

CONFLICTS OF INTEREST IN REPRESENTATION  
OF PUBLIC AGENCIES IN CIVIL MATTERS

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There has been only sporadic attention addressed to the problem of conflicts of interest in representation of public agencies in civil matters.<sup>1</sup> The academic literature, for the most part, addresses general issues but does not engage concrete problems. There are several examinations of prosecutor ethics but few that have gone beyond the issues addressed in the ABA Standards Relating to Prosecution.<sup>2</sup> An exception is the interesting pair of articles by Professor Michael Paulsen dealing with problems arising out of the scandals in the Clinton administration.<sup>3</sup> The professional discourse is similarly thin,

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<sup>1</sup> See AMERICAN BAR ASS'N, *ETHICAL STANDARDS IN THE PUBLIC SECTOR* (Patricia E. Salkin ed., 1999). Earlier thoughtful discussions include the following: Lory A. Barsdate, *Attorney-Client Privilege for the Government Entity*, 97 *YALE L.J.* 1725 (1988); 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 (1986); Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 *U. CHI. L. REV.* 1293 (1987). See also Federal Bar Ass'n Ethics Comm., *The Government Client and Confidentiality: Opinion 73-1* (1973) reprinted in 32 *FED. B.J.* 71 (1973).

<sup>2</sup> See Fred C. Zacharias and Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 *GEO. L.J.* 207 (2000); AMERICAN BAR ASS'N *STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION* (3d ed. 1993).

<sup>3</sup> See Michael Stokes Paulsen, *Is Bill Clinton Unconstitutional? The Case for President Strom Thurmond*, 13 *CONST. COMMENTARY* 217 (1996); Michael Stokes Paulsen, *I'm Even Smarter than Bruce Ackerman: Why the President Can Veto His Own Impeachment*, 16 *CONST. COMMENTARY* 1 (1999).

because it concentrates solely on problems of federal government lawyers, particularly those of prosecutors in criminal matters. Hence, in addressing conflict of interest in representation of public agencies in civil matters, we begin, so to speak, with a slate on which there are relatively few markings.

## I. THE GOVERNING RULES

Many of the discussions regarding ethics of government lawyers proceed from a premise that the client-lawyer relationship between government lawyers and government entities is "different" from the counterpart relationship in private practice.<sup>4</sup> So it is. However, the rules of ethics and the rules of common law governing government lawyers are, for the most part, the same as those governing lawyers generally. These rules include the duty of confidentiality,<sup>5</sup> the duty of loyalty,<sup>6</sup> the attorney-client privilege,<sup>7</sup> the duty to avoid providing

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<sup>4</sup> See, e.g., Jeffrey Rosenthal, *Who is the Client of the Government Lawyer?*, in *ETHICAL STANDARDS IN THE PUBLIC SECTOR* 13 (Patricia E. Salkin ed., 1999) (discussing who is the government lawyer's client).

<sup>5</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 and Rule 1.9 (2000). Most states have now adopted the Model Rules, often with some modifications, and other states, such as New York and California, have adopted important provisions derived from the Model Rules. In any event, the basic concepts in the Model Rules are not different from the ethical rules in various jurisdictions. Hereinafter reference will be made to the Model Rules simply by number.

<sup>6</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a) (2000) (stating that "[a] lawyer shall not represent a client if the representation of that client will be directly adverse to another client"). See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(a) (2000) (explaining that "[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").

<sup>7</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000) (noting that neither a lawyer nor the lawyer's client shall be compelled to give testimony or otherwise produce evidence "with respect to:

- (1) a communication
- (2) made between privileged persons
- (3) in confidence
- (4) for the purpose of obtaining or providing legal assistance for the client").

counsel or assistance to a client in commission of a crime or fraud,<sup>8</sup> the right to withdraw if a client persists in a course of conduct that the lawyer considers imprudent or repugnant,<sup>9</sup> and the duty to withdraw when the client persists in a course of conduct that is criminal or fraudulent in which the lawyer's services have been employed.<sup>10</sup> Thus,

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Many lawyers do not understand the difference between the duty of confidentiality and the attorney-client privilege, nor the fact that the privilege is established by common law and not by the rules of professional ethics. *See Upjohn Co. v. United States*, 449 U.S. 383 (1981); *See also Nix v. Whiteside*, 475 U.S. 157, 176 (1986) (Brennan, J., concurring).

