Ethics for the Government Lawyer

December 11, 2018

12:00 p.m. – 2:00 p.m.

CBA Law Center

New Britain, CT

CT Bar Institute Inc.

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Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging I acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

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Faculty Biographies

Kathleen M. Foster has served as Senior Assistant Corporation Counsel for the City New Haven since 2003. Her practice at the City focuses primarily on representing the City and City officials before administrative agencies of the State and serving as counsel to various City boards and commissions. Kathleen also works on a wide variety of transactional matters on behalf of the Finance Department, Management and Budget, Information Technology, Community Services, Human Resources and Education. Her primary focus is on identifying issues and solving legal problems within municipal government in order to support effective governmental management and responsive City services for New Haven residents.

Kathleen studied history and education at the University of Connecticut. After a brief career in teaching, she pivoted to the law, working as a litigation paralegal in New York City. She received her J.D. from New York University School of Law, where she was a member of the *Annual Survey of American Law*. Kathleen returned to Connecticut to join the law firm of Robinson & Cole in its public finance group. There she worked with cities and towns across the state, as well as with the State itself and several of its quasi-public agencies.

Kathleen is an active member of the Connecticut Association of Municipal Attorneys and has presented on topics regarding ethics for the governmental lawyer. She lives in Meriden with her husband, Attorney Roger B. Calistro, and several pets.

Patricia King graduated from the University of Massachusetts in 1973 and the University of Connecticut Schools of Law and Social Work in 1982. Since 1983, she has worked as a Juvenile Court Advocate, an Assistant State's Attorney in the Judicial District of Waterbury, and an Assistant Corporation Counsel for the City of New Haven. She worked in two New Haven firms as a private practitioner for approximately seven years, handling primarily civil matters, including the Colonial Realty litigation, then as a partner in Moscowitz & King, LLC, focusing on criminal defense. She was one of the three attorneys initially hired to staff the Office of the Chief Disciplinary Counsel at its inception in 2004. She was Chief Disciplinary Counsel between July 2012 and February 2015. After retiring from the Office of the Chief Disciplinary Counsel's Office, she joined Geraghty & Bonnano where her work will focus on legal ethics, attorney misconduct, and legal malpractice.

Pat has been active in her home in New Haven, having served for 9 years on the City Plan Commission, and has been chair of the New Haven Board of Zoning Appeals since 2013. She is fluent in Spanish. She has been an adjunct professor at the Quinnipiac University School of Law since 1997, where she has taught legal skills, Introduction to Representing Clients, and Lawyers Professional Responsibility. She is actively involved in the law schools International Human Rights Law Society and has accompanied the group on its annual service trip to Nicaragua in 2012 and 2014.

Kari L. Olson is a partner in Murtha Cullina's Litigation Department and chairs the firm's Municipal and Land Use practice groups. She received her B.S., Cum Laude, from the University of Connecticut and, in 1998, her J.D. with High Honors from the University of Connecticut School of Law. She was admitted to the Connecticut Bar in 1998. Ms. Olson concentrates her practice in general municipal law and land use litigation. She represents municipalities in all matters of municipal concern and governance. She was named among Best Lawyers 2019 in the area of land use.

The Conflicting Ethical, Legal, and Public Policy Obligations of the Government's Chief Legal Officer

By Michael A. Cardozo

(Editor's Note: This article is adapted from the Maurice Rosenberg Memorial Lecture, presented by the author April 8, 2014 at Columbia Law School.[1])

What is the proper role of the chief lawyer for a government entity? Drawing on my 12 years of experience as Corporation Counsel of the City of New York, I address in this article the ethical, moral, legal, and public policy obligations and values that should guide the actions of an attorney who is fortunate enough to be the principal lawyer for a government body.

In order to define properly the chief government lawyer's role as advocate and legal counselor, he or she must answer fundamental questions of policy and ethics. First, does that lawyer have an obligation to "do justice" when prosecuting civil litigation that affects his or her duty to the governmental client? And if so, what does "doing justice" mean? Second, what obligation does a government lawyer have to protect the long-term institutional interests of the governmental entity when those interests arguably conflict with the short-term policy goals of the present chief executive or incoming mayor-elect? And third, what does a government lawyer who is generally charged with defending the law do when faced with a challenge to an arguably illegal law that the executive does not like?

The common thread that runs through my answers to these questions is that, in my opinion, the responsibility of the chief government lawyer is to ensure that the government entity he or she represents enjoys all the benefits of vigorous advocacy. In this respect, the relationship between lawyer and government entity is no different than the relationship between attorney and client in private practice. Indeed, only through zealous advocacy can the government lawyer optimally advance the interests of the government entity and the rights of its citizens.

Who Is the Client?

The obvious starting point for this debate is defining who is the government lawyer's client. Most commentators agree that the client is whatever governmental entity the lawyer represents, in my case the municipal corporation known as the City of New York.[1] What this means is that the chief government lawyer must never forget that his or her first obligation is to the governmental entity itself and that lawyer's job is not simply to advocate on behalf of individual members of the executive or legislative branch. Just as counsel for a corporation takes day to day direction from the duly authorized con-stituents that are the corporate officers, but nevertheless has an overarching obligation to protect the interests of the corporation, even against the wishes of those officers, so, too, must the government lawyer represent in the first instance a city or state and not its mayor or governor.

In the corporate setting, Rule 1.13(f) of the Model Rules of Professional Conduct, to take but one example, requires the general counsel to make clear to board members and officers that his or her primary responsibility is to protect the interests of the corporation, when it appears that those interests may differ from those of the individual constituents[3] with whom the lawyer is dealing. However, while the rules of professional conduct for lawyers offer some general guidance to government lawyers, the authority and obligations of government lawyers are modified and sometimes augmented[4] by charter and statutory provisions. This similar-but-different quality of governmental lawyering is apparent from the relationship between government lawyer and the client entity.

As a practical matter, the government lawyer's job is almost invariably to advance the objectives and defend the interests of whoever is in charge of

making final decisions on the particular issue in question.[5] Since most litigations against the government challenge the legality of the actions of the governor, mayor, agencies they control, or their appointees or employees, it follows that these democratically elected or duly appointed officials, after receiving appropriate legal advice, should make the key decisions about the litigation objectives in particular cases. The means by which the entity pursues these objectives remains within the professional judgment of the lawyers.[6] Of course, if the challenged actions are clearly illegal, ethical rules would require the government lawyer, like one in private practice, to decline to defend them.[7]

It is worth pausing to consider what happens when two branches of government are on opposite sides of a dispute. In such cases, it is vitally important that both sides receive adequate representation. As the Preamble to the Rules of Professional Conduct makes clear, government lawyers may represent various government entities.[8] Unlike the private lawyer, the government lawyer may continue to represent multiple entities generally, even though in a particular legal controversy between two entities, he may represent one, but not the other. Thus a government lawyer could litigate on behalf of the mayor and be adverse to the city council in a legal dispute between the two, even though he still represents both entities outside the litigation. This would not be true in the private practice context: a private lawyer could not represent one client against another client in a single litigation and still represent both outside that litigation, because that would create a conflict of interest. In New York City, therefore, whenever the mayor and the city council are adverse in litigation, and consistent with New York Court of Appeals precedent,[9] the city council will retain private counsel or rely on its own in-house attorneys.

But identifying the client, and the relevant decision-maker for the client, does not tell us whether the chief government lawyer, in conducting civil litigation, has obligations beyond representing that client's interests and expressed objectives to the best of his or her ability. Phrased another way, does the government lawyer have an independent duty to "do the right thing" by virtue of his or her official position that limits the single-minded dedication with which the government lawyer can pursue litigation on behalf of a government entity?

[I]n the absence of a special constitutional or statutory duty to represent the public interest, there is no overarching responsibility for government lawyers to "do justice" that might temper their vigorous advocacy on behalf of the entity or its elected officials.

"Doing Justice"

The Attorney General of the United States recently suggested that some government lawyers have an independent duty "to do justice" whenever the government entity is party to civil litigation. Attorney General Eric Holder stated that "[t]his, after all, is the essential duty to which all of us—as attorneys general—have been sworn: not just to win cases, but to see that justice is done."[10] Several commentators share this position and extend the "do justice" admonition beyond elected attorneys general and place an additional ethical responsibility upon all government lawyers.[11] They have suggested that it may be wrong for government lawyers to make aggressive motions and assert every possible defense without regard to how sympathetic the facts of plaintiff's particular case may be. In my view, such a position is incorrect. It is not only a dangerous precedent to allow appointed government attorneys to determine what is just and what is not, but unwarranted restraint is also a disservice to the government entity the attorney represents.

The responsibilities of state attorneys general—especially elected ones—are distinguishable from those of their appointed counterparts, such as corporation counsels or city attorneys. Elected state attorneys general are often independent office holders who draw their authority directly from the state citizenry. This creates concomitant duties, derived from the statutes and constitutions that define the attorney general's duties and responsibilities, to protect the public interest. For example, the California Supreme Court has observed that the state attorney general "is often called upon to make legal determinations both in his capacity as a representative of the public interest and as statutory counsel for the state ... [but] that his paramount duty [is] to represent the public interest."[12] In such cases, there may be a special duty to "do justice" and act in the public interest. The nature and extent of such obligations will vary from state to state according to the terms of statutes and constitutions, and precise answers are beyond the scope of this article.[13]

By contrast, in the absence of a special constitutional or statutory duty to represent the public interest, there is no overarching responsibility for government lawyers to "do justice" that might temper their vigorous advocacy on behalf of the entity or its elected officials.[14] The various formulations of ethical rules offer some, but hardly definitive, guidance. The ABA Model Rules, for example, mandate that all lawyers, specifically including government lawyers,[15] should "zealously assert[] the client's position under the rules of the adversary system" and take "whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."[16]

The government lawyer is, of course, an essential participant in internal government policy debates, which adds an extra dimension of responsibility to what

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Michael A. Cardozo is a Partner with Proskauer Rose LLP and served as New York City Corporation Counsel from 2002 to 2013.

he or she does. I cannot emphasize strongly enough that the government lawyer must not only give legal advice, but must also forcefully express views on the desirability and morality of the particular policy question at issue. Indeed, Model Rule of Professional Conduct 2.1 has a special resonance in the government lawyer context:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

While the Model Rule therefore makes clear that the government lawyer should always make his or her moral stance clear to decision-makers at the advisory level, the Rule is permissive and puts the law first. In my opinion, the rule allows government lawyers to use morality as a reference point but does not enable them to elevate moral concerns above sound legal analysis.

The rule makers are perfectly capable of curbing single-minded advocacy if they so desire. In a different context, the Model Rules state that a criminal "prosecutor has the responsibility of a minister of justice and not simply that of an advocate."[17] But they impose no comparable standard on civil government lawyers. The only vestigial trace of such a responsibility, found in the old Model Code of Professional Responsibility, is a non-mandatory ethical consideration that the "government lawyer in a civil action… has the responsibility to seek justice. ... "[18] Yet the rule makers signaled their disapproval even of this non-binding suggestion when they elected not to include it in the new Model Rules. It is clear to me that, at least, there is no mandatory ethical duty per se that requires a government lawyer to exercise restraint in civil litigation for the purpose of "doing justice."

This issue is far from academic. The government lawyer's decision whether or not to pursue litigation zealously on behalf of a government entity has a clear impact on the entity and its citizens. To put this more concretely, should New York City, in an effort to reduce the more than $500 million it annually pays in damages from the more than 8,000 cases filed against it, insist on taking weak cases to trial rather than paying small settlement amounts to make them go away? Or, alternatively, should the Corporation Counsel's Office, to take but one of many examples, have "done justice," despite the City's overwhelming likelihood of prevailing at trial, and settled suits brought by innocent bystanders who were injured in the crossfire when the police shot at and killed a gunman, who had just murdered another man outside the Empire State Building?[19] Similarly, when over 10,000 cases, seeking in excess of $3 billion in damages, were brought against the city by people, described by many as "the heroes of 9/11," who alleged they had become ill as a result of their Ground Zero clean-up efforts, were city lawyers wrong to defend that mass tort case by raising every possible defense, including that of immunity under the New York State Defense Emergency Act?[20]

Clearly, it is in New York City's best interests to reduce the amount it pays out as a result of litigations. And it was my judgment that insisting on the trial of cases in which we believed the City would likely prevail would result in such a reduction. Therefore, Mayor Bloomberg and I determined that cases where Corporation Counsel was confident the city would prevail should be tried on their merits, or settled on very favorable terms, despite the sympathetic facts presented by a particular plaintiff.[21]

In my view, the government lawyer must give the needed legal advice to the government decision-maker, and then, barring a contrary directive from that individual, try or settle the case based on the lawyer's assessment of the ultimate litigation result.

I recognize that some feel deeply uneasy whenever the government takes on a sympathetic citizen in court. Yet this discomfort is an inevitable byproduct of the adversarial system through which the victim of an alleged wrong must seek compensation from the government. To paraphrase Judge Jack Weinstein, so long as government lawyers are playing this game by the present rules, we owe it to the taxpayer to play to win.[22]

The courts and the legislature set the rules of the litigation game by which the government must play. It is the courts and the legislature that decided the city is immune from liability when an innocent bystander is wounded by a cop's bullet unless negligence can be established.[23] Similarly, it is the legislature that has determined that the government is not liable in a civil defense emergency such as 9/11, even if there was negligence.[24] And certainly, if the long-term interests of the city and its citizens include reducing the amount paid out in litigation, and if one of the ways to achieve that goal is by refusing to settle weak cases, can the lawyer do anything other than insist on taking such cases to trial?

Under our judicial system and absent some statute or constitutional provision imposing a duty to protect the public interest, "the court, not the government lawyer, will declare what 'fairness' and 'justice' require."[25] More importantly, for a government lawyer to ignore these rules, as some have advocated, and litigate certain civil cases, but not others, based on personal preconceptions of fairness and without invoking available defenses, suggests the worrisome possibility that the appointed lawyer, rather than the elected decision-maker, makes the potentially dispositive policy decisions. We must not promote a government of lawyers above our government of laws.

The Client's Long-Term Interests

Another example of the ethical and policy tensions inherent in governmental lawyering arises when the long-term interests of the government institution are perceived to conflict with the policy desires of the present chief executive. To be more concrete: What should the chief lawyer for the governmental entity do if he or she concludes that the long-term interests of the city conflict with the chief executive's short-term policy preferences?

