The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics

Formal Opinion 2004-03: Government Lawyer Conflicts: Representing a Government Agency and Its Constituents

Topic: Organization as Client: Special Considerations for a Government Lawyer.

Digest: Government lawyers are subject to the rules that ordinarily govern the attorney-client relationship, including those governing conflicts of interest and entity representation. This opinion addresses various questions relating to government lawyers' conflicts of interest in civil litigation. The questions may ultimately be analyzed differently for government lawyers than for lawyers who represent private entity clients because of the legal framework within which government lawyers function. Questions such as who the lawyer represents, who has authority to make particular decisions in the representation, and whether the lawyer may represent multiple agencies with differing interests are largely determined by the applicable law. In dealing with government officers and employees, the government lawyer must comply with DR 5-109 and DR 5-105, as informed by applicable law. If the agency constituents are unrepresented, DR 5-109 requires the lawyer to clarify his or her role, as well as to report any discovered wrongdoing, as described in this opinion. When the government lawyer proposes to represent the constituent, a threshold question is whether the representation will be in the constituent's official or personal capacity. If the constituent would be represented personally, the lawyer must first determine whether the representation is permissible under the conflict of interest rule, DR 5-105, and the lawyer must comply with the rule's procedural requirements in light of the framework described in this opinion.

Code: DR 2-110; DR 4-101; DR 5-101(A); DR 5-105; DR 5-109; DR 7-101; DR 7-102(A); DR 7-104(A)(2); EC 7-7; EC 7-8; EC 7-14.

Question

What are the ethical obligations of a government lawyer in dealing with potential conflicts of interest (a) among government agency clients; (b) between a government agency and its constituents represented by the government lawyer; and (c) between an agency and unrepresented constituents?

Opinion

1. The Government Lawyer's Enabling Authority.

This opinion addresses conflicts of interest that government lawyers encounter in the exercise of their official duties in the context of civil litigation. Many of the questions faced by government lawyers are similar to those faced by lawyers for private organizations. Therefore, substantial guidance is offered by this Committee's recent opinion on conflicts of interest encountered by lawyers for corporations and other private entities. See ABCNY Opinion 2004-02, Representing Corporations and their Constituents in the Context of Governmental Investigations, -- WL --- (June 2004). However, the questions are often more complex for government lawyers, who may have different sources of legal authority and different obligations from those of lawyers representing private clients.

Other than DR 9-101(B), which relates to "revolving door" issues that arise when lawyers enter or leave public service – issues that this opinion will not address -- no Disciplinary Rule specifically deals with government lawyers' conflicts of interest. Nor does any Disciplinary Rule specifically address issues unique to government lawyers in civil litigation. The provisions of DR 7-103, Performing the Duty of a Public Prosecutor or Other Government Lawyer, relate solely to criminal prosecution. However, an Ethical Consideration, EC 7-14, 1 provides general guidance to government lawyers in civil as well as criminal representations. Although EC 7-14 does not specifically address conflicts of interest, it does inform our discussion of this subject.

The starting point for our analysis is DR 5-109, Organization as Client. The keystone concept of DR 5-109(A) is that "a lawyer employed or retained by an organization . . . is the lawyer for the organization and not for any of the constituents." However, government lawyers are not necessarily "employed or retained" by the organization they

represent. Instead, they generally act under specific legal (including statutory or constitutional) authority, as may be elaborated by case law. See, e.g., paragraph 18 of the Preamble and Scope of the American Bar Association's Model Rules of Professional Conduct (government lawyers may have legal authority to exercise authority "concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships"); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 (2000), Representing a Government Client; EC 7-11 ("responsibilities of a lawyer may vary according to . . . the obligation of a public officer").

Accordingly, a first step in the analysis of the duties and obligations of a government lawyer is a determination of the specific statutory framework that authorizes the government lawyer to act. The relevant statutory framework for any given government lawyer is, of course, a question of law as to which this Committee cannot opine. The following discussion is intended, however, as background to indicate the analysis a government lawyer might undertake. The discussion also provides a more specific framework within which to consider the conflicts we address under the Disciplinary Rules.

Reservation of litigating authority to a specific law department is the common model for government at all levels. For example, 28 U.S.C. § 516 reserves to Department of Justice attorneys, under direction of the Attorney General, "the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested." Section 547 of Title 28, U.S.C., directs United States Attorneys to "prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned." 2 N.Y. Exec. L. § 63(1) gives the New York State Attorney General similar authority to "[p]rosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any officer thereof which requires the services of attorney or counsel, in order to protect the interest of the state . . . ." At a local level, §394 of the New York City Charter provides that "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 of the city and its agencies and in which the city is interested." Section 501(1) of the N.Y. County Law provides that "[t]he county attorney shall prosecute and defend all civil actions and proceedings brought by or against the county, the board of supervisors and any officer whose compensation is paid from county funds for any official act, except as otherwise provided by this chapter or other law." 3 Other statutes pertinent to the government lawyer's authority in a given case may include those authorizing a specific agency to engage in or enforce specific conduct; authorizing a particular agency to sue or be sued; specifying the manner in which certain lawsuits are to be brought; dictating how any judgment is to be paid; local enabling statutes; and so forth.