<sup>8</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (2000). Model Rule 1.2(d) provides that

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

*Id.*

<sup>9</sup> *Id.* Rule 1.16(b). Model Rule 1.16(b) provides that except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

- (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (2) the client has used the lawyer's services to perpetrate a crime or fraud;
- (3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
- (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (6) other good cause for withdrawal exists.

*Id.*

<sup>10</sup> *Id.* Rule 1.16(c). Model Rule 1.16(c) provides that "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." *Id.*

although the terrain in which the government lawyer must follow the ethical map may be different, the ethical map itself is of standard issue. It is no accident that the ethical rules governing lawyers engaged in representing public agencies generally are the same rules governing lawyers representing private parties. In the earlier days of the profession, about two hundred years ago, there was no sharp distinction between representation of persons in public office and those in private position. Hence, there was no sharp distinction in the lawyer's powers and duties in representations of various personages. Indeed one of the classic statements of a lawyer's duty of loyalty, that by Lord Brougham, was made in reference to representation of the Queen of England.<sup>11</sup>

Moreover, there are not other rules, that is, there is no special code for government lawyers. It has, therefore, necessarily been assumed that the same rules should apply alike to government lawyers and those in private practice. This assumption has survived the challenge posed at the federal level by the Thornburgh memorandum,<sup>12</sup> which asserted that lawyers of the federal government were not bound by state ethics rules.<sup>13</sup> The controversy over that position has now subsided. The Department of Justice has since retreated from that position, wisely in my opinion, and Congress, in the McDade bill,<sup>14</sup> has now pronounced that lawyers in the federal

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<sup>11</sup> See DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 189 (1973). Lord Brougham's famous dictum was pronounced in connection with his defense of the Queen in a divorce proceeding instigated by the King. *Id.* at 188.

<sup>12</sup> *Communications with Represented Persons*, 59 Fed. Reg. 39910 (1994) (to be codified at 28 C.F.R. pt. 77) (stating that "this [rule] is intended to preempt and supercede the application of state laws and rules and local federal court rules to the extent that they relate to contacts by attorneys for the government").

<sup>13</sup> See Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies over the Anti-Contract and Subpoena Rules*, 53 U. PITT. L. REV. 291, 321 (1992) (discussing the need for federal lawyers to be subject to state disciplinary rules).

<sup>14</sup> 28 U.S.C. § 530B(a)-(c) (1999). The McDade bill provides that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." *Id.* § 530B(a).

employ are indeed bound by state rules of ethics.<sup>15</sup> As far as I am aware, no official at the state or local government level has contended that the general rules of ethics are inapplicable to lawyers employed by public agencies.

In fact, many lawyers engaged in representation of public entities are primarily in private practice. I refer to lawyers who represent a public agency on a part-time assignment, on essentially the same basis as they represent other clients, for example, the local school board or zoning board. Many lawyers for public entities are full-time public employees. But lawyers in both categories are governed by the generally applicable rules of ethics. The lawyers in private practice are so governed because of their status as private practitioners. The public employee lawyers are so governed because they consider themselves lawyers and because no one has seriously considered that they should have special dispensation or be burdened with special obligations.

