

**ETHICAL CONSIDERATIONS  
OF  
PRIVATE & PUBLIC ATTORNEYS,  
IN ADMINISTRATIVE PROCEEDINGS**

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# **ETHICAL CONSIDERATIONS OF PRIVATE & PUBLIC ATTORNEYS IN ADMINISTRATIVE PROCEEDINGS**

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## **PART I: GENERAL COMMENTS**

### **A. Introduction**

Though Rule 7.4 of the Rules of Professional Conduct (“the Rules”) forbids us from designating specialties, the practice of public law--whether on behalf of the government or a private client--is certainly coming into its own as a recognized “field of concentration.”

A law practice in public law, meant here to describe representing public entities, opposing them, or appearing before them on behalf of clients, is certainly very different from other practices of law. An experienced “public practice” lawyer, for instance, will almost always look first to the Constitution, statutes, administrative rules, ordinances, etc., to find the answer to a legal question, and will be well schooled in the art of statutory construction. Attorneys practicing only in the private arena, facing the same question, will generally first call around looking for someone who has worked in government. Though I always welcome their calls and am glad to help, often, when I ask what do the statutes say, they have not yet looked. Conversely, it takes some time before a government lawyer moving to the private sector masters the art of writing down and billing time. Some, like me, never stop worrying about where the next client will come from. Government lawyers never have to worry -- there is always far more to do than can be done.

### **B. Ethics Rules of Thumb**

#### **Step #1: What do the Rules say?**

Of course, all Oklahoma lawyers, no matter what their areas of concentration, are subject to the same Rules of Professional Conduct. The first rule of thumb for all attorneys is

to consult the Rules, when confronted with an ethical issue. Many times, I have seen attorneys involved in protracted theoretical discussions of an ethical dilemma, but none can answer the question, “What do the Rules say?”

### **Step #2: Consult the Comments**

Often, the “Preamble,” “Scope,” and “Terminology” sections which precede the Rules, and the “Comments” section following each Rule, are quite helpful in analyzing the meaning and intent of the Rules. According to the “Scope” section, “the text of each Rule is authoritative,” while the Comments “are intended as guides to interpretation.” However, as the “Scope” section notes, the “Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rules.” Notwithstanding that the Comments are not considered authoritative, the Bar would be hard pressed to find an attorney failed in her ethical responsibilities if she followed the advice of the Comments section.

Importantly, the “Scope” of the Oklahoma Rules of Professional Conduct acknowledges that government lawyers may sometimes practice under unique ethical circumstances:

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. They also may have authority to represent the “public interest” in circumstances where a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority.

Although this language clearly acknowledges one unique aspect of practicing law for

government lawyers, as discussed below, it does not abrogate a government attorney's duty to abide by the Rules of Professional Conduct in discharging her responsibilities to each client.

**Step #3: Determine what other laws or rules may apply.**

Public practice lawyers are often subject to several layers of rules with ethical overtones, which are not necessarily applicable to the private sector. In an address to the American Bar Association more than fifteen years ago, a Deputy United States Attorney General commented that "government lawyers operate ...under a body of ethics that are (sic) stricter than the already high standard of the profession in general."<sup>1</sup> This is so, in part, because public practice lawyers often represent or otherwise deal with public officials who are subject to ethical duties by virtue of their positions.

Some of the laws or rules applicable to government lawyers that implicate additional ethical duties include the rules and statutes of the **Oklahoma Ethics Commission**, title 74, Chapter 62, Appendix; the **Code of Judicial Conduct**; the **Open Meetings Act**; the **Open Records Act**; the **Administrative Procedures Act**; state statutes or local government ordinances governing **nepotism, conflicts of interest, purchasing**; and so on. Of course, the particular public entity involved in a proceeding may well also have internal or published rules to consult.