In addition to government law departments, it is equally common that government agencies will employ agency counsel. For one of innumerable examples, N.Y. Pub. Auth. Law §1265(8) provides that the Metropolitan Transportation Authority shall have power "to retain or employ counsel, auditors, engineers and private consultants on a contract basis or otherwise for rendering professional or technical services and advice." (Emphasis added.) Within New York City, Section 397 of the New York City Charter permits the mayor, on consultation with corporation counsel and the affected agency head, to delegate to any agency "responsibility for the conduct of routine legal affairs of the agency," subject to monitoring by the corporation counsel and the authority of the mayor, on recommendation of corporation counsel, to suspend or withdraw such delegation.

In referring to "the government lawyer," we do not mean to imply that the particular lawyer in question directly enjoys the authority given by statute to the attorney general or other statutorily-designated attorney. The work of most government law departments is carried out by assistants to the statutorily-designated attorney, operating by delegation of authority in a hierarchical structure. This opinion assumes that assistant government counsel is operating under properly delegated authority, a matter as to which the assistant is required to assure him- or herself by reference to policies, procedures, and supervisory consultation. Assistant government counsel is particularly alerted to the need for supervisory consultation in addressing questions of professional responsibility, including those discussed in this opinion.

2. Who is the "Client"?

Often, a government lawyer employed by a particular agency will have little difficulty identifying the "client agency." See, e.g., Report by the District of Columbia Bar Special Committee on Government Lawyers and the Model Rules of Prof'l Conduct: "[T]he employing agency should in normal circumstances be considered the client of the government lawyer." However, a government lawyer operating under general authority to litigate "for the Government," or to "protect the interest of the state," or to act as "counsel for the city and every agency thereof,"

will occasionally need to ask, "who is my client?" This question may arise, for example, in the face of strategic or policy conflicts between the government lawyer and the represented agency, as well as in the context of inter-agency conflicts.

The Restatement suggests there is no "universal definition of the client of a government lawyer." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97, comment (c), Identity of a governmental client. The Restatement notes, without adopting, general assertions that "government lawyers represent the public, or the public interest," but ultimately concludes that "[f]or many purposes, the preferable approach on the question [of who is the client]. . . is to regard the respective agencies as the clients and to regard the lawyers working for the agencies as subject to the direction of those officers authorized to act in the matter involved in the representation. . . ." Id. See RESTATEMENT §97, comment (f), Advancing a governmental client's objectives. Ethics opinions also discuss the identity of the government client. In ABCNY No. 1990-04 this Committee opined that "[i]f the City is a litigant, it is important to determine which agency of the City is involved. Where a governmental body is organized into a number of different departments or agencies, each department or agency should be treated as a distinct person for purposes of the rule which forbids the concurrent representation of one client against another." In Opinion 1999-06, we similarly noted that "treating different governmental departments or agencies as separate clients for the application of conflicts rules is in keeping with recent opinions treating separate corporate entities in the private sector as distinct clients for conflicts purposes." Other ethics bodies have reached similar conclusions. For example, D.C. Opinion No. 268 opined that "the identity of the City government client depends upon a number of discrete considerations and must be decided on a case-by-case basis." See also ABA Formal Op. 97-405, Conflicts in Representing Government Entities. The Federal Bar Association has stated that "the client of the federally employed lawyer . . . is the agency where he is employed, including those charged with its administration insofar as they are engaged in the conduct of the public business," and that "the lawyer's employment requires him to observe in the performance of his professional responsibility the public interest sought to be served by the governmental organization of which he is a part." Op. 73-1, The Government Client and Confidentiality, 32 Fed. Bar. J. 71 (1973). See also J.Rosenthal, Who is the Client of the Government Lawyer?, in ETHICAL STANDARDS IN THE PUBLIC SECTOR, ABA Section of State and Local Government (P.Salkin ed. 1999).

Ultimately, the question of who is the government lawyer's client is a question of law and not of ethics, and one to which the government lawyer must give careful consideration in each case. For purposes of this opinion, we will assume unless otherwise stated that the government agency is for practical purposes the "client agency." Understanding that the lawyer has a client should serve as a reminder that, generally speaking, the government lawyer owes the client agency the ethical duties that lawyers generally owe entity clients – e.g., duties of competence and diligence, duties of loyalty and confidentiality, and a duty to communicate with agency representatives to learn their views regarding the representation and to update them on how the representation is proceeding.