For example, was it proper for the Corporation Counsel's Office, relying both on arguably applicable public policy and precedent, to contend that

a particular state statute favored by the mayor was constitutional even though the statute's enactment had not been preceded by a home rule message from the city council, as was arguably required by the state constitution? Judicial acceptance of the lack of need for such a home rule message might weaken the city's long-term interest in resisting interference from future state legislatures in the operations of New York City, to the dismay of future mayors and corporation counsels.[26]

Other examples of this tension between short- versus long-term goals abound. If a city has a long-term interest in improving safety and the environment by restricting signs abutting city highways, what should the government lawyer do when a city commissioner wants to make an exception to allow for a particular sign, an exception that future would-be-sign-posters might point to as showing discriminatory treatment? Or, if it is not in a city's long-term interests to agree to consent decrees that put the city under the supervision of the courts for a period that in some cases have extended more than 30 years,[27] what should the lawyer do when a mayor, to solve a particular political and legal problem, decides to agree to another long-term consent decree?

One of my most distinguished corporation counsel predecessors, Fritz Schwarz, has answered these questions by arguing that government lawyers have a special responsibility to care for the long-term interests of the institutions they serve, which politicians will not do sufficiently.[28] I agree. The government lawyer must carefully explain to the elected official the potential adverse long-term consequences to the governmental entity of making a particular argument or taking a particular action. But this duty is advisory in nature.[29] The final decision of whether the short-term policy gain is worth the potential long-term consequence to the city—even assuming the lawyer could comfortably identify the long- versus the short-term gains involved—is one for the elected official, not the government lawyer, to make.

A slightly different example of the tension between short- and long-term goals can arise in the final days of a particular elected official's tenure, when the government lawyer is faced with deciding what course of action to take if he or she knows that a policy shift is imminent. This situation was presented in the waning days of the Bloomberg administration when it became clear that some of Mayor-Elect DeBlasio's policy goals differed sharply from those of Mayor Bloomberg. While changes of policy from one mayor to the next are the essence of democracy, the impact of the changes contemplated by the mayor-elect were complicated by the fact that many of those changes—including the controversial stop and frisk police tactics—were the subject of litigation.[30] This meant that the Corporation Counsel's Office might soon have to take different legal positions on issues it had advanced under Mayor Bloomberg. While some commentators suggested that Mayor Bloomberg's agenda should not have been advocated by the corporation counsel through the final hour of the mayor's tenure, in my view the last days of the administration were no different from the previous 12 years—my office and I had a client to serve, and it was our obligation to advance persuasive legal arguments on behalf of the present mayor.[31]

While the final decisions on litigation settlements, and whether or not to take positions that may not be in the government's long-term interests, should be made by the elected executive, not by the government lawyer, it does not follow that ... the attorney general, corporation counsel or city attorney must always do the executive's bidding.

Let me add that while I personally would have preferred for the now changed Bloomberg policies to have remained in effect, it was perfectly proper, when the new mayor took office, for my very able successor, Zachary Carter, to signal a "U-turn" and announce, as he did, that it is "the prerogative of the mayor and of the city to assert legal positions" even if this requires changing tack. [32]

The Ethical Limits on the Chief Government Lawyer

While the final decisions on litigation settlements, and whether or not to take positions that may not be in the government's long-term interests, should be made by the elected executive, not by the government lawyer, it does not follow that whatever the elected executive wants, he or she should get, or that the attorney general, corporation counsel or city attorney must always do the executive's bidding. As discussed earlier, the chief government lawyer has an overriding duty to represent the government institution and to see that its laws are defended. That obligation trumps his or her duty to the elected official.

This is best illustrated through one of the most difficult decisions I faced at the Corporation Counsel's Office. In 2005, a State Supreme Court justice declared the New York State Domestic Relations Law's prohibition of gay marriage unconstitutional.[33] Accordingly, she ordered the city clerk, represented by the corporation counsel, to issue a marriage license to the plaintiffs, a gay couple. Four other state Supreme Court justices had reached the opposite legal conclusion and had upheld the law's gay marriage ban.[34] The mayor strongly favored legalizing gay marriage, as did I.[35] Given the court's finding of unconstitutionality, I was faced with a dilemma. Should I file a notice of appeal and invoke the city's automatic right to a stay, which would have had the effect of preventing the decision from going into effect until the appeal was decided? Or instead, should I have "done justice" and declined to invoke a stay, which would have meant that the trial court ruling would go into effect allowing gay couples to be married even before the

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appellate courts had had the opportunity to determine the law's constitutionality? If the mayor, and I suspect the city council, favored gay marriage and wanted the ban to be nullified, how could I, as their lawyer, invoke the city's automatic right to a stay? [36]

In fact, I did invoke the stay, and ultimately the New York Court of Appeals, in a 4-2 decision, upheld the constitutionality of the gay marriage ban.[37] I invoked the stay and pursued the appeal, even though the mayor wanted the ban voided, because in my view I had been sworn to uphold the laws of the State of New York.[38] Until the Court of Appeals had declared the law unconstitutional, it was my obligation to defend it. I was very troubled by the possibility that Michael Cardozo, by failing to invoke a stay, would, as a practical matter, have arrogated to himself the unilateral power to nullify a long-standing and duly enacted state law, the constitutionality of which was clearly subject to debate.

Let me pause here to contrast my position with that of Attorney General Holder in the *Windsor* Defense of Marriage Act (DOMA) case. The attorney general took the position then, the basis for which he articulated in a recent speech, that in "exceptional circumstances" government lawyers may at their discretion refuse to defend arguably unconstitutional laws. He argued that:

> Any decisions—at any level—not to defend individual laws must be exceedingly rare. They must be reserved only for exceptional circumstances. And they must never stem merely from policy or political disagreements—hinging instead on firm constitutional grounds. But in general, I believe we must be suspicious of legal classifications based solely on sexual orientation.
> And we must endeavor—in all of our efforts—to uphold and advance the values that once led our forebears to declare unequivocally that all are created equal and entitled to equal opportunity. [39]

Accordingly, the attorney general declined to defend the Defense of Marriage Act before the Supreme Court in *Windsor*. In *Windsor,* Justice Kennedy, writing for the majority, noted the Court's discomfort that the "Executive's failure to defend the constitutionality of an Act of Congress based on a constitutional theory not yet established in judicial decisions has created a procedural dilemma." [40] While a narrow majority of the Court nevertheless reached the merits and declared the law invalid, three dissenting justices concluded the Court lacked jurisdiction to decide the case because no one from the executive branch was defending the law.[41] From a practical standpoint, Attorney General Holder's position nearly deprived the Supreme Court of the opportunity to declare DOMA unconstitutional once and for all.

The potential consequence of a government lawyer's refusal to defend a law was strikingly illustrated in the companion case involving a California state law enacted by referendum that prohibited gay marriage in that state. There the Supreme Court declined to review the lower court's finding of unconstitutionality because, although the proponents of the referendum had sought review, the relevant state officials with the responsibility of defending the validity of state laws agreed that the law was unconsti- tutional and did not appeal.[42] Thus, the lawyers for the State of California, by failing to appeal the lower court's constitutionality ruling, took it upon themselves to void a law, duly enacted by referendum, thereby preventing the courts from resolving the issue.[43]

In my opinion, the failure of Attorney General Holder and the California attorney general to defend the anti-gay marriage laws, and Mr. Holder's recent encouragement to state attorneys general to do the same,[44] was a mistake. Certainly government attorneys do not leave their legal or moral consciences behind when they take their oaths of office, and have the absolute right to disqualify themselves personally from a particular case. They might even have an ethical obligation to do so under Rule 1.7(a)(2), which recognizes a conflict of interest when a lawyer's personal interests (or sympathies and biases) "materially limit[]" the effectiveness of his or her representation and create a risk of punch-pulling. However, it is fundamentally important that government lawyers recognize their special duty to ensure that duly enacted and not clearly unconstitutional laws are adequately defended whenever challenged, so that the courts can review the issue. Such a defense can be accomplished either by the government lawyer's office, that office's hiring of special counsel, or, if the law permits, by another party.

To do otherwise means, as was the case in California, that the government lawyer effectively has the power to abrogate duly enacted legislation. In my view, that is wrong. Moreover, while the decision not to appeal in the California case achieved the immediate policy goal of invalidating the gay marriage law, it prevented the Supreme Court from achieving Attorney General Holder's objective of establishing once and for all "that all measures that distinguish among people based on their sexual orientation must be subjected to a heightened standard of scrutiny."[45] In a recent and related case, the Virginia attorney general took what I believe to be the proper approach when the constitutionality of Virginia's gay marriage ban was challenged in federal court. Although the state attorney general declined to defend the ban himself, two members of the executive branch responsible for granting or denying marriage licenses under the law were entrusted with the responsibility of providing a defense for the statute.[46] This approach is entirely consistent with the duties and responsibilities of the government lawyer and is far preferable to an unchecked policy of discretionary abandonment of duly enacted laws.[47] Moreover, following the rules in such cases creates a firmer foundation for definitive resolution and progress.

The duty to defend a duly enacted law is somewhat similar to the duty a criminal lawyer owes to the defendant he or she represents. While concededly the details of the rights and responsibilities at stake differ in each situation, on a macro level the adversarial system of justice demands unfailing advocacy on both sides of the courtroom. Just as the criminal defendant is entitled to a defense until his or her guilt is proven beyond a reasonable doubt and all appeals are exhausted, so, too, must the government lawyer provide a defense for a law until the highest court

declares it invalid. This analogy, while imperfect, does make clear the centrality of balance to the adversarial system, balance which the government lawyer has a duty to maintain. Maintaining this balance and defending potentially unconstitutional laws is not an obstacle to progress. Rather, it is a necessary component of the adversarial process. Paul E. Wilson, an assistant Kansas attorney general, who was a member of the losing defense team in *Brown v. Board of Education*,[48] has written:

> [T]o me it was clear that the state's position was supported by existing law. The doctrine of separate but equal still controlled . . . . If I had been . . . a member of the Topeka Board of Education, I should have been pleased to vote to repeal the segregation statute and repudiate the public school policy that it permitted. But I was not a legislator, . . . I was a lawyer committed to uphold the law and the adversary process. The appellants were represented by able counsel prepared to attack wherever they sensed vulnerability. As I saw it, the task of counsel for the state was to rebut that effort by bringing to the Court's attention all data and theories favorable to the state's position. . . . Justice Oliver Wendell Holmes is reported to have said that the job of the judge is not to do justice but to play the game according to the rules. The lawyer's task is to inform the court as to what his client believes the rules to be. Whatever the outcome, the lawyer who has been faithful to his responsibility will have made a useful contribution to the result.[49]

Wilson and his colleagues, by defending the "separate but equal" doctrine overruled in *Brown,* contributed to the adversarial process that enabled the Supreme Court to overrule *Plessy v. Ferguson* and the separate but equal doctrine it had created.[50] To have done otherwise might have prevented, as almost occurred in *Windsor,* and did occur in the companion California case, the Court from making a final decision on the law's unconstitutionality.

But this leads to another, related question: what if the elected official thinks that a law is illegal and wants the government lawyer to sue to have it declared invalid? This problem was highlighted when Mayor Bloomberg, late last year, represented by the corporation counsel, brought suit against the city council seeking to have the so-called racial profiling law invalidated.[51] But there was a further complication. In addition to the mayor's suit, two police unions brought a similar suit against New York City asserting the law's illegality.[52]

Given, as I stated, the government lawyers' obligation to defend duly enacted legislation, how could the corporation counsel decline to defend the law's validity in this latter suit? Leaving aside the obvious impossibility of the office arguing, on the one hand, the law's invalidity and on the other hand defending it, what should or could be done? The answer, as alluded to above, is that there was another government entity with a genuine stake in defending the law, here the city council, which could and did intervene in the case—to argue the law's validity and to ensure judicial review of the issue.

Conclusion

Serving as New York City Corporation Counsel is not only an honor but the greatest job any lawyer can ever have. The legal issues facing New York are vast and challenging. The lawyers in the office are terrific. And the opportunities to make a difference in your role as a government lawyer are enormous. But extraordinary pressures come with the job satisfaction. As another former high level government lawyer has observed, "[I]t is harder to be a government attorney than it is to be an attorney in private practice. It's more complicated, it's more challenging, the environment is far more rigorous. You live in a world, in a fish bowl-like world, where public scrutiny is intense."[53]

You cannot be afraid to call them as you see them. You have to be able to tell the policy makers your views, and not be afraid to say a proposed course of conduct may be illegal or in any event unwise. But in the end, I believe the ethical rules you need to observe are no different whether you are a private or public lawyer—at least outside the special context of criminal prosecution or for attorneys general in certain respects. At the same time, you must remember that you have a duty to ensure that the laws you have been sworn to obey are defended when challenged, and that you cannot unilaterally act to annul them.

The words of Judge Jack Weinstein, who before taking the bench served as the chief government attorney for Nassau County, offer a fitting coda to this article. "[W]hile the government's attorney is a political figure," Judge Weinstein observed, "he operates within a framework of professional and ethical responsibility that limits what he can and should do. *There is no inconsistency between sound ethics and good politics.*" [Emphasis added.] Indeed, Judge Weinstein concluded, "Government service, while it furnishes some of the hardest ethical problems, affords a lawyer many of the greatest opportunities for professional fulfillment."[54]

Notes

1. The author acknowledges with thanks Proskauer Rose Professional Responsibility Counsel Charles Mokriski, Proskauer Associate Jack Browning, and Assistant Corporation Counsel Andrew Fine for their assistance in preparing this article.

2. The New York City Charter provides that the Corporation Counsel "shall be attorney . . . for the city and every agency thereof... ." New York, N.Y., Charter ch. 17, § 394 (2012). *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. f (2000) ("A lawyer for the government is required to act ... in a manner reasonably calculated to advance the governmental client's lawful objectives and with reasonable competence and diligence. Those objectives are normally defined by authorized officers of the governmental client acting within constitutional, statutory, and other legal limits."). See also Frederick A.O. Schwarz, Jr., *Lawyers for Government Have Unique Responsibilities and Opportunities to Influence Public Policy*, 53 N.Y. L. SCH. L. REV. 375, 377 (2008) ("For all government lawyers, the [client] is always, it seems to me, the overall greater governmental entity that the lawyer serves: the United States, the state, or for Corporation Counsels, 'the city'"); Jeffrey D. Friedlander, *The Independence of the Law Department*, 53 N.Y. L. SCH. L. REV.479, 482, 487 (2008) ("It is the Law Department that determines the position of the city in litigation.... The ability of the Law Department both to defend the validity of local laws and at

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times to challenge them—indeed, maintaining the office's independence and authority in interpreting the Charter and advising our clients in the making of city policy—requires the office to demonstrate the qualities of competence, integrity, and what I call 'institutional loyalty.'").

