?" The primary rule that is intended to help answer that question is Rule 1.13 (Organization as Client), which will be addressed later. Here, however, it should be emphasized that regardless of how the representation is defined, if a governmental lawyer acting in that capacity represents a person, then it is the governmental lawyer's responsibility to work to achieve a clear understanding with the person represented about the scope of the

[11] **RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER**

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

representation of that person by the lawyer and the allocation of authority between the lawyer and the client.

This brings into play Model Rule 1.4,[12] which stresses the lawyer's duty to communicate with the client. If lawyers act in the spirit of these two rules, they almost always succeed in working out their relationships with the people they represent in ways that prevent serious problems and make it unnecessary to resort to the intricacies of Rule 1.13 (Organization as Client). In other words, many problems that appear to be who-is-the-client types of problems disappear if there is adequate communication and understanding between the lawyer and the person represented about the scope of their relationship.

The reason for this is not difficult to figure out. When a person comes to you and asks you to represent him in connection with a matter, you will almost automatically ask yourself, and, if the circumstances warrant, the other person, "how does this matter relate to your function within the organization?" In other words, explicitly or implicitly, you will find some way to verify that if you do what the person is asking you to do, you will actually be representing your governmental entity in some way. If the person is asking you to represent him in a matter that is purely personal, you will answer that you cannot do so in your governmental capacity. You always begin by ascertaining that the matter in question somehow connects appropriately with the entity you represent and with the person who is asking you for representation. You talk about it with the person, if necessary, so that you have a mutual understanding that is clear to both of you. You talk about the nature and scope of your relationship, including confidentiality and conflicts of interest, if the circumstances warrant.

If the person is a department head or other departmental employee, for example, and if you had not already taken measures to communicate such information, you might say something like this.

> Keep in mind that I represent the city [or other entity, as applicable]. I can keep the information you give me confidential as to most people, but the information belongs to the city and not to me, so I may have to pass it

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[12] Error! Main Document Only.**RULE 1.4: COMMUNICATION**

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

on to other people in the city who are entitled to know it. I do not have and cannot have a personal attorney-client relationship with you, so please understand that I will continue to represent the city even if a conflict develops between you and the city.

This type of conversation is sometimes difficult, and sometimes has the chilling effect of deterring the employee from having information that the city would like to have, but it helps the lawyer avoid conflicts that may otherwise later preclude the lawyer from representing either the city or the employee.

In a sense, it is immaterial whether the lawyer views these conversations as being pursuant to Rule 1.2, Rule 1.4 or Rule 1.13. They are all designed to achieve the same result, which is a clear understanding between the lawyer and the represented person about the nature of the relationship. Whether the person represented is a chief executive officer, a legislative body, an administrator, or a person in any other governmental capacity represented by the lawyer, the object is to achieve a clear understanding about the nature of the attorney-client relationship.

The Local Government Lawyer's Client

For convenience, I am including here a somewhat edited copy of Rule 1.13 and the official comments to it. In many ways, the rule is self-explanatory. In any event, it comes as close as any source to setting down such fundamental principles as there are on the subject.

RULE 1.13: ORGANIZATION AS CLIENT

(a) **A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.**

(b) **If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent**

motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization's … officers, employees, members … 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.

(e) A lawyer representing an organization may also represent any of its … officers, employees, members … 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.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers … employees ... and other constituents. Officers … employees ... and other constituents are the constituents of the corporate organizational client ….

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority,

depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

[4] The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[5] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

Government Agency

[6] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the

wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[7] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[8] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[9] Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

A Final Comment: On Resolving Unusually Difficult Issues

Most issues, even very difficult ones, can be resolved satisfactorily if there is sufficient clear communication and understanding between a government lawyer and the people represented. However, the ease of communication that is available today among lawyers by means of telephone or internet often makes it possible to get help quickly from a multitude of sources. One place to start is to call IMLA.