3. Disagreements Between the Government Litigating Attorney and a Represented Agency.

Separate from the question of the identity of the government lawyer's client is the question, "who has authority to make any given decision about the conduct of the litigation?" This question may be important when the government lawyer has a substantial disagreement with representatives of the agency client about the conduct of the representation. Ordinarily, certain decisions in a representation are ultimately made by the client after receiving the lawyer's advice – for example, decisions concerning the objectives of the representation such as whether to initiate, settle or dismiss litigation – and certain other decisions about how to achieve the client's objectives are made by the lawyer in light of the client's interests and objectives. See ECs 7-7 and 7-8. However, the applicable statute may delegate to the government lawyer some or all decisions that, in a private representation, would be ordinarily entrusted to the entity client. Thus, the extent to which a government lawyer may make decisions in litigation on behalf of a government agency is both an ethics question and a legal question dependant on the government lawyer's enabling authority. 4

Where the enabling authority entrusts the government lawyer to make decisions that would ordinarily be made by the client, the lawyer should act in light of the relevant public interests and obligations of the client agency and based on appropriate consultation with agency representatives. When the enabling authority delegates these decisions to agency representatives, the government lawyer should provide relevant advice. Where appropriate, the government lawyer may vigorously probe the strengths and weaknesses of the agency's position and offer views about how the agency should exercise its authority in light of the relevant public interests and legal mandate. EC

7-14 urges the government lawyer to use his or her discretion to avoid or to recommend against litigation that is "obviously unfair." Whether a government lawyer may have an ethical obligation to identify and seek a substantively "just" result in a particular case, even where that may be at odds with the agency's legally authorized litigation position, is beyond the scope of this opinion. See, e.g., B. 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 (2000).

Ultimately, the government lawyer must act consistently with DR 7-101(A)(1), Representing a Client Zealously, which provides that, with limited exceptions, "[a] lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of the client. . . ." See also DR 5-101(A), Conflicts of Interest–Lawyer's Own Interests. In all but the most unusual cases, of course, the government lawyer will be able to provide competent and diligent representation notwithstanding disagreement with agency representatives. However, if the government lawyer is not authorized to determine the agency's objectives and because of strong philosophical disagreement with the agency, the government lawyer is unable to seek to achieve the lawful objectives determined by the government representative with decision making authority, then the lawyer may be permitted or required to withdraw from the representation. See DR 2-110(c)(1)(e) (a lawyer may withdraw if a client "insists, in a matter not pending before a tribunal, that the lawyer engage in conduct which is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules"); ABA M.R. 1.16(b) (except in matters pending before a tribunal, a lawyer may withdraw if the client "insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement").

4. Inter-Agency Conflicts.

There are any number of circumstances in which a government lawyer may represent more than one agency in a given litigation or matter, and certain agencies, including agencies not directly involved in litigation, may have different or conflicting interests in the matter. To what extent does DR 5-105, Conflict of Interest; Simultaneous Representation, govern such conflicts? DR 5-105(B) provides that

A lawyer shall not continue multiple employment if the exercise of independent professional judgment on behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105(C).

The Preamble and Scope of the American Bar Association's Model Rules of Prof'l Conduct, paragraph 18, notes that government lawyers "may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients." On the other hand, W. Josephson and R. Pearce, To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?, 29 How. L.J. 539 (1986), take the position that separate agencies must be viewed as separate clients. Accordingly, Josephson and Pearce would apply DR 5-105(B) directly.

While the scope of the government lawyer's authority to represent agencies with conflicting positions is ultimately a mixed question of law and ethics, the practical reasons for treating separate agencies like separate clients, and the practical considerations embodied in DR 5-105(B), suggest that representation of conflicting agencies by government lawyers from the same law department is to be avoided. See, e.g., County of Franklin v. Connelie, 95 Misc. 2d 189, 207 408 N.Y.S.2d 174, 186 (Sup. Ct., Essex County 1978), rev'd on other grounds, 68 A.D.2d 1000, 415 N.Y.S.2d 110 (3d Dep't 1979) ("[t]he Court is convinced, as it also believes that the Attorney General is, that it was not proper under all of the facts surrounding this proceeding to have the Attorney General representing all defendants on the arguments before the Court. . . . Clearly, there were conflicts between the [APA] and the Division of State Police and the Office of General Services as the approval of the project wended its way through the labyrinth of bureaucracy. . . ."); cf. Chapman v. New York, 193 Misc.2d 216, 220 n.2, 748 N.Y.S.2d 465, 469 n.2 (Ct. of Claims 2002) (suggesting Attorney General may wish to apply for appointment of independent counsel to challenge constitutionality of private bill that resuscitated a claim for damages against the state). On the other hand, where a government lawyer is charged with protecting the interests of the federal government, the state, or a locality, nothing in the disciplinary rules restrains the government lawyer from attempting to mediate a common position between agencies with conflicting interests.