3. *See also* N.Y. Rules of Prof'l Conduct R. 1.13(a) (2009).

4. "Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority." Model Rules of Prof'l Conduct pmbl. 18 (2013).

5. *See generally* Robert P. Lawry, *Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 Fed. B.J. 61 (1978); *see also* Michael J. Glennon, *Government Lawyering: Who's the Client? Legislative Lawyering Through the Rear-View Mirror*, 61 Law & Contemp. Probs. 21, 27 (1998) ("In one sense, I always viewed the client as the Chairman [of the Senate Foreign Relations Committee] ... I never undertook any activity at odds with what I knew to be the Chairman's position, or even what I thought might be the Chairman's position."); Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. Chi. L. Rev. 1293, 1298 (1987) ("[Q]uestions of intra-branch conflicts can be subtle and complex, but in principle their answer is easy: the attorney's duties run to the officer who has the power of decision over the issue."); Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 Me. L. Rev. 155, 158 (1966) ("The chief government law officer must and should attempt to please some politicians: he is, by virtue of his position, a political or policy-making figure, a member of a government administration which achieved office by a political-governmental program.").

—Model Rules of Prof'l Conduct R. 1.2 (2013).

—*See, e.g.*, Model Rules of Prof'l Conduct R. 3.1 (2013).

8."[L]awyers under the supervision of [government law] officers may be authorized to represent several government agencies in intergovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients." Model Rules of Prof'l Conduct pmbl. 18 (2013); *see also* N.Y. Rules of Prof'l Conduct pmbl. 10 (2009).

9. Cahn v. Town of Huntington, 29 N.Y.2d 451, 456 (1972) (holding that the Planning Board of the Town of Huntington could retain the services of outside council in litigation against the Town Board of Huntington because the town attorney could not represent both sides in the litigation and the "only possible recourse for the [Town] Planning Board was to employ special counsel.").

10. Eric H. Holder, Att'y General, Remarks as Prepared for Delivery at the National Association of Attorneys General Winter Meeting (Feb. 25, 2014), transcript *available at* http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-1402251.html

11. *See* Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. Rev. 789, 813-35, 844-45 (2000) ("Just as the public prosecutor under the 'do justice' maxim owes a duty to the defendant to work towards a substantively fair outcome to the proceedings, so too does the civil government litigator owe a duty of substantive fairness to the defendants ..."); Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation*, 9 Widener J. Pub. L. 235, 280 (2000) ("[S]urely the question of whether government lawyers have a duty to 'seek justice' is sufficiently important for them to give the issue serious consideration, before they reflexively assume the mantle of the zealous advocate.").

12. D'Amico v. Bd. Of Med. Exam'rs, 11 Cal. 3d 1, 14-15 (1974). The California constitution also requires the attorney general to assist district attorneys when "required by the public interest." Cal. Const. art. V, § 13. *See also* N.Y. Exec. Law § 63(8) ("Whenever in his judgment the public interest requires it, the attorney—general may ... inquire into matters concerning the public peace, public safety and public justice.").

13. This does not mean, however, that the state attorney general can neglect his or her responsibility to uphold the laws of the state he or she represents. Indeed, the California state constitution also states that "[i]t shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced." Cal. Const. art. V, § 13.

14. It is worth noting that the New York City Charter, in setting out the powers and duties of the corporation counsel, does not mention the public interest at all. New York, N.Y., Charter ch. 17, § 394 (2012). See also Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions,* 64 S. Cal. L. Rev. 951, 1013 (1991) ("The intrinsically different nature of the government client cannot alone justify a departure from the traditional duty of zealous advocacy. Indeed, the opposite may well be true."); Miller, *supra* note 5, at 1294 ("Despite its surface plausibility, the notion that government attorneys represent some transcendental 'public interest' is, I believe, incoherent."); William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 Howard L.J. 539, 569 (1986) ("The public interest approach ... leads to a government of lawyers, not of laws, a result as objectionable as a government of people, not of law.").

15. Model Rules of Prof'l Conduct R. 1.13 cmt. 9 (2013); *see also* N.Y. Rules of Prof'l Conduct R. 1.13 cmt. 1 (2009) ("The duties defined in this Rule apply to governmental organizations.").

16. Model Rules of Prof'l Conduct pmbl. 2, R. 1.3 cmt. 1 (2013); *see also* N.Y. Rules of Prof'l Conduct R. 1.3 cmt. 1 (2009) ("A lawyer should pursue a matter on behalf of a client ... and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.").

17. Model Rules of Prof'l Conduct R. 3.8 cmt. 1 (2013); *see also* N.Y. Rules of Prof'l Conduct R. 3.8 cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

18. Model Code of Prof'l Responsibility EC 7-14 (1980) ("A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair.... A government lawyer in a civil action... has the *responsibility to seek justice and to develop a full and fair record,* and he should not use his position or the economic power of the government to *harass parties or to bring about unjust settlements or results*.") (emphasis added). The New York Bar has recognized this issue, but has not weighed in one way or the other: "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." N.Y. City Bar Ass'n Comm. on Prof'l & Judicial Ethics, Formal Op. 2004-03 (2004).
19. J. David Goodman, *Bystanders Shot by the Police Face an Uphill Fight to Win Lawsuits*, N.Y. TIMES, Nov. 10, 2013, at A19.
20. *See In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d 520 (S.D.N.Y. 2006).
21. The Preamble to the Model Rules of Professional Conduct recognizes that a government lawyer may have more discretion than his private counterpart in making settlement decisions, noting that "[u] nder various legal provisions, including constitutional, statutory and common law, the responsibil-ities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide whether to agree to a settlement or to appeal from an adverse judgment." Model Rules of Prof'l Conduct pmbl. 18.
22. Weinstein, *supra* note 5, at 170. *See also* Lanctot, *supra* note 14, at 985 ("The central principle that purportedly underlies the adversary system is that 'justice' can best be achieved by the battle of two zealous advocates before a neutral decision maker. Allowing a government lawyer to sit in judgment of the justice of a client's cause would be inconsistent with the fundamental principles underlying the adversary system. If the adversary system is truly the best way to achieve fair results in court, a proposition that is dubious to many, then presumably the government lawyer should zealously advance the agency client's goals in court in the same way that a private practitioner would.").
23. Johnson v. City of New York, 15 N.Y.3d 676 (2010).
24. N.Y. Unconsol. Law SDEA § 9193 (McKinney 2006).
25. Lanctot, *supra* note 14, at 985 ("The ethical codes therefore do not impose a duty on the government lawyer to behave differently than a private lawyer."). As British Lord Chancellor Henry Brougham declared in 1820, "[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client." 2 Trial of Queen Caroline 8 (1821).
26. *Greater N.Y. Taxi Ass'n v. New York*, 21 N.Y.3d 289, 301 (2013). *See* Richard Briffault, Closing Remarks at the Fordham Urban Law Journal Symposium: The Bloomberg's Legal Legacy (Dec. 4, 2012), *available at* http://urbanlawjournal.com/bloomberg-symposium-closing-remarks/ ("[A]s a teacher of local government law, and a believer in the importance of home rule, I find it a little unsettling when New York City's Mayor argues before the state courts that a state law preempts a City initiative. It is even more unsettling when, in order to win a policy dispute, the Mayor asks the state to turn what had long been a field of City regulation into a matter of state concern and a subject for state legislative determination. Once a state has taken over a subject, it may be hard for the City—and for future Mayors—to get it back. Perhaps naively, I think the Mayor ought to be fighting to expand City power, not seeking laws and court rulings that would limit it.").
27. *See, e.g.*, Benjamin v. Fraser, 264 F.3d 175 (2d Cir. 2001) (upholding consent decree pursuant to prison conditions).
28. *See* Schwarz, *supra* note 2, at 391-93.
29. *Id.* at 377-78 ("That a chief government lawyer represents the governmental entity and not the chief executive does not, of course, mean that the lawyer can wander off and make on his or her own all sorts of policy judgments").
30. *See, e.g.*, Floyd v. City of New York, 813 F. Supp. 2d 457 (S.D.N.Y. 2011). Although the De Blasio administration clearly had a right to advance its own litigation agenda, individual corporation counsel lawyers, as an ethical matter, might be precluded from switching position. Note, *Professional Ethics in Government Side-Switching*, 96 Harv. L. Rev. 1914 (1983).
31. *See* James C. McKinley Jr. & Benjamin Weiser, *In Final Weeks, a Push to Put Bloomberg's Stamp on Major Legal Cases,* N.Y. Times, Dec. 26, 2013, at A22.
32. *See* J. David Goodman, *De Blasio Drops Challenge to Law on Police Profiling*, N.Y. Times, Mar. 6, 2014, at A25.
33. Hernandez v. Robles, 7 Misc. 3d 459 (N.Y. Sup. Ct. 2005), *rev'd,* 26 A.D.3d 98 (1st Dep't 2005), *aff'd*, 7 N.Y.3d 338 (2006).
34. Kane v. Marsolais, 808 N.Y.S.2d 566 (N.Y App. Div. 2006), aff'd sub nom. Hernandez v. Robles, 7 N.Y.3d 338 (2006); Samuels v. N.Y. State Dep't of Health, 811 N.Y.S.2d 136 (N.Y App. Div. 2005), aff'd sub nom. Hernandez v. Robles, 7 N.Y.3d 338 (2006); Seymour v. Holcomb, 790 N.Y.S.2d 858 (N.Y. Sup. Ct. 2005), aff'd 811 N.Y.S.2d 134 (3rd Dep't 2006), aff'd sub nom. Hernandez v. Robles, 7 N.Y.3d 338 (2006). Shields v. Madigan, 5 Misc. 3d 901 (N.Y. Sup. Ct. 2004), aff'd, 2006 N.Y. App. Div. LEXIS 11425 (2d Dep't Sept. 26, 2006).
35. In fact, eight years earlier, as President of the City Bar Association, I had approved a report that argued the law's gay marriage ban was unconstitutional. *Same-Sex Marriage in New York*, 52 Record of The Association of The Bar of The City of New York 343 (1997).
36. In a somewhat related context, I had defended a law, which the city council had passed over the mayor's veto, that banned the use of metal baseball bats in high school games. *See* Ray Rivera, *Council Bans Metal Bats in High School*, N.Y. Times, Mar. 15, 2007, at B2, *available at* http://www.nytimes.com/ 2007/03/15/nyregion/15council.html?_r=0.
37. *Hernandez v. Robles*, 7 N.Y.3d 338 (2006).
38. It was my duty as Corporation Counsel of New York to uphold and defend the laws of New York City and of New York State. Therefore, it was not possible for me to decline to defend the gay marriage ban on the grounds that it was a state, rather than a city, statute.
39. Holder, *supra* note 10.
40. United States v. Windsor, 133 S. Ct. 2675, 2688 (U.S. 2013).
41. Justice Scalia wrote for three dissenting Justices: "The final sentence of the Solicitor General's brief on the merits

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[filed on behalf of the government appellants] reads: 'For the foregoing reasons, the judgment of the court of appeals *should be affirmed*.' That will not cure the Government's injury, but carve it into stone. One could spend many fruitless afternoons ransacking our library for any other petitioner's brief seeking an affirmance of the judgment against it. What the petitioner United States asks us to do in the case before us is exactly what the respondent Windsor asks us to do: not to provide relief from the judgment below but to say that that judgment was correct ... Since both parties agreed with the judgment of the District Court for the Southern District of New York, the suit should have ended there ... We have never before agreed to speak—to 'say what the law is'—where there is no controversy before us." *Windsor*, 133 S. Ct. at 2699-700 (emphasis in the original) (citations and footnotes omitted).

42. Hollingsworth v. Perry, 133 S. Ct. 2652 (U.S. 2013).

43. This approach seems to conflict with California law. Specifically, the California constitution states that "[i]t shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced." CAL. CONST. art. V, § 13. In addition, the California Supreme Court had previously ruled that the attorney general "has the duty to defend all cases in which the state or one of its officers is a party." *D'Amico*, 11 Cal. 3d at 15. That court had also held that in "the exceptional case the Attorney General, recognizing that his paramount duty to represent the public interest cannot be discharged without conflict, may consent to the employment of special counsel by a state agency or officer." *Id.* at 14. No such special counsel was appointed in the California gay marriage case.

44. Holder, *supra* note 10.

45. *Id.*

46. Bostic v. Rainey, 970 F. Supp. 2d 456, 468 (E.D. Va. 2014) ("Defendant Schaefer is a proper defendant here because he is a city official responsible for issuing and denying marriage licenses and recording marriages .... Defendant Rainey is a proper defendant because she is a city official responsible for providing forms for marriage certificates.").

47. As other challenges to various state laws barring gay marriage work their way through district courts, a variety of approaches to their defense have emerged. In Indiana, Utah, Oklahoma and Texas, government officers are defending the laws themselves. The Governor of Kentucky hired a private firm to defend its law after the state attorney general refused to do so. Brett Barrouquere, *Kentucky Gay Marriage Appeal Will be Handled by Ashland Firm Under $100K Contract*, THE COURIER-JOURNAL (Mar. 13, 2014),http://www.courier-journal.com/story/news/local/2014/03/13/Kentucky-gay-marriage-appealwill-be-handled-Ashland-firm-under-100K-contract/6388039. Outside the context of gay marriage, the Ohio Attorney General advanced a novel approach: file briefs on both sides. The Attorney General's office filed one brief to defend an Ohio law that makes it a crime to knowingly lie during an election campaign and another brief arguing that the law violates the First Amendment. The Attorney General argued that his dual constitutional obligations—to uphold the laws of Ohio and to protect the rights of its citizens—compelled his decision. Adam Liptak, *In Ohio, a Law Bans Lying in Elections. Justices and Jesters Alike Get a Say*, N.Y. TIMES, Mar. 25, 2014, at A16.

48. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

49. PAUL E. WILSON, A TIME TO LOSE: REPRESENTING KANSAS IN BROWN V. BOARD OF EDUCATION 100-01 (Univ. Press of Kan. ed. 1995).

50. Plessy v. Ferguson, 163 U.S. 537 (1896).

51. Mayor of New York v. City Council of New York, 451543/2013 (N.Y. Sup. Ct. 2013).

52. Patrolmen's Benevolent Ass'n of N.Y. v. City Council of New York, 654550/2013 (N.Y. Sup. Ct. 2013). Mayor De Blasio subsequently reversed Mayor Bloomberg's position and withdrew the office's challenge to the racial profiling law. J. David Goodman, *De Blasio Drops Challenge to Law on Police Profiling*, N.Y. TIMES, Mar. 6, 2014, at A25.

53. Henry M. Greenberg, *A Principled Discussion of Professionalism: Lawyer Independence in Practice*, 6 N.Y. JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW 21 (2013).

54. Weinstein, *supra* note 5, at 172 (emphasis added). ML

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revealed no concrete development plans. Two months after its opinion in *Valsamaki,* the Maryland Court of Appeals issued, *Sapero v. Mayor and City Council of Baltimore*, 398 Md. 317 (2007), emphasizing that the CODE OF PUBLIC LOCAL LAWS OF BALTIMORE CITY, §21-16 requires that, in order to use quick-take condemnation, the City of Baltimore must demonstrate why, because of some exigency or emergency, it is necessary and in the public interest for the City to take immediate possession of a particular property. *Sapero* also went on to emphasize the need to make certain that the quick take process did not abridge a property owners' fundamental rights and that the due process requirements of the Maryland Real Property Article had to be followed. *Sapero, supra.*

A & E North, LLC vs. Mayor & City Council of Baltimore City (2013)

Last year, the *A & E North, LLC* case arose from a regular condemnation action filed in the Circuit Court for Baltimore City to acquire the former Parkway Theatre. The theatre is an historically and architecturally significant structure. At the time of the lower court proceedings, the A & E North, LLC ("Owner") stored a significant amount of personal property in the theatre. Prior to trial, the Owner requested the lower court to postpone the scheduled trial date and to order the City to pay the Owner's expenses to move the personal property from the theatre to another location. The lower court denied both requests.

At trial, the jury took a view of the property, heard testimony from the City's sole witness (an appraiser), and awarded damages in an amount consistent with the City's evidence as to value. The Owner appealed initially to the Court of Special Appeals (the intermediate appellate court) and subsequently to the Court of Appeals. Both courts sustained the lower court's ruling, holding that an owner challenging the right to take is not entitled to relocation benefits, and that he was not a displaced person under the statute.

A&E North, LLC v. Mayor and City Council of Baltimore, 427 Md. 605 (2013).

133 Conn.App. 763 (Conn.App. 2012), 33148, Berchem, Moses and Devlin, P.C. v. Town of East Haven /**/ div.c1 {text-align: center} /**/

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133 Conn.App. 763 (Conn.App. 2012)

37 A.3d 796

BERCHEM, MOSES AND DEVLIN, P.C.

v.

TOWN OF EAST HAVEN et al.

No. 33148.

Court of Appeals of Connecticut.

February 28, 2012

Argued Nov. 16, 2011.

[37 A.3d 797]

Michael A. Albis, New Haven, for the appellants (defendants).

Brian W. Smith, Milford, for the appellee (plaintiffs).

BEACH, ALVORD and PETERS, Js.

PETERS, J.

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In *Gesmonde, Pietrosimone, Sgrignari, Pinkus & Sachs v. Waterbury,* 231 Conn. 745, 750-51, 651 A.2d 1273 (1995), our Supreme Court held that, under appropriate circumstances, a conflict of interest between a municipal commission and the municipality's corporation counsel, who ordinarily would represent the commission, empowers the commission to hire outside counsel for the purpose of representing its interests. The principal issue in this appeal is whether the trial court properly applied *Gesmonde* in holding that the East Haven board of police commissioners had the authority to hire the plaintiff law firm as outside counsel to represent its interests in a dispute with the mayor about the rehiring of an East Haven police officer. We affirm the judgment of the court.

On August 3, 2009, the plaintiff, Berchem, Moses & Devlin, P.C., filed a claim for attorney's fees allegedly owed to the plaintiff by the defendants, the town of East Haven (town) and April Capone Almon, the mayor of East Haven (mayor), for services rendered to the East Haven board of police commissioners (board). The defendants denied any liability and filed a number of special defenses including governmental immunity, qualified immunity, laches, estoppel and a claim that the legal services billed by the plaintiff were unreasonable and outside of the scope of the letter of engagement. Following a trial to the court, the court rendered a judgment in favor of the plaintiff, awarding it damages, prejudgment interest and offer of compromise interest. The defendants have appealed.

The following undisputed facts were found by the court. In 2004, Robert Nappe retired from his position

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as an East Haven police officer to serve as a civilian police officer in Iraq. Nappe returned to East Haven in 2005 and applied to the board to be reinstated as a police officer. Making a distinction between resignation and retirement, the board denied his application. Thereafter, Nappe filed a

mandamus action seeking an order that **[37 A.3d 798]** the board reinstate him (mandamus action).[1] The board was represented in the mandamus action by Lawrence C. Sgrignari, the town attorney. The court, *A. Robinson, J.,* interpreted General Statutes § 7-294aa[2] to entitle Nappe to reinstatement as an East Haven police officer. Still represented by Sgrignari, the board appealed from that judgment. The board's appeal operated as a stay of the court's order that Nappe be reinstated.

The mayor was elected while the board's appeal was pending. The mayor agreed with the court's decision in the mandamus action and directed James F. Cirillo, Jr., the newly appointed town attorney, to withdraw the town's appeal, which would terminate the stay of the court's order. In response, the board hired the plaintiff law firm as independent counsel to represent its adverse interests.

On April 4, 2008, the plaintiff, on behalf of the board, filed an action in the trial court that sought, inter alia,

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an ex parte temporary injunction and a permanent injunction against the defendants (injunction action). On April 7, 2008, the court, *Silbert, J.,* entered an ex parte temporary injunction enjoining the defendants from (1) taking any action to undermine or to interfere with the board's appeal to the Supreme Court, (2) taking any further action to undermine or to usurp the board's decision making authority with regard to the appointment of Nappe as an East Haven police officer or (3) taking any action to hire Nappe as an East Haven police officer without the advance consent and approval of the board. Subsequently, the court narrowed the scope of the injunction to provide that the defendants were enjoined " from taking any action to hire or reinstate Nappe as an East Haven police officer without the advance consent and approval of the [board], pending the Supreme Court's rulings on the issues previously discussed." [3]

Our Supreme Court never had the opportunity to address the merits of Nappe's claim in the mandamus action because, following a change in its membership in May, 2008, the board voted to withdraw its appeal. Nappe thereafter was reinstated to his position as a police officer in accordance with the judgment rendered in the mandamus action.

The plaintiff submitted a bill in the amount of $25,041.18 for legal services rendered to the board in pursuing the injunction action and the appeal from the mandamus action. The mayor refused to authorize payment of the bill, which remains unpaid. In response, the plaintiff instituted the present action seeking payment from the defendants.

The trial court, *Hon. William L. Hadden, Jr.,* judge trial referee, found that there existed a clear conflict

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of interest **[37 A.3d 799]** between the board and the defendants relating to the exercise of powers of appointment, a central responsibility of the board pursuant to the town charter. The court concluded that the board had the implied authority to retain independent counsel pursuant to *Gesmonde, Pietrosimone, Sgrignari, Pinkus & Sachs v. Waterbury,* supra, 231 Conn. at 750-51, 651 A.2d 1273, and that the plaintiff was therefore entitled to recover its fees from the defendants.

On appeal to this court, the defendants claim that the court improperly (1) concluded that the

plaintiff was entitled to recover attorney's fees and (2) awarded the plaintiff prejudgment and offer of compromise interest. We are not persuaded by either of these claims, and affirm the judgment of the court.

I

The principal focus of the defendants' appeal is their challenge to the propriety of the court's award of attorney's fees to the plaintiff. We are not persuaded.

If there is a direct and obvious conflict of interest between a municipal commission and the corporation counsel who ordinarily would have represented the commission, " the commission [has] the implied authority to hire independent counsel to represent its interests." *Gesmonde, Pietrosimone, Sgrignari, Pinkus & Sachs v. Waterbury,* supra, 231 Conn. at 751, 651 A.2d 1273.

In this case, the defendants argue that Nappe's eligibility for reinstatement was a political question, rather than a legal one that called for the expertise of the board, and they question the propriety of the board's decision to *take* an appeal from the mandamus action. The defendants maintain that the conflict between the board and the mayor was transitory in nature. They argue that the attorneys in *Gesmonde* were successful in their pursuit of the matter for which they were

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retained and contend that the plaintiff was not. Further, they assert that the plaintiff's claim is not cognizable because the board should have requested funding from the East Haven board of finance.

The court held, however, that the record established the same basis for the board's entitlement to independent counsel as our Supreme Court held to be persuasive in *Gesmonde.* In both cases, a municipal board and a city disagreed about a question of law on a matter entrusted to the authority of the board. In both cases, the question concerned the validity of an appointment decision. In both cases, the city's position was so unequivocal that the board was not obligated formally to request funding from the city.[4] See **[37 A.3d 800]** id., at 750-55, 651 A.2d 1273. A " direct and obvious conflict of interest" ; id., at 754, 651 A.2d 1273; therefore existed between the board and the defendants.

We agree, therefore, with the court that, in this case, the board had the authority to hire the plaintiff as its own counsel. The board's pursuit of independent counsel was justified by the importance of the issue of statutory construction on which the board and the mayor

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significantly disagreed. The matter at issue, which concerned the exercise of powers of appointment, fell within the board's primary jurisdiction. Therefore, " in order for its unique interests to be represented in the underlying dispute the [board] had the implied authority ... to engage the plaintiff's legal services." *Id.,* at 754-55, 651 A.2d 1273. It follows that, under the circumstances of this case, the court properly awarded attorney's fees to the plaintiff.

II

The court awarded the plaintiff $31,275.31 in damages, which included $25,041.18 in attorney's fees, $2905.21 in postjudgment interest pursuant to General Statutes § 37-3a and $3310.92 in offer of compromise interest pursuant to General Statutes § 52-192a. Without challenging the calculation of the underlying bill submitted by the plaintiff, the defendants contest

the validity of these additional awards.

A

The defendants maintain that the plaintiff was not entitled to an award of postjudgment interest because (1) its engagement letter made no mention of any potential interest charges on legal fees due to the plaintiff and (2) the board failed to seek appropriate funding from the town to pay for the plaintiff's services. We disagree.

A trial court's decision to award postjudgment interest is subject to review for an abuse of discretion. *Bower v. D'Onfro,* 45 Conn.App. 543, 550, 696 A.2d 1285 (1997). Section 37-3a [5] (a) authorizes an award of interest " as

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damages for the detention of money after it becomes payable."

The defendants' obligation to pay statutory interest depends on whether the defendants refused to pay the plaintiff's bill " without the legal right to do so." (Internal quotation marks omitted.) *Sosin v. Sosin,* 300 Conn. 205, 230, 14 A.3d 307 (2011). Under the contentious circumstances of this case, we are persuaded that the court had the authority to make such a determination. The defendants cannot rely on the terms of the engagement letter between the plaintiff and the board because they were not parties to that agreement. With respect to the defendants' claim that the board failed to seek appropriate funding, the town, in its new administration, made it clear that funding for the plaintiff's services would not be forthcoming. The defendants' objections to the court's award of postjudgment interest do not, therefore, suffice to establish an abuse of discretion by the court.

B

The defendants claim that the court improperly awarded the plaintiff offer of compromise interest pursuant to General Statutes § 52-192a. We disagree.

[37 A.3d 801] " The question of whether the trial court properly awarded interest pursuant to § 52-192a is one of law subject to de novo review." *Willow Springs Condominium Assn., Inc. v. Seventh BRT Development Corp.,* 245 Conn. 1, 55, 717 A.2d 77 (1998). Section § 52-192a[6]

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authorizes an award of interest whenever: " (1) a plaintiff files a valid offer of [compromise] within eighteen months of the filing of the complaint in a civil complaint for money damages; (2) the defendant rejects the offer of [compromise]; and (3) the plaintiff ultimately recovers an amount greater than or equal to the offer of [compromise]." (Internal quotation marks omitted.) *Willow Springs Condominium Assn., Inc. v. Seventh BRT Development Corp.,* supra, at 55, 717 A.2d 77.

The court found that the plaintiff had filed a timely offer of compromise, which was rejected by the defendants, and that the plaintiff had recovered $1946.39 more than the amount of its compromise offer. Accordingly, it held that the plaintiff was entitled to $3310.92, representing 8 percent annual interest on the amount recovered from the date that the plaintiff's complaint was filed to the date of judgment.

The defendants first object to the court's calculation of offer of compromise interest on the ground that the damages awarded to the plaintiff would not have exceeded the plaintiff's offer of compromise without the addition of the postjudgment interest awarded to the plaintiff pursuant to §

37-3a. In light of our decision to affirm the court's award of postjudgment interest, we find this objection to be unpersuasive.

Alternatively, the defendants maintain that the plaintiff's offer of compromise was fatally defective on its face because, instead of being addressed to " the defendant, the town of East Haven," it was addressed to the " the defendant, CITY OF NEW HAVEN." Although the defendants concede that this may have been a simple clerical error, they maintain that, as a result of the error, " there was no basis for the defendants to determine with certainty from the face of the offer to whom it was being directed." Neither the trial court nor this

court is required to find such a contention to be credible.

As a matter of policy, we agree with the plaintiff that the defendants' contention ignores the well established public policy of encouraging pretrial resolution of private disputes. In service of that policy, this court previously has held that a trial court has the authority to award offer of compromise interest where " the plaintiff substantially complied with the statutory requirements and the defendant was in no way disadvantaged by the mere circumstantial defect in the filing of the offer of [compromise]." *Boyles v. Preston,* 68 Conn.App. 596, 616, 792 A.2d 878, cert. denied, 261 Conn. 901, 802 A.2d 853 (2002). Applying this principle in *Boyles,* we held that an offer of compromise was not fatally defective even though the document had not been signed by the plaintiff's attorney, the person identified by name therein. *Id.,* at 614-16, 792 A.2d 878. We are persuaded that this principle is equally applicable to the circumstances of this case, in which the defendants concededly **[37 A.3d 802]** had received actual notice of the plaintiff's offer of compromise.