**Step 4#: Can you explain it in 13 seconds?**

I have been told that during the time John Kennedy ran for President in the early 1960s, the average length of a sound bite of a Presidential candidate's voice on the evening news was 45 seconds. Now, the average sound bite is something like 13 seconds. For those

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<sup>1</sup> "Address of the Honorable Arnold I. Burns at the American Bar Association National Conference on Professionalism," June 26, 1987.

involved in the public sector, the possibility is always present that an ethical *faux pas* will wind up in the public eye. If you (or your client) can't explain it in 13 seconds, you may not have the chance to explain it at all.

**Step 5: Call the Bar.**

If the question relates to the Rules of Professional Conduct, the Oklahoma Bar Association's ethics counsel is your best source of help not only in resolving the question, but in giving you protection against criticism for your actions.

**Step 6: Should action be taken regardless of professional consequences?**

As discussed elsewhere, ethical conduct and personal "moral" values are not synonymous. In fact, they often have little to do with each other. But sometimes, the two do clash.

**C. The purpose of ethics rules**

Ethics rules give guidance to those who desire to act ethically, helping them steer clear of common ethical pitfalls and avoid having to reinvent the ethics wheel. Ethics rules also create a standard of behavior, so that prosecutors/regulators have a basis on which to discipline those who are unethical.

Ethics rules are sometimes also designed to reassure the public, though often the reassurance is illusory. Ethics rules do not create ethical people, and the difference between whether a person is ethical or unethical often has little to do with the presence or enforcement of rules.

Ethic conduct and "moral" conduct are not synonymous -- the two concepts sometimes have nothing to do with each other. For instance, there is nothing inherently immoral about taking an administrative law judge out to lunch; practicing law with a non-

lawyer; placing client money in your operating account, and so on.

However, Murphy's law has never been truer than in the context of ethics: "In any given set of circumstances, the proper course of action is best determined by subsequent events." Ethics rules are designed to prevent problems, or even the appearance of problems, and to raise the consciousness of the already "moral" or "ethical" attorney, so that he or she realizes in advance that an innocent action may, however incorrectly, be perceived by others as inappropriate. Many ethics rules are designed simply to avoid controversy, theoretically instilling greater confidence in the system.

But ethics rules are only as effective as attorneys are willing and able to abide by them. As Einstein commented, "Nothing is more destructive of respect for government and the law of the land than passing laws which cannot be enforced."

The ineffectiveness of ethics rules to generate confidence in the system is clearly demonstrated each day of our professional lives as attorneys. Lawyer jokes and television shows depicting us as greedy, uncaring and ineffective are a constant. Much of the public seems no longer to value the judicial process and its many important safeguards, instead openly disparaging the system because it disagrees with a particular result. Unfortunately, merely abiding by our Rules of Conduct will not change this; it is our code of personal ethics that will make a difference.

Ethics always includes leadership, and true leadership always includes ethics. As Albert Schweitzer said, "Example is not the main thing in influencing others. It is the only thing." Leadership can be displayed actively through our vocal support for ethical conduct, and passively, by the example we set and our expectation that others, including our clients, follow our example. While we are obligated to strive for positive change and improvement of

our legal system, we can accomplish this while at the same time demonstrating our respect for the system, and respect for others who work within it. But we must go further and demand that our clients also respect the system.

We must also understand no matter how “wrong” we believe the public to be about the ethical practices of our profession, what the public perceives controls the public’s reaction to us as attorneys, and to the judicial system. In the context of ethics, the adage is often true that, “Public opinion is always in advance of the law.” Ethics rules usually are written out of public concern that past “unethical” situations will be repeated.