5. "Official Capacity" Parties as Client Agency Constituents.

In many instances an agency official may be named in his or her "official capacity" or in some similar designation. The Advisory Committee Notes to the 1961 Amendment of Federal Rule of Civil Procedure 25(d)(1) describe such actions as "in form against a named officer, but intrinsically against the government or the office or the incumbent thereof whoever he may be from time to time during the action." They include, for example, "actions against officers to compel performance of official duties or to obtain judicial review of their orders . . . [or] to prevent officers from acting in excess of their authority . . . [and i]n general . . . whenever effective relief would call for corrective behavior by the one then having official status and power. . . ." They do not include "actions which are directed to securing money judgments against the named officers enforceable against their personal assets. . . ."

Thus, unless circumstances indicate otherwise, a government lawyer representing an official named solely in his or her official capacity would still, in effect, be representing the client agency alone, and, unless circumstances indicated otherwise, the government lawyer would deal with the named official as a constituent of the agency rather than as someone personally represented by the government lawyer. Representation of the entity in this context is analogous to the representation of an entity in the private context. See DR 5-109 and ABCNY Opinion 2004-02; see also NY CPLR §1023, Public body described by official title; NY CPLR Art. 78, Proceeding against body or officer; cf. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97, comment (c) (2000), Identity of a governmental client. Issues regarding constituents represented only "in their official capacity" are discussed further in this opinion in section 7, Dealings with Unrepresented Agency Constituents. To the extent the government lawyer deals directly with the official-capacity party in the lawsuit, a clear statement of the limitations of the lawyer's role in the matter is ordinarily required. See infra §7.

6. Representation of Agency Constituents.

In addition to representing governmental entities, it is common for government litigating attorneys to represent individual government employees in their personal capacity for acts undertaken in their official capacities. For example, at the federal level, 28 C.F.R. §50.15(a) (2004) provides that a present or former federal official

> may be provided representation in civil, criminal and Congressional proceedings in which he is sued, subpoenaed, or charged in his individual capacity . . . when the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's employment and the Attorney General or his designee determines that providing representation would otherwise be in the interest of the United States.

Section 50.15(a)(3) of 28 C.F.R. makes clear that "Justice Department attorneys who represent an employee under this section also undertake a full and traditional attorney-client relationship with the employee with respect to application of the attorney-client privilege."

At the state level, N.Y. Public Officers Law §17 provides that upon compliance with certain conditions, "the state shall provide for the defense of the employee in any civil action or proceeding in any state or federal court arising out of an alleged act or omission which occurred or is alleged in the complaint to have occurred while the employee was acting within the scope of his public employment or duties. . . ." Similar authority is given to the New York City Corporation Counsel by §7-109 of the Administrative Code of the City of New York, which provides:

The corporation counsel, in his or her discretion may appear, or direct any of his or her assistants to appear, in any action or proceeding, whether criminal or civil, which may be brought against any officer, subordinate or employee in the service of the city, or of any of the counties contained therein, by reason of any acts done or omitted by such officer, subordinate or employee, while in the performance of his or her duty, whenever such appearance is requested by the head of the agency in which such officer, subordinate or employee is employed or whenever the interests of the city require the appearance of the corporation counsel. . . .

Likewise, N.Y. General Municipal Law §50-k(2), provides for representation of New York City employees for "any alleged act or omission which the corporation counsel finds occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation. . . ." Such representation is conditioned on the employee's "full cooperation" in the defense of the action and related actions, and a failure or refusal to cooperate authorizes the corporation counsel "to withdraw his representation." Id. §50-k(4). (The interplay of this provision with DR 2-110, Withdrawal from Employment, is beyond the scope of this opinion, but DR 2-110 must be consulted in connection with any such withdrawal.)

Employees represented pursuant to provisions similar to the above are no longer mere "constituents" of the client agency, they are represented clients in their own rights. See, e.g., American Bar Association (ABA) Informal Op. 1413 (1978) ("a Government lawyer assigned to represent a litigant . . . has an attorney-client relationship with the litigant, and . . . the lawyer's status as a Government employee does not exempt him or her from professional obligations, including those to preserve a client's confidences and secrets, that are imposed upon other lawyers"). Obviously, individual representation raises the possibility of conflicts with the government litigator's obligation to protect the interests of his or her overarching jurisdiction. These conflicts must be addressed under statutes and regulations that may govern individual representations as well as under the conflicts provisions of the disciplinary rules.