There are a few exceptions to the foregoing propositions, consisting of rules specially applicable to public lawyers. One is Model Rule 3.8, setting forth special responsibilities for prosecutors.<sup>16</sup> These

<sup>15</sup> *Id.*

<sup>16</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 (2000). Model Rule 3.8 provides that

[t]he prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) exercise reasonable care to prevent [personnel] . . . from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6;
- (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor

special rules governing criminal practice involve important issues but are beside the point of the present analysis, which concentrates on representation in civil matters. Another important exception is the set of special provisions in Model Rule 1.11 concerning conflict of interest.<sup>17</sup> These rules, however, address ethical problems arising from lateral movement of lawyers back and forth from the private sector into government service and from government service into the private sector.<sup>18</sup> Model Rule 1.11 limits the scope of imputation of conflict of interest, whereby a lawyer making a lateral move ordinarily would "taint" other lawyers in a private firm to which the lawyer moves.<sup>19</sup>

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reasonably believes:

- (1) the information sought is not protected from disclosure by any applicable privilege;
  - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
  - (3) there is no other feasible alternative to obtain the information.
- (g) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

*Id.*

<sup>17</sup> *Id.* 1.11(c). See also 28 U.S.C. § 530 B(a)-(b). Model Rule 1.11(c) provides that

[e]xcept as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

- (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or
- (2) 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).

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(c) (2000).

<sup>18</sup> *Id.* Rule 1.11(a)-(c) (illustrating the rule for "Successive Government and Private Employment").

<sup>19</sup> See *id.* Rule 1.10(a). According to Model Rule 1.10(a), "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one

Model Rule 1.11 also restricts the use of information about private persons that a government lawyer has acquired in public office.<sup>20</sup> There is also recognition, in the comments to the Rules of Professional Conduct, of problems posed by the concept of "law firm" in connection with the rule of imputation.<sup>21</sup> Beyond this, however, a lawyer in government is governed by the same rules that are applicable to lawyers generally.

That being so, why are there any special ethical problems that lawyers in public service encounter? I suggest that there are two general types of problems. The first problem is that there are additional statutes applicable to lawyers in public practice. Public lawyers, like all public officials, are governed by legal provisions that apply only to public officials. That is, public employee lawyers are governed by statutes and regulations that are defined in terms of their public employment rather than in terms of their being lawyers. The second problem is suggested by the following question: "Who is the client?"

The analysis here will focus on the second of these problems—that of the identity of the client. That is not to say that the special regulations applicable to public employees are insignificant. Quite the contrary.

of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2." *Id.*

<sup>20</sup> *Id.* Rule 1.11(b). Model Rule 1.11(b) provides that [e]xcept 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. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

*Id.*

<sup>21</sup> *See id.* Rule 1.10 cmt. 1. Comment 1 to Model Rule 1.10 defines "the term 'firm' [to] include[] lawyers in a private firm, and lawyers in the legal department of a corporation or other organization, or in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts." *Id.*

## II. LAW GOVERNING PUBLIC EMPLOYEES

The federal government has provisions governing public employees as a general category and, so far as I am aware, all the states have such regulations for state employees.<sup>22</sup> Many states have regulations governing employees of local government as well. Many local governments, particularly larger cities, have separate or supplementary regulations.<sup>23</sup> These regulations govern such parochial matters as residency requirements but, directly relevant to present discussion, also such matters as outside employment, receipt of gifts or other emoluments, integrity in financial dealings, and affiliations after leaving government employment.<sup>24</sup> Any and all of these requirements may apply to lawyers, depending on the jurisdiction and on the provisions of the specific set of regulations.<sup>25</sup>

As most of the audience no doubt is aware, the Pennsylvania Supreme Court recently resolved an important issue concerning the application to lawyers of these "nonlawyer" regulations.<sup>26</sup> The issue was whether the Rules of Professional Conduct, promulgated by the supreme court and governing lawyers, constituted the exclusive governance of lawyers, or, to the contrary, whether the legislature could validly impose other requirements by way of statute.<sup>27</sup> The court held, appropriately in my opinion, that the Rules of Professional Conduct were not preemptive of the legislature's regulatory authority.<sup>28</sup> A showing of actual conflict between a statute and a rule of court could well justify a different result. For example, if the legislature sought to invade or abrogate the lawyer's duty of confidentiality, it could well be that the legislation would be held invalid under the principle of separation of powers. In the absence of

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<sup>22</sup> Mark Davies, *Considering Ethics at the Local Government Level*, in *ETHICAL STANDARDS IN THE PUBLIC SECTOR* 127, 129-31 (Patricia E. Salkin ed., 1999).