Churchill said, “Any clever person can make plans for winning a war if he has no responsibility for carrying them out.” The ineffectiveness of ethics rules to generate confidence in the system is clearly demonstrated each day of our professional lives as attorneys. Lawyer jokes depicting us as greedy, uncaring and ineffective are a constant. Speaking in general terms, the public seems no longer to value the judicial process and its many important safeguards, instead openly disparaging the entire system because it disagrees with a particular result. Unfortunately, merely abiding by our Rules will not change this; it is our code of personal ethics that will make a difference -- and our willingness to exhibit leadership. Albert Schweitzer said, “Example is not the main thing in influencing others. It is the only thing.” Leadership can be displayed both actively through our vocal support for ethical conduct and, and passively, by the example we set and our expectation that others, including our clients, set the same example. We are obligated not only to strive for positive change and improvement of our legal system, we are obligated to demonstrate respect for the system, and to respect others who work within it.

## **PART II: SPECIFIC ETHICAL DILEMMAS**

**A. Ex parte communications. Rule 3.5, Rules of Professional Conduct; Cannon 3, Code of Judicial Conduct.**

1. **Rule 3.5** provides, “A lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; (b) communicate ex parte with such a person except as permitted by law; or (c) engage in conduct intended to disrupt a tribunal.”

The prohibition is also contained in **Cannon 3 of the Code of Judicial Conduct**.<sup>5</sup> O.S., ch. 1, app. 4. When a decision maker is sitting as an administrative law judge, the ethical obligations of the judiciary are also applicable to her or him. *See*, “Application of Code of Judicial Conduct.” The Code provides, at Cannon 3(B)(6), that a judge “should accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law. A judge should not initiate nor consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding[.]” The Cannon excepts certain scheduling or administrative communications, or emergencies that do not deal with substantive matters or issues or the merits, provided that the judge “reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication.”

A judge may also initiate ex parte communications when expressly authorized by law to do so. Litigants would be well-advised to review agency rules and regulations, as well as applicable statutes, to determine whether such authority exists.

With respect to Rule 3.5, note that the Rule applies to “officials” other than judges, thus one should assume it includes members of boards and commissions or other governmental decision-making bodies acting in a regulatory capacity or presiding over

adversarial proceedings.

Of course, the most obvious opportunity for ex parte communications occurs where a member of a regulatory staff works in close proximity to an administrative law judge or other decision-maker. In those cases, resolution of the propriety of such a communication is critical not only from an ethical standpoint, but because questions of due process may arise as a result of such communications.

The nature of the proceeding has a great influence on whether ex parte communications are appropriate. If the proceeding is not adversarial, at least in the traditional sense, such communications may not only be acceptable, but appropriate. For instance, in the context of Parole Board hearings, ex parte communications are the norm, because the hearings are not premised on notions of due process.

2. It is not only parties who may have ethical obligations with respect to ex parte communications, but third parties, as well. An attorney who is not an advocate for any party may not communicate ex parte with a decision maker sitting on pending case, with the intent to influence the decision maker on the proceeding's merits. An attorney who is not an advocate for any party must have the "intent" to influence a judge on merits to support a finding that the attorney has engaged in conduct prejudicial to administration of justice by communicating ex parte. Such intent is determined by considering whether the attorney knew or reasonably should have known there was material likelihood her actions would materially prejudice proceeding, taking into account the time, place, and attorney's justification for the questioned conduct.

Thus, in *State ex rel. Oklahoma Bar Association v. Hine*, 937 P.2d 996 (Okla.1997), *cert. denied*, 522 U.S. 864, 118 S.Ct. 171, 139 L.Ed.2d 113, the Oklahoma Supreme Court

held that an attorney who is not an advocate for any party may be disciplined for communicating ex parte with the trial judge sitting on a pending case, when the communication was made with intent to influence the judge on the case's merits. Such communications, the Court held, violate the standard of professional conduct that is expected of an officer of the court.

Hine, an attorney, wrote the trial judge in her capacity as a member of a child advocacy group. The Supreme Court held that regardless of whether the letter was written as a private citizen, as an officer of the court, Hine owed a special duty to the judicial system—an obligation of respect greater than that owed by other participants in the legal process. She was obligated, the Court said, not to engage in conduct that is prejudicial to the administration of justice. Hine communicated with a sitting judge “with the intent to influence him on the proceeding’s merits,” thus discipline was appropriate. In view of “her altruistic motives and other mitigating evidence,” the Court ordered a public reprimand.