In sum, we conclude that the court's award of $31,275.31 to the plaintiff was proper. There existed a direct and obvious conflict of interest between the defendants and the board that entitled the board to individual representation of its interests, and the court's awards of postjudgment and offer of compromise interest were proper, pursuant to §§ 37-3a and 52-192a.

The judgment is affirmed.

In this opinion the other judges concurred.

Notes:

[1] *Nappe v. Police Commissioners,* Superior Court, judicial district of New Haven, Docket No. CV-05-4008609-S, 2007 WL 2200375 (April 16, 2007).

[2] General Statutes § 7-294aa provides, in relevant part: " (a) Any sworn police officer employed by the state or a municipality who takes a leave of absence or resigns from such officer's employment on or after September 11, 2001, to volunteer for participation in international peacekeeping operations, is selected for such participation by a company which the United States Department of State has contracted with to recruit, select, equip and deploy police officers for such peacekeeping operations, and participates in such peacekeeping operations under the supervision of the United Nations, the Organization for Security and Cooperation in Europe or other sponsoring organization, shall be entitled, upon return to the United States, (1) to be restored by such officer's employer to the position of employment held by the officer when the leave

commenced...."

[3] *Board of Police Commissioners v. East Haven,* Superior Court, judicial district of New Haven, Docket No. CV-08-4030652-S, 2008 WL 2252556 (May 9, 2008).

[4] Finally, in both cases, the argument advanced by the plaintiff was correct as a matter of law. Although *Gesmonde* establishes no prerequisite of success in the underlying litigation, we note that the force of the defendants' objections to the court's judgment is substantially undermined by the fact that, after the defendants' withdrawal of their appeal from the mandamus action, our Supreme Court had occasion to consider the merits of an appeal closely resembling that which the plaintiff had advised the board to pursue. In *Barton v. Bristol,* 291 Conn. 84, 967 A.2d 482 (2009), our Supreme Court granted certification to consider the question of statutory construction that would have governed the board's appeal from the mandamus action. The court held that a police officer who, like Nappe, had retired from police service to participate in an international peacekeeping mission in Iraq, was *not* entitled, under General Statutes § 7-294aa, to be reinstated to his former position. *Id.,* at 97-102, 967 A.2d 482. The court concluded that the police officer did not come within the scope of § 7-294aa because he had not resigned; rather, he had retired. *Id.,* at 102, 967 A.2d 482. *Barton* establishes the propriety of the appellate route that the plaintiff attempted to pursue on behalf of the board and the likelihood that, but for the interference of the mayor, the board would have prevailed on appeal.

[5]General Statutes § 37-3a provides in relevant part: " (a) Except as provided in sections 37-3b, 37-3c and 52-192a, interest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions or arbitration proceedings under chapter 909, including actions to recover money loaned at a greater rate, as damages for the detention of money after it becomes payable...."

[6] General Statutes § 52-192a provides in relevant part: " (c) After trial the court shall examine the record to determine whether the plaintiff made an offer of compromise which the defendant failed to accept. If the court ascertains from the record that the plaintiff has recovered an amount equal to or greater than the sum certain specified in the plaintiff's offer of compromise, the court shall add to the amount so recovered eight per cent annual interest on said amount.... The interest shall be computed from the date the complaint in the civil action ... was filed with the court...."

King, Patricia 6/7/2018
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24 Geo. J. Legal Ethics 517

Georgetown Journal of Legal Ethics
Summer, 2011

Current Development 2010-2011
Adam Edris [a1]

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ISSUES OF CLIENT IDENTIFICATION FOR MUNICIPAL ATTORNEYS: AN AGENCY AND PUBLIC INTEREST APPROACH

INTRODUCTION

In deciding to undertake representation, one of the first questions a lawyer must consider is the identity of the client. The answer to this question is usually simple: in many instances it is the individual sitting across from the lawyer. In the context of corporate law it is, for all intents and purposes, the corporation, with the executives and directors hierarchically acting as the voice of the company. [1] As the scope of a lawyer's responsibilities widens, the more amorphous the client becomes. Publicly employed municipal attorneys are well familiar with the client identification challenges of their role. Municipal attorneys often represent multiple municipal entities, their officers, and their employees. [2] Their duty often grants them discretion to render advice and opinions to municipal entities. [3] They may also have the authority to bring suit, decide settlements, or appeal judgments on behalf of the government entity. [4] To further complicate the matter, municipal attorneys usually have a responsibility to pursue, or at the very least keep in mind, the public interest in fulfilling their obligations to the entities they represent. [5] When the goals of the entities, agents, and public interest represented by a government attorney diverge, a conflict of interest may occur for the municipal attorney.

It is important that municipal attorneys have a model by which they may resolve conflicts of interest. These individuals exercise great influence over the direction of municipal litigation. Enabling ordinances and statutes of municipal attorney offices authorize municipal attorneys, for example, to act as "counsel for the city and every agency thereof, and ... have charge and conduct of all the law business of the city and its agencies in which the city is interested." [6] This ***518** influence is further pronounced considering that such ordinances and statutes restrict municipal agencies from seeking alternative counsel. [7] Similarly, municipal attorneys are restricted from declining to represent municipal agencies. [8] Early identification of conflicts is therefore important to avoiding wasted litigation costs and the embarrassment of removing a municipal attorney from a matter when the conflict cannot be resolved. Municipal attorneys also often work with minimal oversight, and in some cases are subject to minimal judicial review, [9] making it especially critical that municipal attorneys have a model to guide resolution of conflicts of interest.

The manner in which the municipal attorney identifies her client often determines whether a conflict exists and, if it does, in whose favor she should act. The American Bar Association's *Model Rules of Professional Conduct* admit that client identification is beyond the scope of the Rules. [10] The rule drafters go further to acknowledge that the task of identifying the government attorney's client may be more difficult than in the private context. [11] Commentators have

converged on a client identification model under which the government agency that "employs" the attorney is the client (agency-as-the-client model). [12] Although this model is well-structured theoretically, it ignores many of the realities of a government attorney's role. For example, the model ignores the possibility that the municipal attorney is responsible for representing multiple agencies; furthermore, to the extent a single agency client can be identified, the model ignores the conflicts that may arise within the agency. Perhaps more glaring, the agency-as-the-client model ignores the municipal attorney's directive to pursue the public interest, where such responsibility is delegated. [13]

This Note argues that the agency-as-the-client model should be the baseline for client identification; however, this model falls short when a municipal attorney represents multiple agencies with conflicting interests. This model also fails when the municipal attorney's office and agency are in conflict with regard to how to proceed with an action. In such instances, the municipal attorneys should ***519** resolve conflicts in favor of the public interest. This Note then argues that municipal attorneys must utilize familiar tools of legal practice to reach a definition of the public interest. Part I explores the office structure of various municipal attorneys and provides a brief overview of the types of conflicts that may occur as well as relevant rules and opinions that guide resolution of such conflicts. Part II examines two models for government attorney client identification, the "agency-as-a-client" and "public-interest-as-the-client" models, outlines the arguments against the public-interest-as-the-client model, and argues that the favored agency-as-the-client model also fails to guide municipal attorneys in client identification in certain instances. Part III proposes resolving conflicts unaddressed by the agency-as-the-client model in favor of the public interest. Part IV argues that municipal attorneys should define the public interest through an expression of intent from the applicable legislative body, often the state legislature or city council.

I. BACKGROUND

Understanding the structure of the municipal attorney's office, the nature of conflicts of interest, and which rules, codes, and opinions offer guidance is useful to better evaluate the merits of the models for resolving issues of client identification.

A. DEFINING THE MUNCIPAL ATTORNEY AND GOVERNMENT ENTITIES

The structure of a municipal attorney's office varies by city. For example, many "municipal attorneys" (who may have other titles such as district attorney, attorney general, municipal corporate counsel, and city attorney) are autonomous offices of one or more attorneys, with the head officer sometimes elected. [14] The municipal attorney's office is then designated, usually by statute or ordinance, as legal counsel for all or some of the public agencies of the municipality. [15] This designation may provide that the municipal attorney "shall represent and advise ... [all county officers] in all matters and questions of law pertaining to their duties, and shall have exclusive charge and control of all civil actions and proceedings in which the County, or any officer thereof, is concerned or is party." [16] Specialized agencies without their own legal counsel may have government lawyers assigned to them by the office of the municipal attorney. [17] ***520** These lawyers do not become members of the agencies to which they are assigned but remain affiliated with the municipal attorney's office. [18] The government lawyer may be reassigned to another agency as the municipal attorney office head sees fit. [19] Alternatively, some cities retain private counsel to serve these functions through retainer, contract, or other similar arrangements. [20]

Similar to municipal attorney offices, municipal agency offices vary in terms of hierarchy. The *Model Rules of Professional Conduct* and agency-as-the-client model guide attorneys to resort to a higher authority when there is

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disagreement over a course of action or potential for conflict. [21] Some agencies are led by one elected or appointed official with several lower level employees. [22] In such cases, identifying the higher authority is simple. However, some agencies are led by several individuals, such as a city council, commission, or board. [23] Such agencies may have a presiding officer or chair, in which case the municipal attorney may look to that post as the higher authority; however, a majority of a board can typically overrule the presiding officer. [24] Relative to agencies with a single head, agencies led by a board complicate the task of seeking a higher authority in instances of conflict, especially when such conflict involves members of the board.

B. OVERVIEW OF CONFLICTS

The variation in structure of municipal attorney and agency offices has the potential to create multiple fact-specific conflicts; however, there are common and recurring examples. This Note focuses on concurrent conflicts, sequential conflicts; and attorney-client conflicts. Concurrent conflicts occur when the interests of two municipal agencies represented by a municipal attorney conflict. [25] They need not involve a direct lawsuit between agencies, but more typically occur when the interest of one agency client is in conflict, or has the potential to come into conflict, with that of another agency client. [26] These conflicts can also occur when the municipal attorney's office is designated to represent an agency and an agency's employee in litigation when they would normally be on the same side. In such cases, the agency may have an interest in raising defenses that would leave the employee exposed to personal liability, or would deprive the employee of his right to indemnification or municipal representation (for example, the city might want to argue that the agency ***521** employee acted without authorization). [27] Sequential conflicts (also referred to as former client conflicts) occur when the interests of a former agency client of the attorney conflict with those of a present agency client. [28] The scenarios under which such conflicts arise and their associated risks are similar to those of concurrent conflicts.

Attorney-client conflicts occur when the personal or professional interests of the municipal attorney conflict with those of the municipal agency client. [29] This conflict can occur when the municipal attorney and agency disagree on the substantive legal issues involved in a matter. [30] This comes up, for example, when the agency client and attorney differ on whether to bring suit, or the attorney advises the agency against a course of action that the agency is inclined to pursue anyway. A municipal attorney may advise an agency against a course of action because of a belief that the action is beyond the scope of the agency's authority, or that it would go against the general public interest.

A municipal attorney must advance her client's interest so long as it can be done in good faith; [31] however, in the private context, attorneys are able to decline representation if they differ with their client's views. [32] Municipal attorneys are, for the most part, not allowed to select their client agencies. Similarly, municipal agencies are restricted from selecting counsel of choice. [33] While this dynamic has the potential to create tension in cases of disagreement, municipal attorneys often have the authority to authorize independent representation of an agency in the event of such conflict, though this is rarely done. [34] These restrictions on a municipal attorney's ability to decline representing an agency highlight the need for a mechanism by which to resolve conflicts.

C. OVERVIEW OF RELEVANT ETHICAL RULES AND OTHER AUTHORITIES

Municipal attorneys look to the source of their representational authority, ethical rules, and court opinions for guidance on how to resolve client identification issues and conflicts of interest. [35] The source of representational ***522** authority,

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such as constitutions, statutes, and ordinances, may guide a municipal attorney in cases of conflict; however, this is rare.[36] Municipal attorneys often represent multiple municipal agencies through broad mandates.[37] While such mandates determine the agencies and officers to whom the municipal attorney owes an obligation, they rarely provide a direct mechanism by which to resolve conflicts.[38] However, some sources of representation designate a responsibility to act in favor of the public interest.[39] To the extent the conflict can be resolved in this manner, the sources do provide some guidance for identifying the client agency.

State ethics codes, many of which are modeled after the *Model Rules*,[40] are one of the primary sources of the ethical obligations of a municipal attorney.[41] The *Model Rules* prescribe how lawyers should engage organizations as clients,[42] which includes government agencies.[43] Nevertheless, the *Model Rules* drafters note that the *Rules* do not offer much guidance in identifying a government client.[44] Model Rule 1.13 generally states that a lawyer must act in the best interest of the organization she represents.[45] In the case of conflict, or possibility of injury to the organization, the Rule guides the attorney to refer the matter to higher authority in the organization.[46] Rule 1.13 is helpful in the private context, where the client organization is often a single company with a clear organizational hierarchy. Unfortunately, Rule 1.13 falls short in the municipal context because it does not account for the possibility that an attorney has obligations to multiple organizational clients with overlapping interests. Thus, the *Model Rules* do not prescribe a method by which a municipal attorney may identify her client and associated obligations when agencies conflict. Unlike the sources of representation discussed above, the *Model Rules* designate no responsibility to pursue the public interest.[47]

***523** **Municipal** **attorneys** may also look to case law and **ethics** advisory opinions that interpret local **ethics** rules for guidance. The majority view is that **municipal** **attorneys** have more latitude to represent conflicting interests for a wide range of reasons.[48] Assigning municipal agencies shared counsel under the municipal attorney's office promotes uniform legal policy whereby the authority of municipal agencies is exercised in a consistent and non-overlapping manner.[49] Cost considerations also justify such leeway. Private practitioners, who are most likely to replace municipal attorneys in the case of removal, may have improper economic incentives. For example, private practitioners have a natural incentive to garner larger fees, which may manifest as a readiness to bring suit or draw out litigation. Municipal attorneys are often salaried and therefore have no such incentive.[50] Similarly, retention of private counsel, irrespective of improper economic motivation, comes at an additional expense to the city.