For example, 28 C.F.R. §50.15 (2004) contains extensive provisions addressing the possibility of a conflict between the "interest of the United States" and that of the individual employee; of conflicts between multiple individual employees; and the retention of private counsel in the event of such conflict. N.Y. Public Officers Law §17(2)(b) also provides for representation of an employee by private counsel "whenever the Attorney General determines based upon his investigation and review of the facts and circumstances of the case that representation by the Attorney General would be inappropriate, or whenever a court of competent jurisdiction, upon appropriate motion or by a special proceeding, determines that a conflict of interest exists and that the employee is entitled to be represented by private counsel. . . ." N.Y. County Law §501(2) directs "the county attorney [to] represent the interests of the board of supervisors and the county" whenever "the interests of the board of supervisors or the county are inconsistent with the interests of any officer," in which case the officer may retain private counsel. See also N.Y. Public Officers Law §18. A government lawyer assigned to represent an individual constituent should be alert to these statutes and should advise the individual client about them, as relevant, when discussing conflicts of interest.

Beyond statutory or regulatory provisions, the individual client of a government lawyer is entitled to the protections afforded by the conflict provisions of DR 5-105. The government lawyer evaluating representation of an individual employee must explore potential conflicts at the very outset of the relationship. DR 5-105(A). During this process the government lawyer and the government employee must both have a clear understanding of whether preliminary discussions are privileged and who controls the privilege, the agency or the employee. See NYC Eth Op. 2000-1 (prospective client confidences). If the privilege belongs to the individual, there should be a clear understanding as to whether or not the information gained during the representation may be shared with the agency client. See ABCNY No. 2004-2, Representing Corporations and their Constituents in the Context of Governmental Investigations, nn. 9, 11 & 12 and accompanying text, discussing information sharing agreements and prospective waivers of confidentiality. If information disclosed by the individual will be shared with the agency, and especially if the agency has authority to assert or waive the privilege with respect to such information, the government lawyer must consider whether an essentially unprivileged discussion (from the perspective of the employee) will be sufficiently "full and frank" to provide a reliable basis for a conflict determination.

Having gathered the necessary facts, the Government lawyer must decide whether it is possible to represent the individual consistent with DR 5-105. In most if not all cases, DR 5-105(A) will be implicated, because the lawyer would be representing the differing interests of an individual and the government. Therefore, the lawyer will have to apply the "disinterested lawyer" test of DR 5-105 to determine whether multiple representation is appropriate. See ABCNY No. 2004-2, Representing Corporations and their Constituents in the Context of Governmental Investigations. Under DR 5-105(C), the lawyer may represent multiple parties with differing interests only "if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved."

In some cases, the test will not be met, because a disinterested lawyer would not believe that a single lawyer can competently represent the individual and the government. For example, where a government agency and an individual agency constituent are both parties, the availability of different defenses for governmental entities than for individuals may lead to an insurmountable conflict. See, e.g., Rodick v. City of Schenectady, 1 F.3d 1341, 1350 (2d Cir. 1993) (conflict for lawyer representing both officer and municipality in action under 42 U.S.C. § 1983 (2004) to take position beneficial to municipality but detrimental to officer); Dunton v. County of Suffolk, 580 F.Supp. 974 (E.D.N.Y. 1983), rev'd, 729 F.2d 903 (2d Cir.), opinion amended, 748 F.2d 69 (2d Cir. 1984) (disqualifying conflict to represent both county and individual police officer in action under 42 U.S.C. § 1983 where county intended to argue that officer's actions were ultra vires). The government lawyer must consider potential conflicts between

represented individual constituents and the interests of the governmental jurisdiction even if a government agency is not a party to the action.

If a non-waivable conflict surfaces in a privileged initial interview of a government employee, the government lawyer may be disqualified from further representation of the agency as well as of the employee. See ABCNY No. 2004-2, Representing Corporations and their Constituents in the Context of Governmental Investigations. However, depending on the nature of the conflict and the size of the government law department, judicial decisions may permit the use of appropriate screening mechanisms to avoid disqualification of the entire government law department and the assignment of another government lawyer to represent the agency itself. Cf. People v. English, 88 N.Y.2d 30 (1996); Matter of Schumer v. Holtzman, 60 N.Y.2d 46, 454 N.E.2d 522, 467 N.Y.S.2d 182, (1983); United States v. Vlahos, 33 F.3d 758, 763 (7th Cir. 1994); ABA Formal Op. 342 (1975).

Assuming the "disinterested lawyer" test has been satisfied, the government lawyer must obtain appropriate consent after "full disclosure of the implications of the simultaneous representation and the advantages and risks involved." DR 5-105(C). See ABCNY No. 2004-2, Representing Corporations and their Constituents in the Context of Governmental Investigations. The question of who is authorized to consent on behalf of the government, state, municipality or agency client must be addressed. Cf. NYSBA No. 629 (government agencies may in otherwise proper circumstances give consent to cure a conflict). Whether the government lawyer or an agency representative is authorized to consent on behalf of the "government" in a particular matter will ultimately depend on the scope of the legal authority conferred on the government lawyer and the agency.