<sup>23</sup> *See id.* at 129-31.

<sup>24</sup> *Id.* at 132-43.

<sup>25</sup> For a useful catalogue of state and local statutes and regulations, see *id.* at 127.

<sup>26</sup> *P.J.S. v. Pennsylvania State Ethics Comm'n*, 723 A.2d 174 (Pa. 1999).

<sup>27</sup> *Id.* at 174.

<sup>28</sup> *Id.* at 178.



a showing of any such interference with basic concepts of a lawyer's responsibility, however, the additional legislative regulations apply.<sup>29</sup>

Similar legal issues have been addressed in other jurisdictions, with various results.<sup>30</sup> It is beyond the scope of this Article to address these variations, or, indeed, to delve more deeply into the issue in Pennsylvania. My only purpose is to bring to mind that these general regulations may have application to lawyers and hence impose additional obligations beyond those prescribed in the Rules of Professional Conduct. That limited purpose permits me to return to the more salient problem posed by the questions.

### III. WHO IS THE CLIENT?

The first question any lawyer must consider in undertaking a representation is the identity of the client. In private practice, this question usually has an obvious answer if the engagement is for representation of an individual. In that situation, the individual is the client. Even here, however, there can be complications. If the individual is a minor, for example, there can be questions whether the lawyer should take direction from the child or from the child's parents or should await appointment of a guardian who can provide directions. A special subcategory is a lawyer appointed in a divorce proceeding to represent a child of the divorcing parents. Similar problems can arise in representing the mentally impaired or the elderly. Where a third party is compensating the lawyer, questions arise concerning the role of such a third party. A familiar situation is the engagement of a lawyer by a liability insurance company to represent its insured. That situation has generated extensive literature dealing with this "eternal triangle."<sup>31</sup> Still another complicated situation arises

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<sup>29</sup> *Id.*

<sup>30</sup> See *Pennsylvania v. Stein*, 701 A.2d 568 (Pa. 1997) (ruling that a regulation infringes upon the jurisdiction of the court where it applies to attorneys as a class); *Maunus v. State Ethics Comm'n*, 544 A.2d 1324 (Pa. 1988) (holding that attorneys employed by the Pennsylvania Liquor Control Board were not exempt from the financial disclosure provisions of the Ethics Act); *Ballou v. State Ethics Comm'n*, 436 A.2d 186 (Pa. 1981) (holding that a municipal solicitor was not a public employee subject to financial disclosure provisions of the Ethics Act).

<sup>31</sup> See David A. Hyman, *Professional Responsibility, Legal Malpractice, and*

where the individual holds an office, such as trustee or executor, and the lawyer is engaged to represent the individual *ex officio*.

Even with these variations and complications, however, a private lawyer's representation of an individual is relatively straightforward. The answer to the question "who is the client?" is that the client is the flesh-and-blood individual.

But many private representations involve clients that are organizations, not individuals. The most common is representation of business corporations. The concept of "organization" in this context includes partnerships, unions, professional and trade associations, charitable corporations, and may include less formally constituted unincorporated associations. In representation of an organization, the simple answer to the question "who is the client?" is that the organization is the client. But this answer is often not merely simple but simplistic. An organization must act and speak through individuals associated with it, including the acts and speech involved in dealing with the organization's lawyers. As stated in Model Rule 1.13(a) of the Rules of Professional Conduct "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."<sup>32</sup>

Strictly speaking, a lawyer for an organization, therefore, does not communicate, confer, take direction from or give advice to the organization. Instead, those functions are performed with persons who are client representatives in the client-lawyer relationship. A term I sometimes use, awkward but perhaps expressive, is that the lawyer deals with "client people." The "client people" with whom a lawyer deals may be relatively low-level operatives,<sup>33</sup> or they may be the board of directors of the corporation, union, or other organization. In dealing with lawyers, and of course other "outsiders" as well, all such individuals exercise functions defined in agency law. They are agents of the corporation of one kind or another.