Courts have generally recognized that concepts from private sector representation cannot directly apply when a government attorney's office is the central legal office supplying attorneys to the agencies in conflict.[51] Some government agencies hold internal adjudicatory hearings whereby the advocate and hearing official are both part of the same agency.[52] Courts have found the proper solution to avoid conflict in such cases is to have insulation walls whereby the adjudicator works in an office separate from that of the hearing official to prevent impermissible influence.[53] Such insulation walls are difficult in the context of the municipal attorney office because municipal lawyers move between agencies on a regular basis. Furthermore, insulation walls would provide little protection against conflict when the municipal attorney office and the municipal agency disagree regarding a substantive legal matter. Other courts have resolved conflicts by weighing factors such as the reasonable expectations of the person who sought the lawyer's counsel, how the government agency is constituted, and how the agencies relate to each other.[54]

II. MODELS OF CLIENT IDENTIFICATION

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In many ways the identity of the client determines whether a conflict is present. The *Model Rules* and sources of representational authority designate who the municipal attorney represents and owes an obligation. These authorities, ***524** unfortunately, fail to guide the municipal attorney to a single client. Case law and ethics advisory opinions provide standards under which traditional conflicts of interest are permitted for a government lawyer but do not present a model identifying a primary client.

Commentators have put forward various models for government attorney client identification, including the "public-interest-as-the-client," [55] "whole-government-as-the-client," [56] "one-branch-of-government-as-the-client," [57] and "agency-as-the-client." [58] The whole-government-as-the-client and branch-of-government-as-the-client models view the government as a whole, or a branch of government, as the attorney's client, respectively. These models make sense where the interests of the whole or branch of government are aligned. Scholars, however, have criticized these models for creating a significant likelihood of conflict by identifying too large a client. [59]

This section will focus on the two remaining models, the public-interest-as-the-client and agency-as-the-client models. As the names suggest, the public-interest model views the public as the municipal attorney's client at all times. The agency model views the "employing" government agency as the client. [60] Scholars and policy makers have converged on the agency-as-the-client model; however, the public-interest model, while heavily criticized, offers insight as to how the agency model may be improved. [61]

A. PUBLIC-INTEREST-AS-THE-CLIENT MODEL

Under the public-interest-as-the-client model, the public interest is the client of the municipal attorney in all matters. [62] The priorities of a municipal attorney "depend not on some vague and misleading notion about the identity of the 'real' client but instead on how the attorney's performance will affect the government's obligation to serve the public." [63] This model has fallen under heavy scrutiny on the grounds that pursuit of the public interest is unintelligible. [64] Commentators argue that the notion of public interest is too amorphous. [65] The individual interests that comprise the greater public interest are not "amenable to aggregation." ***525** [66] Applying public choice theory, Professor Steven Berenson concludes that such aggregation leads to the representation of individual factions whereby the pursuit of the public interest would at best result in the advancement of a narrow group's interests and not that of the broader public. [67] Perhaps worse yet, critics have expressed concern that municipal attorneys may be tempted to substitute their own notions of public good for that of the broader public in pursuit of personal gain or career advancement. [68]

Assuming municipal attorneys could reach a generally accepted version of the public interest, critics have relied on notions of democratic accountability and separations of powers to argue that advancing the general public interest should not be the municipal attorney's role. [69] Commentators note that it is antidemocratic for municipal attorneys, particularly appointed ones, to advance their own determinations of public interest over elected officials, or officials more closely related to the electorate. [70] Furthermore, refusal to pursue an action simply because a municipal attorney does not feel it will win, or maintains that an agency is acting beyond the scope of its powers, usurps the role and decision-making authority of the judicial and legislative branches of government. [71] This violation of the notion of separation of powers poses a risk of chilling the flow of information between municipal attorneys and municipal officers. [72] Municipal agents and agencies may be more reluctant to seek the advice of municipal counsel, or may be more selective in the confidences

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they share, if they must worry about municipal attorneys imposing their view of public interest over that of the agent or agency. [73]

B. AGENCY-AS-THE-CLIENT MODEL

Commentators generally favor a model under which the agency that employs or uses the services of a municipal attorney is the client. [74] Under this model, individual government agencies appear discreet and manageable, which allows for the traditional application of rules of attorney conduct. Similar to a corporation, the agency is the client, and it is subject to the direction of those officers authorized to act in the matter involved in the representation. [75] With ***526** respect to internal agency conflicts, the municipal attorney need only look to the hierarchy of the agency for further guidance. [76]

The agency-as-the-client ("agency") model simplifies the issue of client identification when compared to the public-interest-as-the-client ("public-interest") model. The public-interest model requires the municipal attorney to formulate the public interest and to determine whether government action conforms. This is a two-step process with much room for subjectivity. The agency model only requires that the municipal attorney identify an "employing" agency whose interests the attorney must serve, a far less subjective task. While the agency model simplifies the issue of client identification, it becomes more likely to fail as the number of agencies that a government attorney's office represents grows. This holds particularly true for municipal attorney offices that are designated to represent the municipality as a whole in all matters. [77] Consider, for example, concurrent and sequential conflicts of interest between agencies. [78] The agency model views the agency involved in the matter as the client; however, it remains silent as to the municipal attorney's obligations to other agency clients, particularly when their interests conflict.

The agency-as-a-client model also implicitly mistakes the source of authority for many municipal attorney offices. Though individual attorneys may be assigned to work for a specific municipal agency for an extended period of time, they are not necessarily employed or retained by the agency. [79] Instead they are employees of the municipal attorney's office and act pursuant to the applicable source of authority (constitution, statute, ordinance, etc.). [80] While the "employing" agency should normally be considered the client of the municipal attorney, this may not be the case when she is acting under her general authority to litigate. [81] The notion of a government agency client breaks down when a municipal attorney acts independently in bringing litigation or taking action to protect the interest of the state.

Finally, the agency model does not address attorney-client conflicts. It ignores a municipal attorney's mandate to pursue the public good. The representational responsibilities of a municipal attorney's office often include representation of the "city," "people," "public good," or some other variation that can easily be construed to reflect a responsibility to pursue the public interest. [82] Where issues of public interest are involved, the agency-as-a-client model is silent as to how to ***527** address attorney-client conflicts. [83] With this in mind, a scenario may arise under which the agency-as-the-client model would yield a result that clashes with the responsibilities designated to a municipal attorney.

III. AGENCY AS THE CLIENT, PUBLIC INTEREST AS THE INTERMEDIARY

The agency-as-the-client and public interest models both have strong merits. The agency model is simple, while the public interest model allows municipal attorneys to pursue the public good where such responsibility is delegated. This section maintains that the agency-as-the-client model should operate as a baseline for client identification. When the agency model yields two or more client agencies that appear to be in conflict (i.e., a concurrent or sequential client conflict), the

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municipal attorney should resolve the conflict in favor of the public interest. First, this section examines standards by which a municipal attorney may identify whether a concurrent or sequential client conflict in fact exists. Specifically, it suggests that municipal attorneys should look to the *Model Rules* as interpreted by the courts and case law interpreting statutes authorizing municipal attorney's offices to determine if conflict exists. Second, with respect to attorney-client conflicts, this section will argue that where a municipal attorney has authority to pursue the public interest, she should again resolve such conflicts in favor of the public interest.

A. PROPERLY IDENTIFYING CONFLICT UNDER THE AGENCY-AS-THE-CLIENT MODEL

The simplicity of the agency-as-a-client model is its strongest attribute and arguably the primary reason commentators favor it. The major shortcoming of the model is that it fails to acknowledge that municipal attorneys are often "employed" by multiple municipal agencies.[84] In cases of conflict between agencies (concurrent and sequential client conflicts), the agency-as-the-client model breaks down. Specifically, the model does not suggest in whose favor such conflicts should be resolved. Before it is certain that the agency model has broken down, the municipal attorney must determine whether a conflict exists.

The *Model Rules* as interpreted by courts, and case law interpreting statutes authorizing municipal attorney offices address questions of conflict and offer ***528** standards by which to identify whether conflicts exist.[85] Courts have developed multiple formulations to determine whether a conflict of interest exists in dual representation. Generally, such standards aim to avoid the appearance of impropriety from the perspective of an "informed citizen," due to the risk of impairing public confidence in its municipal government and attorneys.[86] Courts are generally willing to grant municipal attorneys greater leeway to represent opposing parties than would be permitted for private lawyers.[87] The New Jersey Supreme Court framed the basis of this inquiry by weighing: "(1) Contractual obligations and business transactions between the public entities; (2) the frequency of litigations that arise between the two public entities; and (3) the frequency with which the two entities have been antagonistic."[88] Even in cases where the agencies are closely related and the likelihood of conflict is present, courts have allowed municipal attorneys to continue to represent both agencies so long as there are appropriate insulation walls to avoid the misuse of confidential information.[89] While the agency-as-the-client model answers the question of client identity, the case law mentioned above provides a mechanism by which municipal attorneys may answer the question of whether a conflict exists.[90]

With respect to attorney-client conflicts, the agency-as-the-client model falls short in a different manner. It instead ignores a municipal attorney's responsibility to pursue the public interest in instances where agency action is inconsistent with that interest. In cases of attorney-client conflicts, municipal attorneys should act in favor of the public interest if the agency action is in conflict with the public interest. Determining whether a conflict exists in this context depends first on defining the public interest. Once this interest is defined, the municipal attorney knows if a conflict exists and she may take steps to act in favor of the public interest.

B. THE PUBLIC INTEREST IS A COGNIZABLE STANDARD

Commentators argue that the public-interest-as-the-client model is unworkable and runs contrary to notions of democracy and separation of power.[91] This ***529** subsection aims to address arguments against using public interest as criteria for identifying a municipal attorney's client. The primary argument against employing the public interest is that it is an unintelligible standard subject to the arbitrary judgment of the attorney.[92] However, this assumes that a municipal attorney must reach some broad and overarching notion of public interest, when in fact the lawyer need only identify

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the public interest applicable to the particular legal problem.[93] Professor William Simon argues that lawyers should be allowed to exercise discretion in deciding what clients to represent and how to represent based on the notion that "our legal system depends on grounded judgments about legality and justice" and that even though "lawyers disagree with such judgments, they usually do not regard them as subjective and arbitrary."[94] He notes that such judgments "are controversial, but controversy does not preclude legitimacy."[95] Applying Professor Simon's framework, Professor Steven Berenson argues that "attempts by an attorney to identify ... public good in legal decision making are based on familiar tools of legal practice, such as interpreting and applying judicial decisions, statutory and constitutional interpretation, and understanding and applying the broader social norms of legal culture."[96] Based on this argument, a municipal attorney may reach a definition of the public interest that is legitimate.

Critics of the public-interest model also argue that it runs afoul of democratic accountability in that it allows presumably unelected municipal attorneys to make what amount to policy decisions, in the place of elected officials; however, this problem persists with the agency model.[97] The agency and agency employees involved in a matter are not necessarily any closer to the electorate than the municipal attorney.[98] In some cases, agency heads, who are often involved in a wide range of legal matters, appoint a subordinate agency official to be responsible for the lawsuit.[99]

As noted earlier, some municipal attorneys are elected to office.[100] With respect to the agency, a lawsuit may easily concern an unelected official or employee. Futhermore, the municipal attorney has the expertise to properly advise the agency official to engage or refrain from pursuing an action.[101] As Professor Berenson argues, "to deprive [municipal] lawyers [of] ... the authority, in the name of separation of powers, to settle litigation that is likely to be ***530** unsuccessful ... or to reject proposed regulations that are likely to be struck down for being beyond the scope of an agency's authority, seems both wasteful and inefficient."[102] Finally, note that municipal attorneys often have the discretion to bring suit on behalf of the municipality.[103] The fact that critics do not perceive *this* as an infringement on democratic accountability, but instead see it as the municipal attorney faithfully performing her duty, is perplexing.[104]

The sources of authority for many municipal attorneys may designate a duty to act in the public's best interest.[105] This may be worded so as to declare that the municipal attorney represents the "city," "people," and "public good."[106] Even when the source of authority does not explicitly delegate a responsibility to represent the public interest, it is sometimes implicit in a municipal attorney's duty.[107] Municipal attorneys are often required to act to enforce laws that have been enacted to protect the public from harm.[108]

Defining a municipal attorney's client as the employing agency, per the attorney-as-the-client model, is likely-to resolve many challenges of client identification.[109] The agency model, however, fails to guide municipal attorneys when there are multiple client agencies that may be in conflict. The next step of the analysis requires that municipal attorneys look to the *Model Rules*, as interpreted by courts, and case law interpreting statutes authorizing municipal attorney's offices to determine if a conflict in fact exists. If so, the municipal attorney should resolve the conflict in favor of the public interest, so long as she has authority to pursue it.

IV. DEFINING THE PUBLIC INTEREST

There remains the challenge of defining the public interest, or more precisely devising a method of reaching a fair definition of the public interest. This section argues that municipal attorneys can reach a fair definition of the public

interest by using tools familiar to legal practice, such as applying canons of statutory and judicial interpretation. To that end, Part IV also argues that municipal attorneys should look to the expressions of state or local legislatures' intent, depending on the state's home rule regime, [110] in defining the public interest.

*531 A. THE MUNICIPALITY AS A CREATION OF THE STATE AND MUNICIPAL ATTORNEYS AS AGENTS OF UNIFORM LEGAL POLICY

"An enduring tradition in political theory depicts 'the state' as the holder of a monopoly of legitimate force." [111] The common wisdom is that the state legislature's power to create, modify, or abolish municipal corporations is plenary, subject only to constitutional strictures, and that the municipality is dependent upon the state legislature for any powers possessed or exercised. [112] With this in mind, states have the authority to limit the powers of municipalities to achieve uniformity, among many ends. [113] Scholars often cite uniform legal policy as a primary reason for granting municipal attorneys greater leeway than private attorneys in representing conflicting clients. [114] The state legislature acts as the sovereign democratic power and is responsible for delegating authority to municipalities. It is in this delegation of authority that municipal attorneys may find an expression of the public interest.

The state legislature presumably speaks for the citizens of the state and best reflects an accurate aggregation of their interests. [115] Therefore, they would theoretically be the best body to define the public interest. Furthermore, seeking a source external to the municipal attorney's independent judgment minimizes a municipal attorney's ability to impart her own subjective view of the public interest. Finally, by guiding all municipal attorneys in a state to seek a single authority for defining the public interest, municipal attorneys remain faithful to the goal of uniform legal policy as it applies to the state.