3. Lawyers and judges should exercise care in their public and private social relationship to avoid creating any appearance or impression that a lawyer enjoys a special relationship with, or possesses a particular ability to influence, a judge, which might affect such judge's discharge of his judicial responsibilities. Legal Ethics Opinion No. 292.

4. Cannon 3 of the Code of Judicial Conduct allows a judge (including an ALJ) to “obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, with a record being made, and affords the parties reasonable notice to respond.

**B. Informal communications with witnesses. Rule 4.2.**

1 Who speaks for the organization? It is a basic concept of legal ethics that a

lawyer may not communicate (or cause another to communicate) about the subject of representation with a party the lawyers knows to be represented by another lawyer in the matter. The exception is when the lawyer has the consent of the other lawyer or is authorized by law to do so.

The comments to Rule 4.2 explain that in the case of an organization, the Rule prohibits communications by opposing counsel concerning the matter in representation, with several categories of persons, including:

- persons having a managerial responsibility on behalf of the organization;
- any other person whose act or omission in connection with the matter may be imputed to the organization for purposes of liability;
- persons whose statement may constitute an admission on the part of the organization.

The problem for opposing counsel is identifying who these persons are. Often the organizational chart of a company, if it exists at all, is somewhat unclear, and, as discussed below, may not be relied upon to define the limitations of the Rule, at any rate. Similarly, statutes defining the duties of an employee of a public entity are not the proper basis on which these lines may be drawn.

While as a part of discovery one might ask to have identified those persons deemed by the organization to be covered by Rule 4.2, the response to such a request is sometimes interesting. On the one hand, the response may appear to be an effort to include anybody and everybody within the Rule, thereby preventing informal communication with anyone. Later, at depositions or trial, the entity may take the position that those same persons have no authority to manage it, bind it, or make statements which may be deemed admissions.

At any rate, attorneys will not want to risk a bar complaint -- or worse -- by misunderstanding or misjudging with whom they are free to speak.

In *Weeks v. Independent School Dist. No. I-89*, 230 F.3d 1201 (10th Cir. 2000), cert. denied, 532 U.S. 1020, 121 S.Ct. 1959, 149 L.Ed.2d 755, Weeks, a bus driver, brought an action against his employer, a school district, under various federal laws. The District Court disqualified Weeks' attorney, Barringer, from further participation in the case, after the school district filed a motion to exclude evidence obtained through ex parte communications between Barringer and two school district employees. One employee was named Midgett. The second employee, Hix, was Weeks' immediate supervisor. The School District claimed that both Midgett and Hix were employees with whom communications were prohibited under Rule 4.2.

Barringer admitted not only that she communicated directly with the two witnesses, but that had begun to represent Midgett and was considering representing Hix in similar litigation against the district. However, she contended that both Midgett and Hix were "low-level supervisory employees" with no authority to make management decisions that bind the School District, thus ex parte communications with them were not prohibited under Rule 4.2. To support the assertion that Midgett and Hix lacked sufficient authority to speak on behalf of the School District, Barringer cited, inter alia, state statutes defining school "administrators" and describing the management structure for local school districts. The district court found a violation of Rule 4.2 and sua sponte disqualified Barringer from further participation in the case. The court also prohibited Weeks from using any evidence obtained through ex parte communications with Hix and Midgett at trial, permitting only their deposition testimony to be introduced.