Notwithstanding best efforts at the outset of a representation, counsel must be prepared to deal with conflicts that arise suddenly in the middle of a representation. If that occurs, the lawyer must consider whether the unanticipated conflict requires terminating the representation or whether, under the "disinterested lawyer" test, the representation can continue with consent after full disclosure. See DR 5-105(B), DR 2-110(B)(2), and (C)(2); cf. NYSBA No. 674 (1995) (discussing conflict that arises in joint representation of corporate and individual clients when individual commits perjury in a deposition).

7. Dealings with Unrepresented Agency Constituents.

In the course of representing an agency or agency employee, a government lawyer will spend a great deal of time dealing with agency personnel who are not individually represented by the government lawyer and who have not retained personal counsel. These will include constituents whose acts or omissions are the subject of the litigation but who are not parties to the action; constituents who are fact witnesses; and constituents otherwise designated to speak for the agency in discovery or trial. Dealings will occur most commonly in the context of investigatory interviews; deposition preparation and depositions; and trial preparation and trial. These are dealings where the agency constituent (and government lawyer) may not be entirely without confusion as to the role of the government lawyer.

DR 5-109(A) provides the following initial guidance to the lawyer in such circumstances:

When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

DR 7-104(A)(2) further instructs that a lawyer may not "[g]ive advice to a party who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyer's client." In order to avoid confusion, as well as to avoid a finding that the government lawyer inadvertently entered into a lawyer-client relationship with the constituent, see, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §14(1)(b) (2000) and comment f thereto, 5 the government lawyer must analyze in advance exactly what his or her role will be in dealing with the constituent in the proceeding at issue, and then provide such affirmative explanation of that role as may be necessary to the situation. 6

For example, in the context of investigatory interviews, the government lawyer might explain that he or she is the attorney for the agency, or a component thereof; and might also explain from whom within the organization–for

example, the agency head, component head, or other official–he or she takes substantive direction in the matter. The government lawyer might then explain that he or she has been assigned to find out the facts relating to a particular matter; and, as may be appropriate, explain to the constituent the nature of any privilege and who holds the privilege.

Understanding and explaining the government lawyer's role in the context of formal adversarial proceedings, as in preparing for or appearing with a constituent at a deposition or trial, is more complex. In this regard, the government lawyer may, for example, explain the nature of the action; the status of the agency or component as a party or potential party; and that he or she represents the agency or component in the matter. The government lawyer might also explain to whom within the organization, such as the agency head or other delegated official, he or she reports on the matter and who is responsible for setting the agency's position in the litigation. Then, depending on the circumstances, the government lawyer might explain that the employee is being prepared and called to testify in a matter relating to the employee's conduct as a constituent; and that it is in the agency's interest that the employee is fully prepared for the deposition. It may also be appropriate, depending on the circumstances, for the government lawyer to reassure the employee that the agency sees nothing wrong with how the agency or the particular constituent handled the matter at issue and will vigorously defend the case. The DR 5-109(A) warning may be given as required, or earlier as counsel may prefer. Depending on the nature of the proceedings and how the lawyer expects them to be conducted, the lawyer may further explain that as agency counsel he or she will make objections; advise the constituent on issues of agency privilege; and deal in other ways with counsel at proceedings involving the examination of an agency constituent.

Additional obligations may arise later and unexpectedly. For example, the agency constituent may disclose negative information regarding the facts at issue, or regarding personal conduct relevant to credibility that may be embarrassing–or worse–for the constituent. Sometimes, although the government lawyer does not represent the constituent personally, it may be in the interests of the agency for the government lawyer to object to a line of inquiry or take other action in order to prevent unwarranted intrusion into the privacy of its constituent. In many instances, however, particularly given the heightened obligations of candor incumbent on a government lawyer, the government lawyer may intend to disclose embarrassing information received from the constituent. It may be necessary to explain to the constituent that the agency intends to make such disclosure, and that the constituent would have to obtain personal counsel to press any objection. See, e.g., United States v. Schaffer Equip. Co., 11 F.3d. 450, 457 (4th Cir. 1993) (government lawyers breached "general duty of candor to the court [that] exists in connection with an attorney's role as an officer of the court" by failing to reveal government expert's falsification of credentials). See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 comment f. In this regard, we believe that it is always appropriate for government counsel to advise that under no circumstances may the constituent testify falsely. Cf. NYSBA No. 728 (2000) (DR 7-104(A)(2) "has been understood to allow a lawyer, additionally, to give certain non-controvertible information about the law to enable the other party to understand the need for independent counsel").