B. PUBLIC INTEREST DEFINED THROUGH STATE OR LOCAL LEGISLATIVE INTENT

The question of which legislature's intent a municipal attorney must look to can be a difficult one that turns on the state's home rule regime. Absent home rule, a state statute conflicting with a local ordinance will always prevail, which would suggest that a municipal attorney look to the state legislature for an expression of the public interest. Many states, in exercising their plenary power, have amended their constitutions to provide for municipal home rule. [116] Of those ***532** states, most have a legislative home rule statute under which municipal governments have authority to enact legislation unless preempted by a state statute. [117]

Academic papers and court opinions have extensively discussed the specific conditions under which state or local legislation controls, and it is a topic beyond the scope of this Note. [118] For the purposes of identifying an expression of the public interest, state legislation remains a useful guide. Derivatively, a home rule constitutional amendment granting municipalities independence from state control is useful as a guide in finding an expression of public interest because such an amendment reflects a public interest to defer to the municipalities to determine their own public interest. This does not necessarily mean that municipal attorneys must completely defer to client agencies to determine what is in the public's best interest. Instead the municipal attorney must look to applicable local laws or expressions of intent from the local legislature.

Such laws or expressions of intent are likely to grant municipal officials great authority and therefore make it less likely that a municipal attorney would be successful in identifying a public interest that conflicts with agency action. This,

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however, is not an unfavorable result. If the electorate determines that it is in their best interest to have agencies with broad authority, the municipal attorney should honor that interest and follow the direction of her agency client.

CONCLUSION

Municipal attorneys operate in a capacity that differs from private practitioners such that traditional professional rules of conduct do not apply in the same way. [119] Unlike private lawyers, municipal attorneys are public servants with mandates as broad as to give them control over all legal matters in which the city has an interest. [120] Municipal attorneys represent multiple municipal agencies, their officers, and employees. As a result of representing multiple interests, there is great potential for conflicts between agency clients. Furthermore, as public servants, municipal attorneys may also be required to pursue the public interest of the city. Where the public interest and desires of government agency clients are not aligned there is again potential for conflict. Municipal attorneys need a model by which they may properly identify their client so as to determine if there is, in fact, a conflict. This model must also provide a guide for how that conflict should be resolved.

***533** The first step in resolving possible conflicts of interest involves accurately identifying the municipal attorney's client. Under the agency-as-a-client model, the municipal attorney's client is the agency involved in the matter. [121] The agency model will usually answer the immediate question of client identification. The agency model breaks down when a municipal attorney represents multiple agencies that may have a conflict of interest. [122]

When such conflicts arise the municipal attorney must then determine if the conflict is impermissible. The municipal attorney should look to the *Model Rules* as interpreted by the courts and to case law interpreting statutes authorizing the municipal attorney's office to determine if conflicts exist. If there is indeed a conflict, the municipal attorney should resolve the conflict in favor of the public interest, provided she has authority to pursue such an aim. Alternatively, a conflict may arise when the agency client attempts to act in a manner that is inconsistent with the public interest. [123] Similarly, municipal attorneys should resolve such conflicts in favor of the public interest.

The final step in resolving a conflict of interest involves identifying the public interest. Commentators argue that the public interest is unintelligible and that municipal attorneys interpreting and acting on behalf of what they deem to be the public interest runs contrary to notions of democratic accountability. [124] It is possible, however, for municipal attorneys to reach an accurate definition of the public interest using "familiar tools of legal practice." [125] Specifically, municipal attorneys should look to an expression of the state or local legislature's intent to define the public interest.

A municipal attorney's duty as a public servant demands that she be faithful to both the public and the agencies she represents. While the manner in which a municipal attorney identifies her client plays a large role in determining if a conflict exists, it is the municipal attorney's duty to the public that should ultimately resolve such conflicts. By looking to legislative intent to reach a definition of the public interest, municipal attorneys remain faithful to that duty.

Footnotes

a1 J.D., Georgetown University Law Center (expected May 2012); B.A., Stanford University (2006).

1 *See* MODEL RULES OF PROF'L CONDUCT R. 1. 13(a)-(b) (2010) [hereinafter MODEL RULES].

2 ABA & THE BUREAU OF NAT'L AFFAIRS, ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT REFERENCE MANUAL: REPRESENTING GOVERNMENTAL CLIENTS 91:4101 (2004) [hereinafter ABA: REPRESENTING GOVERNMENTAL CLIENTS].

3 *Id.*

4 *Id.*

5 *See* Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 794 (2000) (citing Douglas v. Donavan, 704 F.2d 1276, 1279 (D.C. Cir. 1983)) (citing Gray Panthers v. Schweiker, 716 F.2d 23, 22 (D.C. Cir. 1983)).

6 New York City Charter § 394.

7 Steven K. Berenson, *The Duty Defined: Specific Obligations that Follow from Civil Government Lawyers' General Duty to Serve the Public Interest*, 42 BRANDEIS L.J. 13, 56 (2003).

8 *Id.*

9 *See* Note, *Government Counsel and their Obligations*, 121 HARV. L. REV. 1409, 1410 (2008).

10 MODEL RULES R. 1.13 cmt. 9.

11 MODEL RULES R. 1.13 cmt. 9.

12 *See, e.g.*, Wayne C. Witkowski, PRACTISING LAW INST., WHO IS THE CLIENT OF THE MUNICIPAL GOVERNMENT LAWYER?, PLI Order No. 10925 (July 25, 2007); THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK: THE COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS, *Formal Opinion 2004-03: Government Lawyer Conflicts: Representing a Government Agency and its Constituents*, 60 THE RECORD 282, 286 (2005) [hereinafter *Government Lawyer Conflicts: Representing a Government Ageney*]; Lias G. Lerman, *Public Service by Public Servants*, 19 HOFSTRA L. REV. 1141, 1159-60 (1991).

13 *See, e.g.*, ABA & THE BUREAU OF NAT'L AFFAIRS, ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT REFERENCE MANUAL: CONFLICTS AND CONFIDENTIALITY 91:4101 (2004) (citing Humphrey v. McLaren, 402 N.W.2d 535 (Minn. 1987)).

14 Geoffrey C. Hazard, Jr., *Symposium: Legal Ethics for Government Lawyers: Straight Talk for Tough Times: Conflicts of Interest in Representation of Public Agencies in Civil Matters*, 9 WIDENER J. PUB. L. 211, 222-23 (2000).

15 *Id.* at 223; *see* Witkowski, *supra* note 12.

16 Ward v. Super. Ct. of L.A. Cnty., 70 Cal. App. 3d 23, 30 (1977) (quoting the Los Angeles County Charter article VI, § 21).

17 Hazard, *supra* note 14, at 223.

18 *See id.*

19 *See id.*

20 *See* Berenson, *supra* note 7, at 56.

21 MODEL RULES R. 1.13(b); Hazard, *supra* note 14, at 224.

22 *See* Hazard, *supra* note 14, at 224 (noting that a mayor's office fits the mold of a government entity with an easily identifiable highest authority).

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23 *Id.* at 223.

24 *Id.* at 224.

25 Berenson, *supra* note 7, at 46.

26 *Id.*

27 *See* Ronal E. Mallen & Jeffrey M. Smith, *Legal Malpractice: Substantive Areas of Malpractice Exposure*, § 24.19, Governmental Attorneys-- Conflicting Interest (2009) (citing Johnson v. Bd. of Cnty. Comm'rs, 85 F.3d 489 (10th Cir. 1996) (holding that conflicts could arise between the appropriate defenses where a municipal attorney represents a government official who was sued in his public and personal capacities for sexual harassment)).

28 Berenson, *supra* note 7, at 47.

29 *Id.*

30 *Id.* at 56.

31 *Id.* (citing William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 36-37 (1978)).

32 *Id.*

33 *Id.*

34 *Id.* at 56-57 (noting that such provisions are rarely invoked due to the cost of hiring independent counsel and the detrimental impact on maintaining uniform legal policy for the state).

35 *See* Witkowski, *supra* note 12.

36 *See supra* text accompanying notes 6 and 14.

37 *Supra* pp. 3-4.

38 *See supra* text accompanying notes 6 and 14.

39 *See, e.g.*, ABA & THE BUREAU OF NAT'L AFFAIRS, ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT REFERENCE MANUAL: CONFLICTS AND CONFIDENTIALITY 91:4101 (2004) (citing Humphrey v. McLaren, 402 N.W.2d 535 (Minn. 1987)).

40 *See* MODEL RULES chair's intro. (noting that as of 2007, forty-two states had adopted some version of the *Model Rules*).

41 *See* Hazard, *supra* note 14, at 212-15 (noting that there is no special code for government lawyers and that the historical presumption has been that rules of **ethics** and common law govern **municipal** **attorneys** in the same manner as private attorneys, with few exceptions).

42 MODEL RULES R. 1.13.

43 MODEL RULES R. 1.13 cmt. 9.

44 MODEL RULES R. 1.13 cmt. 9.

45 MODEL RULES R. 1.13.

46 MODEL RULES R. 1.13(b).

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47 ABA: REPRESENTING GOVERNMENTAL CLIENTS, *supra* note 2 (citing AMERICAN BAR ASSOCIATION, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005, at 307 (2006) (noting that the scope of the *Model Rules* was amended to remove pursuit of the public interest from the responsibilities of a government lawyer because lawyers "do not ordinarily represent the 'public interest' at large")).

48 ABA: REPRESENTING GOVERNMENTAL CLIENTS, *supra* note 2; *see* Berenson, *supra* note 7, at 47.

49 *See* ABA: REPRESENTING GOVERNMENTAL CLIENTS, *supra* note 2.

50 *See* Berenson, *supra* note 7, at 57.

51 Hazard, *supra* note 14, at 223.

52 *See* generally Jeff Bush & Kristal Wiitala Knutson, *The Building and Maintenance of "Ethics Walls" in Administrative Adjudicatory Proceedings*, 24 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 7 (Spring 2004).

53 Hazard, *supra* note 14, at 223.

54 ABA & THE BUREAU OF NAT'L AFFAIRS, ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT REFERENCE MANUAL: CONFLICTS AND CONFIDENTIALITY 91:4101 (2004).

55 *See* Ralph Nader & Alan Hirsch. *A Proposed Right of Conscience for Government Attorneys,* 55 HASTINGS L.J. 311, 313 (Dec. 2003).

56 *See* MODEL RULES R. 1.13 cmt. 9.

57 *See* MODEL RULES R. 1.13 cmt. 9.

58 *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 97 cmt. c (2000).

59 *See* Witkowski, *supra* note 12.

60 *Id.*

61 *See, e.g.*, D.C. RULES OF PROF'L CONDUCT R. 1.6(k) (2010).

62 Witkowski, *supra* note 12.

63 *Id.* (citing William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty when Clients Are in Conflict?*, 29 HOW. L.J. 539, 558 (1986)).

64 *See, e.g., id.*; Berenson, *supra* note 5, at 802-05; Robert J. Marchant, *Representing Representatives: Ethical Considerations for the Legislature's Attorneys*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 439, 456 (2003).

65 Witkowski, *supra* note 12.

66 Berenson, *supra* note 5, at 804.

67 *Id.* (citing Frank Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1333 (1994)).

68 Witkowski, *supra* note 12.

69 *See, e.g.*, Berenson, *supra* note 5, at 805-06; Marchant, *supra* note 64, at 457.

70 Berenson, *supra* note 5, at 806; *see* Marchant, *supra* note 64, at 457.

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71 Berenson, *supra* note 5, at 806.

72 *See* Marchant, *supra* note 64, at 460.

73 *See* Witkowski, *supra* note 12.

74 *See generally* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 97 cmt. c (2000); *see also* Witkowski, *supra* note 12.

75 *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 97 cmt. c (2000).

76 *See* MODEL RULES R. 1.13(b).

77 See *supra* note 6.

78 *See supra* Part I.B.

79 *See Government Lawyer Conflicts: Representing a Government Agency, supra* note 12, at 285.

80 *Id.*

81 *See id.*

82 *See supra* text accompanying notes 6 and 14.

83 Consider, for example, an instance where a municipal attorney has an opportunity to prosecute an appeal that would advance the public interest of the city; however, the officials for the city, who would be named in the suit, have expressed an objection to such an appeal. Assuming that the agency-as-the-client model controlled, the municipal attorney could not pursue the appeal. If the municipal attorney has a responsibility to pursue the public interest, failure to pursue the appeal could be considered a dereliction of duty. *But see* Feeny v. Commonwealth, 366 N.E.2d 1262, 1267 (Mass. 1977).

84 *Supra* Part II.B.

85 *See, e.g.*, Matter of Opinion No. 653 of Advisory Committee on Professional Ethics, 623 A.2d 241, 244-45 (N.J. 1993); Stork v. Sommers, 630 A.2d 984, 988 (Pa. 1993); Town of Johnson v. Santilli, 892 A.2d 123, 131-32 (R.I. 2006).

86 Mallen & Smith, *supra* note 27; *see also* Lyness v. Commonwealth, 605 A.2d 1204, 1210 (Pa. 1992) (holding that the actual existence of bias as a result of a municipal agency acting as both prosecutor and judge is inconsequential, and that the potential for bias and the appearance of non-objectivity is sufficient to create a fatal defect under the state's constitution).

87 *See supra* note 48-50 and accompanying text.

88 *In re* Opinion No. 653 of Advisory Committee on Professional Ethics. 623 A.2d 241, 246 (N.J. 1993).

89 *See* Mallen & Smith, *supra* note 27; Berenson, *supra* note 7, at 61.

90 A survey of the standards developed by various jurisdictions to determine whether a conflict of interest exists in cases of concurrent or sequential client conflicts is beyond the scope of this Note; however, the standard put forth above is an illustrative example of one that municipal attorneys could apply to determine if conflict exists.

91 *See supra* Part II.A.

92 *See supra* Part II.A.

93 Berenson, *supra* note 5, at 814.

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94 William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1120 (1988).

95 *Id.*

96 Berenson, *supra* note 5, at 817.

97 *See supra* Part II.B.

98 Berenson, *supra* note 5, at 822.

99 *Id.*

100 *Supra* Part I.A.

101 *See* Berenson, *supra* note 5, at 823.

102 *Id.* at 826.

103 *Id.* at 824.

104 *Id.*

105 *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 156 cmt. f (2000); Berenson, *supra* note 5, at 800.