Relying on Fed.R.Evid. 801(d)(2)(D) as guidance in determining whether an employee has “speaking authority” for a corporation, the Tenth Circuit upheld the district court. The Court relied in part upon reasoning that although Rule 801(d)(2)(D) addresses hearsay evidence, the Rule is helpful because of its definition of an admission by a party-opponent. Rule 801(d)(2)(D) defines an admission as a statement that is offered against a party that is “a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.” Based upon this definition, the Court applied Rule 4.2 to Barringer's communications, observing that first it must decide whether Midgett and Hix had “speaking authority” such that they could bind the School District in a legal evidentiary sense, and second, whether the ex parte communications concerned the subject of Weeks' case.

Barringer argued that to answer the question of whether Midgett and Hix had speaking authority sufficient to bind the School District, the court should consider the Oklahoma School Code's definition of “support employee” and its description of appropriate bargaining units. Barringer also argued that Midgett and Hix are support employees included within the support personnel bargaining unit, and thus cannot be “supervisory” or “managerial” employees within the meaning of Rule 4.2. Because, she argued, the Labor Management Relations Act (LMRA), 29 U.S.C. § 141 et seq. (1998), prohibits supervisors from inclusion in a bargaining unit and further defines “supervisor” in a way that does not include the duties and responsibilities of Midgett or Hix, Midgett and Hix cannot be “supervisory” employees of the School District.

The Tenth Circuit found citations to the Oklahoma School Code and the LMRA unpersuasive. It reasoned, first, that those statutes have entirely different purposes than the

professional conduct rule governing ex parte communications. Second, it reasoned, the statutes provide no assistance in discerning which employees are covered under Rule 4.2 because whether an employee falls within the scope of Rule 4.2 is not strictly whether the employee is designated as “supervisory” or as a “support employee.” Rather, the test refers to agency principles and asks whether the employee has management speaking authority such that he or she could bind the School District in a legal evidentiary sense.

Midgett, the Court said, was responsible for “overseeing subordinate employees in the performance of activities relating to the compensation of school bus drivers and other support employees of the Transportation Department,” and her position provided her with extensive experience in handling and overseeing overtime information. One of the significant areas of dispute in Weeks' case involved the School District's handling of his overtime during his employment, which was from 1989 through 1995.

Based upon this evidence, the Tenth Circuit found that Midgett was an employee with whom Barringer was prohibited from communicating under Rule 4.2. Midgett had managerial authority over some of the issues in controversy in the underlying litigation, particularly overtime issues. Under agency principles, she was vested with managerial speaking authority on the areas within her responsibility. Her testimony could be considered against her employer in a legal evidentiary sense. Because Barringer and Midgett communicated about the subject of Weeks' claim against the School District, the communication violated Rule 4.2. Based upon similar reasoning, the court found Hix also had sufficient speaking authority that the communication was prohibited by Rule 4.2.

### **C. Unrepresented parties. Rule 4.3.**

Attorneys employed by governmental agencies often have contact with unrepresented

persons. These contacts are governed by Rule 4.3 of the Rules of Professional Conduct. The Rule provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. A lawyer shall not give advice to such a person other than the advice to secure counsel, if the interests of such person are, or have a reasonable possibility of being, in conflict with the interests of the client.

(Emphasis added.) Often, persons seeking to deal directly with state agencies are unrepresented, even in administrative proceedings. Government lawyers must give special consideration to the extent to which they may assist such persons in keeping with their ethical responsibilities.

**D. Conflicts of Interest. Rule 1.7.**

1. **Representing multiple parties in a single action.** As discussed in the Scope section of the Rules, it is not unusual for public lawyers to be asked to represent multiple parties in a single action, including both individuals and governmental entities. They may also be asked to represent a public officer both individually and in her official capacity. Non-attorney public officials view multiple representation as a logical, cost-saving matter. Nevertheless, the starting point for any attorney must be an analysis under Rule 1.7, which provides:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) 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

(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.