NYSBA No. 728, which dealt with a government attorney's role as "investigator of the facts relevant to his client's cause," addressed another issue government lawyers occasionally confront in dealing with witnesses and agency constituents: whether there is an ethical obligation to advise the constituent of the risk of self-incrimination. The opinion addressed that question in the context of a municipal attorney interviewing an unrepresented claimant against the municipality whose claim related to a matter that had also led to criminal proceedings against the claimant. The opinion noted that an advice of rights might both serve (by promoting fair dealing) and disserve (by impeding information gathering) the municipality's interests. Thus, "[t]he municipal attorney might reasonably conclude that the municipality's interest in dealing fairly with the public justifies advising the unrepresented claimant to secure a lawyer, even in circumstances where a private party's lawyer would be disinclined to give this advice." Id. However, "there is nothing in the disciplinary rules that explicitly requires the municipality's attorney to advise the unrepresented claimant about the need for a lawyer or the risk of self-incrimination," and the opinion thus left it to the municipality's law department (or as may have been delegated to individual attorneys) to decide, "as a matter of sound public policy and professional judgment," whether or not to give advice about the need for an attorney and the risk of self-incrimination. Id. Cf. United States v. Valdez, 16 F.3d 1324 (2d Cir.) (discussing trial court's discretion to advise unrepresented witness of his right against self-incrimination), cert. denied, 513 U.S. 810 (1994); People v. Siegel, 87 N.Y.2d 536, 663 N.E.2d 872, 640 N.Y.S.2d 831 (1995) (similar).

8. Wrongdoing by an Agency Constituent.

When confronted with wrongdoing by an agency constituent, DR 5-109(B) provides the following guidance:

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 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 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 in behalf of the organization as determined by applicable law.

DR 5-109 provides useful direction to the government lawyer. We note that reporting organizational wrongdoing may again require the government lawyer to confront the question of what organization he or she represents in a given matter in order to determine "the highest authority that can act in behalf of the organization as determined by applicable law." See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97, comment (c), Identity of a governmental client (regarding the different forms and divisions in which government agencies may exist); comment j, Wrongdoing by a constituent of a governmental client ("referral can often be made to allied governmental agencies, such as . . . a state's office of attorney general"); ABA Model Rules of Professional Conduct, Rule 1.13 Comment, Government Agency ("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 under similar circumstances"). A related question is what entity may have authority to authorize disclosure of information that may be otherwise privileged. See RESTATEMENT §74, comment e, Invoking and waiving the privilege of a governmental client (noting that in some states, the attorney general has authority to waive the privilege, and in other states, the decision is made by another executive officer or agency). In addition, many government agencies are subject to statutes and regulations governing the reporting of waste, fraud and abuse.[7] The nature of any privilege and who controls it must be clearly understood by the government attorney. These are issues of law which the government attorney must resolve as may be necessary to comply with DR 5-109(B)(3).

Finally, DR 5-109(C) provides that "[i]f, despite the lawyer's efforts in accordance with DR 5-109(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 a substantial injury to the organization, the lawyer may resign in accordance with DR 2-110." DR 5-109(C) provides its small comfort equally to the government lawyer as to private counsel for an organization. But as discussed above, government counsel will have many alternatives to consider before concluding that withdrawal is the only recourse. [8]

Conclusion

Government lawyers are subject to the rules that ordinarily govern the attorney-client relationship, including those governing conflicts of interest and entity representation. However, the conflict of interest questions encountered by government lawyers in civil representation may be particularly complex, and the questions may ultimately be analyzed differently for government lawyers, because of the legal framework within which they function. For example, threshold questions about the identity of the public client, and about whether particular decisions in the representation are entrusted to the government lawyer or to an agency representative, must be determined by reference to the law establishing the government law department, and not exclusively by referring to disciplinary provisions. Similarly, the question of whether a government law department may represent multiple government agencies with differing interests, or even antagonistic positions, is in part a question of law, although ethical

considerations suggest that, at the very least, it is advisable to avoid representing public agencies in disputes with each other.

In dealing with individuals within the government (e.g., officers or employees of a government agency), government lawyers must comply with DR 5-109, which generally governs the representation of an entity. When the agency constituents are unrepresented and the government lawyer does not propose to represent them, the lawyer must clarify his or her role as set forth in this opinion. In that event, the government lawyer will be limited in the extent to which he or she may provide advice to the individual. When the lawyer learns of wrongdoing by an unrepresented constituent of the agency, the lawyer must take steps to prevent or rectify the wrongdoing as required by DR 5-109 (C) as well as in accordance with legal obligations.