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*the Eternal Triangle: Will Lawyers or Insurers Call the Shots?*, 4 CONN. INS. L.J. 353 (1997-1998); Robert E. O'Malley, *Ethics Principles for the Insurer, the Insured, and Defense Counsel: The Eternal Triangle Reformed*, 66 TUL. L. REV. 511 (1991); Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475 (1996).

<sup>32</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(a) (2000).

<sup>33</sup> See *Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981).

For purposes of lawyers' ethical responsibilities, the representation of public organizations is similar to the representation of private organizations. In both situations, the client, properly speaking, is an organization, and the persons with whom the lawyer directly deals are not clients but agents of the client. A similar analysis applies when the government entity is an individual, for example, the governor or the superintendent of education. Such a person has two legal capacities, one being his personal affairs and the other his *ex officio* persona. The fact that the two capacities may overlap and may be difficult to differentiate sometimes complicates analyses and results, but it does not refute the proposition that two legal capacities are involved.

The fact that the client people are agents raises two important problems for a lawyer dealing with such persons. The first is whether they have authority to act for the corporation in the matter in question. A related question is whether the lawyer dealing with such a person should question that person's authority, indirectly, diplomatically, or by way of confrontation. There are cases where the lawyer should not accept at face value the instructions emanating from such a person because the instructions will be found to be legally inimical to the corporation and therefore *ultra vires*. But it can often be a delicate matter in deciding whether the instructions are a valid basis on which the lawyer should proceed or are instructions that should somehow be questioned within the corporate hierarchy.

The second problem in dealing with a corporate agent is that the agent—the "client person"—may believe or assert that he personally is the lawyer's client. The contention may be that the lawyer solely represented the client person and not the corporation or, more commonly, that the lawyer represented both the corporation and the client person. If either of those contentions is sustained, then the lawyer will be held to have had a conflict of interest.<sup>34</sup> The

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<sup>34</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (2000). Model Rule 1.7(b) provides that

[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and

consequences of such a conclusion can be loss of the corporation's attorney-client privilege, a motion to disqualify the lawyer and his firm,<sup>35</sup> and, in some situations, an action for legal malpractice.<sup>36</sup>

I have explored these aspects of representation of private corporate entities in some detail for a purpose. In my opinion, the rules, issues and determinations arrived at in analysis of legal representation of private corporations are the basic model for analysis of the rules, issues and determinations in representation of public entities.

#### IV. PUBLIC LAWYER PRACTICE

In summary, proper analysis of conflicts of interest for public lawyers should focus on the legal structure of the public lawyer's relationship to the client. This involves analysis of the legal structure both of the legal services office with which the lawyer is affiliated and the legal structure of the recipient of the lawyer's services. A thorough analysis of either of these would take us deeply into the law of government itself: federal, state and local. Hence, only a sketch with illustrations is possible here.

Concerning the legal structure of the lawyer's office, a good illustration is the office of a state attorney general. Initially, we should note that these structures vary widely from state to state. For example, in many states the attorney general is an autonomous constitutional officer chosen by public election.<sup>37</sup> An attorney general so constituted is in a sense his own client and does not report to others as "their"

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(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

*Id.*

<sup>35</sup> *Yablonski v. United Mine Workers of America*, 454 F.2d 1036 (D.C. Cir. 1971).

<sup>36</sup> *See generally Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler*, P.C., 309 N.W.2d 645 (Mich. Ct. App. 1981) (per curiam) (holding that the attorney-client privilege does not apply to members of corporate boards of directors and corporate control groups).

<sup>37</sup> *See e.g.*, MD. CONST. art. V, §1; MASS. CONST. amend. XVII; N.J. CONST. art. V, § 4, cl. 3; N.Y. CONST. art. V, § 1; PA. CONST. art. 4, § 4.1.

lawyer. At the local level, much the same is true of elected district attorneys who have civil functions, as they do in many states. Moreover, many such officials are designated by law as legal counsel for all or some of the public agencies at their level of government. By the same token, the various specialized agencies do not have their own legal counsel but have lawyers assigned to them by the office of attorney general or district attorney, as the case may be.