The Comments to this Rule specifically address government lawyers, noting that “there are circumstances in which a lawyer may act as advocate against a client...[G]overnment lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party.” A government lawyer may also be asked to act as an advocate for a government official whose interests could ultimately be adverse to the agency or the government with whom the attorney is employed. For instance, a public official who may be subject to personal liability may wish a state agency to settle a matter, paying funds from the agency’s coffers. Acknowledgement in the Comments that such problems may arise, however, does not relieve an attorney from performing the proper analysis under the Rule and taking the proper steps before undertaking the representation.

**2. Analysis of Rule 1.7.** The decision to represent multiple clients under Rule 1.7 involves a two-step process:

First, the attorney “must reasonably believe” the representation will not “adversely affect” the “relationship” with, or the “representation” of all other clients. “Relationship” is a broader term than “representation.” The Comment to the Rule indicates that “when a disinterested lawyer would conclude that the client should not agree to the representation. . .the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.” Unless this first hurdle can be overcome, permission of the

client is irrelevant since the client cannot waive a conflict under this criteria.

If the first hurdle is overcome, then full disclosure to each client is required prior to obtaining each client's consent for representation. It is suggested that a written memorandum of all disclosures that have been made should be provided to the client. The attorney should retain a copy which contains a written acknowledgement that the client has been provided a copy, understands the implications of multiple representation, and has given his or her consent to the multiple representation. These disclosures should be done privately with each individual client or client representative (in the case of an agency, city, town, or other entity).

3. **Disclosures covered by Rule 1.7.** Following are some of the factual possibilities that should be discussed with each client when contemplating representation of multiple clients. Depending on the circumstances of the particular case, other disclosures may also be appropriate. For disclosures to the clients to be adequate under the Rule, both the disadvantages of multiple representation and the advantages, including factual possibilities and the potential problems which may arise, must be discussed. The discussion must include, of course, the possibility that the attorney may be forced to disqualify from representation of some or possibly all clients, under some circumstances.

a. The clients' positions may become adverse. For instance, the governmental entity may ultimately desire to take the position a co-party who is an employee of the agency acted outside the scope of her authority. Or, an individual employee/client may take the position that the agency policy or an agency supervisor required the particular conduct at issue in the litigation.

b. The clients may disagree upon the objectives, scope, or means of

representation. Rule 1.2 governs the scope of representation, including the right of the client to determine the objectives of the representation, and to be consulted as to the means by which the objectives are to be pursued. Philosophical or practical differences or expectations about how the case should be handled can become points of contention. Expenditures for experts and other costs for preparation of the case can also become an issue, particularly if the governmental entity does not wish to expend funds on experts, depositions, and so on, from which an individual co-party may benefit to a greater degree than the agency. Further, an individual client may have greater incentive to try to settle or mediate a case.

All plaintiffs or defendants are not created equal. Experts' evaluations may indicate stronger cases or defenses for some the clients than for others. Some clients will be stronger witnesses, have greater credibility, be more articulate or their cases may have greater jury appeal. Clients' levels of cooperation, enthusiasm or "staying power" may vary. Some clients may be more sophisticated about the proceedings than others. Trial tactics, litigation expenses, and preparation approaches for each individual's case may be affected by these differences. These possibilities must be explored early on and an agreement developed for dealing with them, if multiple clients wish to have representation by the same counsel. Memorialize these conversations.

c. Confidentiality of information. Rule 1.6 prohibits a lawyer from revealing information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized to carry on the representation.

There may be information of a personal nature which one client may not wish the other clients to know, particularly in the context of clients who may be in an

employee/employer relationship. A client may have information about the merits of the case, personal feelings or opinions about another of the potential clients, and so on, which he or she may not wish to share, or may feel uncomfortable discussing openly with the others. Even if the information is inadmissible, it may be discoverable, or at least the topic of a discovery dispute.