When the government lawyer proposes to represent the constituent, a threshold question is whether the constituent will be represented in his or her official or personal capacity. If the constituent would be represented personally, the lawyer must first determine whether the representation is permissible under the conflict of interest rule, DR 5-105, and must comply with the rule's procedural requirements in light of the framework provided in this opinion.

Dated: September 17, 2004

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1. EC 7-14 provides as follows:
   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 the lawyer should so advise his or her 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 should not use his or her position or the economic power of the government to harass parties or to bring about unjust settlements or results. The responsibilities of government lawyers with respect to the compulsion of testimony and other information are generally the same as those of public prosecutors.
2. We also note the existence of 28 U.S.C. § 530B and 28 C.F.R. Part 77, which specifically subject attorneys of the Department of Justice to the rules of professional responsibility of the states in which they practice law.
3. There may be exceptions where, for example, the government law office has a conflict of interest. See, e.g., Williams v. Rensselaer County Bd. of Elections, 118 A.D.2d 966, 500 N.Y.S.2d 190 (3d Dep't 1986) (Commissioner of county's Board of Elections was entitled to independent counsel in litigation in which his interests conflicted with those of the county); Judson v. City of Niagara Falls, 140 A.D. 62, 129 N.Y.S. 282 (4th Dep't 1910) (city council may employ independent counsel to conduct investigation of city departments where, otherwise, corporation counsel would appear as legal advisor of two antagonistic departments and the committee investigating them), aff'd, 204 N.Y. 630, 97 N.E. 1107 (1912).
4. See, e.g., The Attorney General's Role as Chief Litigator for the United States, 6 U.S. Op. Off. Legal Counsel 47, 1982 WL 170670 (O.L.C.), discussing the Attorney General's "full plenary authority over all litigation" and his role in "coordinat[ing] the legal involvements of each 'client' agency with those of other 'client' agencies, as well as with the broader legal interests of the United States overall." The opinion also emphasizes "that in exercising supervisory authority over the conduct of agency litigation, the Attorney General will generally defer to the policy judgments of the client agency," and that "policy concerns . . . implicated in decisions dealing with litigation strategy . . . will [be] accomodate[d] . . . to the greatest extent possible without compromising the law, or broader national policy considerations." The New York State Attorney General is reported to have a similar view of his authority. See J.Weinstein, Some Reflections on Conflicts between Government Attorneys and Clients, 1 Touro L. Rev. 1 (Spring, 1985), n. 17, available on Westlaw as C317 ALI-ABA 959, citing Attorney General's Memorandum, Powers of the Attorney General in the Conduct and Control of Litigation for State Agencies. See also Feeney v. Commonwealth, 366 N.E.2d 1262 (Sup. Ct. Mass. 1977) (Massachusetts' Attorney General may decide to appeal over the objections of state officers whom he represents); Sec'y of Admin. and Fin. v. Attorney Gen., 326 N.E.2d 334 (Sup. Ct. Mass. 1975) (Attorney General may refuse to appeal over the objection of the State Secretary of Administration and Finance).
5. A personal representation would require, among other things, a conflict analysis, informed consent, and compliance with agency procedures. ABCNY No. 2004-2, Representing Corporations and their Constituents

in the Context of Governmental Investigations, contains a pertinent discussion of the factors to be considered in evaluating conflicts and structuring such a representation to minimize potential conflict. Compare U.S. Dep't of Justice, Office of Legal Counsel, Memorandum, Relationship between Department of Justice Attorneys and Persons on whose Behalf the United States Brings Suits Under the Fair Housing Act (Memorandum dated January 20, 1995), http://www.usdoj.gov/olc/1995opinions.htm (concluding that when the Department of Justice undertakes a civil action on behalf of a complainant alleging a discriminatory housing practice under the Fair Housing Act, it does not establish an attorney-client relationship with the complainant, and discussing potential applicability of common interest/joint defense privilege).

6. There may be situations where the government perceives that its paramount legal obligation is to obtain information from the individual and that it is not free to provide the necessary clarification. An analysis of such situations is beyond the scope of this opinion. There may also be situations where the lawyer for the government becomes the lawyer for these constituents as well. A specific analysis of such situations is also beyond the scope of this opinion.
7. For example, relying principally on 28 U.S.C. § 535 (2002), the Professional Ethics Committee of the Federal Bar Association has stated that it "does not believe there are any circumstances in which corrupt conduct may not be disclosed by the federally employed lawyer," apart from circumstances involving personal representation of an individual by the government lawyer. Op. 73-1, The Government Client and Confidentiality, 32 Fed. Bar. J. 71 (1973). This is a question of law as to which we do not opine.
8. There may also be situations where it is permissible or necessary for the government lawyer to withdraw written or oral opinions or representations that the lawyer previously gave. See 4-101(C)(5). An analysis of such situations is beyond the scope of this opinion.