This set of constitutional relationships is the background for the interesting set of cases in which one lawyer or sets of lawyers from the office of the attorney general appear on the opposite side from other lawyers in that office in litigation involving a legal dispute between two agencies.<sup>38</sup> The "conflicts" cases in this situation sometimes involve the attempt to apply concepts of conflict of interest borrowed from private sector representation. These concepts cannot be sensibly applied where a central legal office, such as that of the attorney general, has sole authority to supply lawyers to the agencies involved. As the courts have generally recognized, the proper solution is to have "insulation walls" between the lawyers and let the litigation proceed.<sup>39</sup> The situation is ethically anomalous only if the private model is uncritically applied to the different context of public legal representation in interagency legal disputes. I trust that enough has been said on this point to illustrate the underlying proposition: Analysis of the problem must begin with analysis of the legal status or "constitution" of the actors involved.

The same approach should be taken in analysis of the legal structure of the public client. In typical discussions of representation of public agencies, it is assumed that all public agencies are alike, but they are not. Some public "agencies" consist of a single individual, such as the governor, or an elected state treasurer, or a superintendent of schools, sometimes elected and sometimes appointed. Some agencies are multipersonal, consisting of five- or seven-person commissions or boards, for example, a state tax commission or a local school board or zoning board. The fact that an agency is multipersonal is itself highly significant in determining client identity. To be sure, the

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<sup>38</sup> See Ann Bradford Stevens, *Can the State Attorney General Represent Two Agencies Opposed in Litigation?*, 2 GEO. J. LEGAL ETHICS 757 (1989).

<sup>39</sup> See *Lyness v. Commonwealth*, 605 A.2d 1204, 1209 (Pa. 1992).

chair of such a commission or board has some kind of special authority as a presiding officer. Typically, however, a majority of the board can overrule the chair on matters of policy. That necessarily implies that the chair is not the final authority in the relationship with the agency's legal counsel. Instead, the relationship between the chair and the board resembles that between the CEO and the board of directors in a private corporation.

Another variable in the "constitution" of a public agency is the basis of selection of the officials of the agency. The basis of selection can be independent election, as in the case of many school boards. Another basis of selection is appointment by some superior authority such as the governor, a mayor, or a board of county commissioners. The difference in basis of selection is highly relevant to the problem of resort to higher authority. As indicated in Model Rule 1.13(b)(3), resort to higher authority is the private lawyer's primary recourse when there is disagreement over the legality of a course of action proposed by a lower level official.<sup>40</sup>

Still another variable in a public agency's constitution is the extent to which the attorney-client privilege may protect communications, and the individuals whose communications are so protected. At one extreme, state law may hold that the attorney-client privilege applies only to communications concerning strategy in litigation.<sup>41</sup> At the other extreme, the attorney-client privilege may be held to protect all communications within an agency to the same extent as if the agency were a private corporation.<sup>42</sup> The terms of state law in this respect obviously influence the kind, depth, and subject matter of communications between agency officials and legal counsel. If the communications will be open to discovery or other public disclosure, there are corresponding limits on the candor that the participants can permit themselves to indulge.

The foregoing is only a sketch and partial catalogue of the importance of the "background law"—the law specifying the legal

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<sup>40</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(b)(3) (2000).

<sup>41</sup> See FLA. STAT. ANN. § 119.07(3)(1) (West 1996) (providing that "mental impression, conclusion, litigation strategy, or legal theory" is temporarily exempt from disclosure).

<sup>42</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 cmt. 6 (2000).

status of the participants—in public representation. Without doubt participants in this conference can call to mind many other examples, and the resulting ethical dilemmas. (We should bear in mind that not only the public lawyers but also the "client" public officials are involved in these dilemmas.) What I have sought to do is to suggest an approach to these problems. There will be further occasions for deeper exploration and perhaps even some solutions.