106 Witkowski, *supra* note 12.

107 *See* Berenson, *supra* note 5, at 801.

108 *Id.* at 800-01.

109 *See Government Lawyer Conflicts: Representing a Government Agency, supra* note 12, at 286 (citing Report by the District of Columbia Bar Special Committee on Government Lawyers and the *Model Rules*).

110 *See infra* Part IV.B.

111 Frank H. Easterbrook, *Symposium: Changing Images of the State: The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1328 (1994); *see also* Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907) (holding, in pan, that the state may at its pleasure modify or withdraw governmental powers conferred upon municipalities).

112 R. Perry Sentell Jr., *Local Government Litigation: Some Pivotal Principles*, 55 MERCER L. REV. 1, 8 (2003) (citing OSBORNE M. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW 75 (1982)).

113 *See supra* note 49 and accompanying text.

114 *See supra* note 49 and accompanying text.

115 *But see generally* Easterbrook, *supra* note 111, at 1331-32.

116 Note, *Conflicts Between State Statutes and Municipal Ordinances*, 72 HARV. L. REV. 737, 738 (1959) (citing twenty-six state constitutions that contain a home rule provision).

117 *Id.* at 739.

118 *See, e.g.*, Town of Johnston v. Santilli, 892 A.2d 123. 128 (R.I. 2006). *See generally* George D. Vaubel, *Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule*, 22 STETSON L. REV. 643, (1993) (discussing state and local relations with a focus on legislative denial of municipal power and legislative preemption of local regulations).

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119 *See* Hazard, *supra* note 14, at 212-14.

120 *See supra* text accompanying notes 6 and 14.

121 *Supra* Part II.B.

122 *Supra* Part III. A.

123 *Supra* Part III.A.

124 *Supra* Part II.A.

125 Berenson, *supra* note 5, at 817.

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Ethics for Government Lawyers

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What are Ethics anyway?

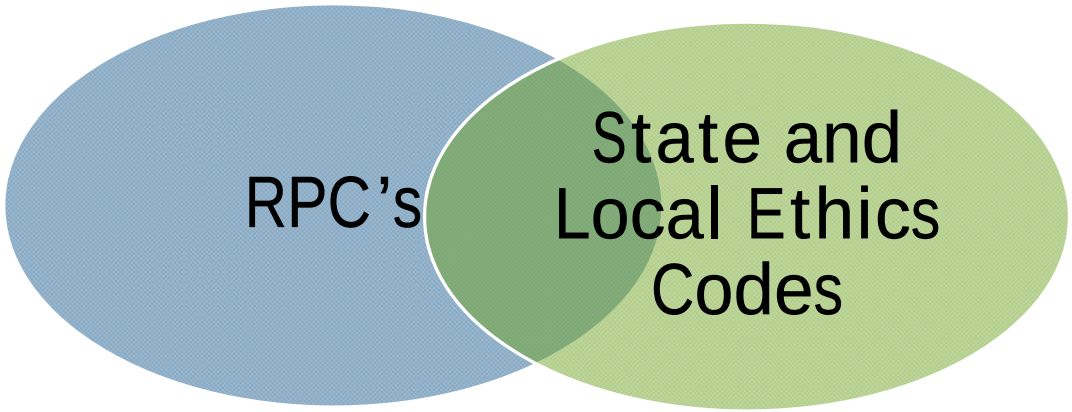
- A moral code that governs a person's or group's behavior

- *Synonyms: moral code, morals, morality, values, rights and wrongs, principles, ideals, standards (of behavior), value system, virtues, dictates of conscience*
- *The concept is very broad*
- *Focus today is on "professional" ethics; how you conduct yourself within the realm of your public service*

Why do we Care?

- Like it or not, you are engaged in public service, whether elected or appointed, paid or volunteer
- You are subject to enhanced scrutiny of your moral character
- You are required to comply with State and local laws regarding ethics
- The failure to act properly could have legal, employment, financial and/or embarrassing consequences

Ethical Rules for Government Lawyers



Applicable Rules of Professional Conduct

- Rule 1.4 Communication
- Rule 1.6 Confidentiality
- Rule 1.7 Conflicts, Concurrent clients
- Rule 1.8 Prohibited Transactions
- Rule 1.9 Conflicts, Former clients
- Rule 1.13 Organization as client
- Rule 2.1 Lawyer as Advisor

Rule 1.7(a)

Except as provided in subsection (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.

A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

When is there a conflict under the RPCs?

Under Rule 1.7(a) a conflict exists when:

- Representation of one client will be directly adverse to another client
- There is a substantial risk that representation of one or more clients will be materially limited by the lawyer's responsibilities to
  - Another client
  - A former client
  - A third person
  - By a personal interest of the lawyer.

*Conflict of interest between municipal commission and corporation counsel empowers commission to engage outside counsel. *Gesmonde v Waterbury* (Ct Sup Ct 1955), *Berchem v East Haven* (Ct App Ct 2011)

Rule 1.7(b) – When can a lawyer represent a client?

Notwithstanding the existence of a concurrent conflict of interest under subsection

(a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or the same proceeding before any tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.8 - Prohibited Transactions

Governs lawyer who enters into business transaction with current or former client (within 2 years after termination of representation).

(a) A lawyer shall not enter into a business transaction, including investment services, with a client or former client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client or former client unless:

(1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client or former client and are fully disclosed and transmitted in writing to the client or former client in a manner that can be reasonably understood by the client or former client;

(2) The client or former client is advised in writing that the client or former client should consider the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in the transaction;

(3) The client or former client gives informed consent in writing signed by the client or former client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction;

Rule 1.8 - Continued

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

Rule 1.8 - Continued

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) A lawyer may pay court costs and expenses of litigation on behalf of a client, the repayment of which may be contingent on the outcome of the matter;

(2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) The client gives informed consent; subject to revocation by the client, such informed consent shall be implied where the lawyer is retained to represent a client by a third party obligated under the terms of a contract to provide the client with a defense;

(2) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) Information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client.

Rule 1.8 - Continued

(h) A lawyer shall not:

(1) Make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) Settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) Acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) Contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing subsection (a) through (i) that applies to any one of them shall apply to all of them.

Rule 1.9: Former Client Conflict

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9 (c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.11: Conflicts For Government Employees and Officers

(a)Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government: (1) is subject to Rule 1.9 (c); and (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under subsection (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless: (1) The disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) Written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term ``confidential government information'' means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Rule 1.11: Conflicts For Government Employees and Officers

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee: (1) Is subject to Rules 1.7 and 1.9; and (2) Shall not:

(i) Participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) Negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially; except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12 (b) and subject to the conditions stated in Rule 1.12 (b).

(e) As used in this Rule, the term ``matter'' includes:

(1) Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) Any other matter covered by the conflict of interest rules of the appropriate government agency

Who is my client??

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 that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

Rule 1.13: Organization as Client

- Rule 1.13
  - (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
  - (b) A lawyer must proceed in the best interest of the organization and if necessary refer issues up the chain.
  - (c) If the higher authority refuses to act and the lawyer is reasonably certain the violation of law will result in substantial injury, she may reveal information whether or not permitted under Rule 1.6.
  - (d) EXCEPT this doesn't apply if information was learned in investigating alleged violation or defending alleged violation.
  - (e) Lawyer has a duty to inform highest authority if she has been discharged because of actions under b or c.
  - (f) Lawyer must explain identity of the client when the organization's interests are adverse to those of the constituents
  - (g) Lawyer may represent an organization AND directors, officers, employees, etc. if there is consent under 1.7.

Confidentiality:

- Interplay between Rule 1.13 and Rule 1.6
- Rule 1.8(b) – prohibits use of confidential information for the lawyer's benefit.
- Ethics Code?

Purpose of Ethics Codes

Ensure governmental decisions and policies are made through the proper channels.

Prevent public office from being used for personal gain.

Promote public confidence in the integrity of government.

The Vagaries of Ethics

The same client may be utterly clueless and blissfully ignorant in one case and hyper vigilant in another. This is because they do not really understand conflicts of interest.

- Generally speaking, ethics rules are designed to avoid actions when the action presents a conflict of interest for the actor.

- What is a conflict of interest?
  - A term used to describe the situation in which a public official or fiduciary who, contrary to the obligation and absolute duty to act for the benefit of the public or a designated individual, exploits the relationship for personal benefit, typically but not always pecuniary.

Conflicts of Interest

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- What is a conflict of interest?
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Conflicts of Interest - Generally

Conflict of interest : Acting in one's official capacity, when one has

1.a ***personal interest***, such as a matter involving a ***close relative or business associate or your career***; *or*

2.a ***financial interest***; *or*

3.a ***personal bias or predilection*** *that prevents you from being objective.*

Perceived Conflicts of Interest

- Situations that present an apparent conflict but for which there is no real improper influence.
  - Example: You are in charge of hiring and your mother-in-law applies for a job
  - She is the most qualified candidate
  - You hire her based upon merit
  - In fact, you HATE your mother-in-law

How to deal with Perceived Conflicts

- Standard applied to judges and others by statute and common law
- Means that there need be no rule that specifically prohibits your conduct but, nonetheless, you must consider what a reasonable member of the general public would think.
- "The **appearance of impropriety** is a phrase referring to a situation which to a layperson without knowledge of the specific circumstances might seem to raise ethics questions. For instance, although a person might regularly and reliably collect money for her employer in her personal wallet and later give it to her employer, her putting it in her personal wallet may appear improper and give rise to suspicion, etc. It is common business practice to avoid even the appearance of impropriety."
- Bottom Line: It is something to AVOID!

Actual Conflicts of Interest

Conflicts expressly forbidden by rule or policy

Conflicts not expressly forbidden but for which you are improperly influenced in your decision

*Requires introspection

Actual Conflicts of Interest Laws Governing Ethics

State Code of Ethics (Conn. Gen. Stat. § 1-79, et seq.)

Statutory Agency Code of Ethics (e.g., Conn. Gen. Stat. Sections 7-148t, 8-11 and 8-21).

Municipal Code of Ethics

Case law

Does your Municipality have an Ethics Code?

Town Policy: Many towns prescribes ethical standards of conduct for public officials and employees.

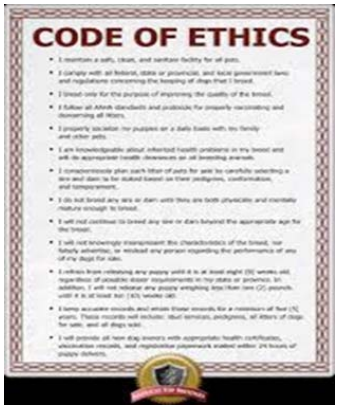
Town Charter

Code of Ordinance

Written Policies

What Every Good Ethics Code should have

- General Application
- Clear and concise standards regarding conflicts of interest
- Avenue for assistance
- Policy or process for implementing
- Opportunity for redress



GENERAL APPLICATION

"The Code shall cover and apply to Public Officials, Public Employees and Public Agents"

"Public Agent" shall mean those who are authorized to exercise any power to perform duties or provide goods, services, advice, studies or to transact business for the Town or the Board of Education.

"Public Employee" shall mean a person employed, whether part-time or full-time, by the Town or a political subdivision thereof.

"Public Official" shall mean an elected or appointed official, whether paid, unpaid, full-time or part-time, of the Town or an agency, board, commission or committee.

Clear & Concise Standards

- What is a Conflict?
- How Do You Define?
  - Personal (Familial)
  - Financial
  - Other
- Likely Will Be Over or Under Inclusive.

Other Possible Ethical Dilemmas For the Government Lawyer

- Use of Town Property
- Gifts
- Confidential Information
- Appearance on behalf of private clients

Does your Municipality have an Ethics Board?

Any town, city, district, or borough may, by charter provision or ordinance, establish a board, commission, council, committee or other agency to investigate allegations of unethical conduct, corrupting influence or illegal activities levied against any official, officer or employee of such town, city, district or borough. See Conn. Gen. Stat. § 7-148h.

Advising Boards of Ethics

- Boards are not the "Ethics Police": generally they investigate complaints and render opinions.
- Emphasize basic conflicts principles. Many local ethics codes are not intuitive and are poorly drafted.
- Advise that the law will usually be read literally. Except when it isn't.
- Encourage people to look at things from the point of view of the public, the media or the "opposition".
- Remind people that you cannot speak for the Board and that its members may look at the issue differently.
- That said, be frank when you think something is a bad idea.
- Do not labor to find an "out". This is not the Internal Revenue Code.

How to Analyze a Conflict

- Who is the client?
- What is the source of the concern regarding the representation?
  - Another current client? Is the current client adverse?
  - Former client? Use of confidential information or substantially related matter
  - Personal interest of the lawyer?
  - Is the representation prohibited by law?
  - What is the limitation on the representation?
    - Is the limitation material?

How to explain conflict of interest issues

- IDENTIFY if individual interests conflict with those of the organization
- CLARIFY your representation of the organization and not any single person acting in their individual capacity
- EMPHASIZE that you cannot give advise on conflicts of interest to officials in their individual capacity (although we do it all the time)
- DETERMINE if the organization needs to secure outside counsel for the individual
- ENCOURAGE individuals to seek their own counsel when circumstances warrant
- REMEMBER you are obliged to “exercise independent professional judgment and render candid advice”

Explaining conflicts to non lawyers

- Rule 1.4 (b) "A lawyer shall explain a matters to the extent reasonably necessary to permit the client the make informed decisions…"
- Rule 2.1 "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant…"
  - Be clear in your language.
  - Be honest about the good, the bad and the ugly.
  - Be patient with the client's frustrations.
  - Answer more questions than you ask.
  - Be tactful but straightforward.
  - Employ the "We can when…." technique.

Can the conflict be waived?

- Some conflicts cannot be waived
  - Direct adversity
  - Local/State Ethics Rules
- Do you reasonably believe that you can provide competent and diligent representation to each affected client?
  - Requires written informed consent from each client (See definition of informed consent)

ETHICS FOR THE GOVERNMENT LAWYER: Concluding Thoughts

- Understand our special rules and be an advocate for them.
- Keep your eyes open to all sorts of factors that can impact your representation of your client.
- Try to listen to people more than you speak.
- That said, basic principles bear repeating.
- Be civil and courteous.
- Be professional and respectful.
- Take a break or step away when your patience is worn thin.
- Take pride in public service and encourage your clients to do the same.


Questions