Each client should be informed that if he or she has information the client does not wish to be shared with the others, such a situation could potentially materially limit the ability of the attorney to carry out his or her responsibilities to all clients. (Of course, as discussed earlier, if the attorney becomes aware that the representation will be materially limited, client consent becomes irrelevant and the multiple representation will be forbidden by Rule 1.7.)

d. Effect on attorney-client evidentiary privilege. In Oklahoma, there is no evidentiary privilege under the attorney-client rule:

as to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to an attorney retained or consulted in common, when offered in an action between or among any of the clients[.]

This exception to attorney-client privilege has significant implications for representation which Rule 1.7(b)(2) clearly requires to be disclosed.

e. The possibility of settlement. This can be an extremely important and difficult aspect of multiple representation. What if some clients want to settle, while others insist on holding out for trial? What if some of the clients have unrealistic expectations in relation to the outcome of the litigation?

In this context, in addition to Rule 1.7, Rules 1.2 and 1.8 apply. **Rule 1.2** requires a lawyer to abide by a client's decision whether to accept an offer of settlement

in a matter. **Rule 1.8(g)** provides:

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients. . .unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas invoked and of the participation of each person in the settlement.

f. Duty of loyalty. Loyalty is an essential element in the lawyer's relationship to each client he or she represents. That multiple clients are represented in the same action obviously has no effect on the duty of loyalty owed to each such client, individually.

g. Who's paying the defendants' bills? Another consideration is Rule 1.8(f). Often, the governmental entity pays for all counsel, even if separate counsel is retained for some parties. **Rule 1.8(f)** provides that a lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client consents after consultation;
- (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.

#### **D. An organization as client. Rule 1.13.**

1. **Identifying the client.** Often, the interests of the entity and individuals within it may conflict, either in dealing proactively with resolving disputes, or because both an entity and individuals have been named as defendants in litigation. An attorney may be asked by a government officer to assist in finding a way not to hire someone because of a disability, or to assist in firing an employee because of age, gender, or other inappropriate reasons. Advice may be sought on terminating the employment of someone complaining of sexual harassment, or who has filed a workers' compensation claim. Disregarding the possibility of

conflicts among the defendants with respect to culpability, problems in representation may arise because the interests of the organization as a whole are different from those of one or more of the constituents through which the corporation acts.

The problem is exacerbated because often it is unclear who the client is, particularly in the mind of the official who hired the attorney. The bill may be paid by a government check, but the official with whom counsel deals directly may expect personal loyalty. Obviously, then, the first step is to clarify who the client is, both in the attorney's mind and in the mind of the client, and to explain the difference, as is specifically required by Rule 1.13(d).

The Comments to Rule 1.13 state:

The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority.

**2. Conflicts between the entity and its constituent parts.** Assuming the governmental entity is the client, the Rules provide that if a lawyer representing an organization:

knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which might be imputed to the organization, and is likely to result in

substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

This is quite a standard! Not just any old law violation triggers the lawyer's duty to proceed as is reasonably necessary in the best interest of the organization--that is, the client. How does one decide? The Rule continues by providing that:

the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations.

The lawyer is required to take measures designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Action may include asking reconsideration of the matter; advising that a separate legal opinion of the matter be sought, and referral to higher authority in the organization. If all else fails, the lawyer may resign in accordance with Rule 1.6, relating to confidentiality of communications.

### **PART III: OTHER ETHICAL CONSIDERATIONS RELATING TO PUBLIC LAW**

In addition to the above, it is worth noting the Rules contain several other Comments relating specifically to government lawyers:

#### **A. Confidentiality and Rule 1.6.**

The **Comment to 1.6** states, in part:

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law.

The confidentiality rule applies not merely to matters communicated in confidence by the

client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

With respect to confidentiality, it is important to note that the evidentiary privilege applicable to government clients is different from that of private clients. Title 12 O.S. §2502, which describes the attorney client evidentiary privilege, provides, in pertinent part:

D. There is no privilege under this rule:

....

7. as to a communication between a public officer or agency and its attorney unless the communication concerns a pending investigation, claim or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation or proceeding in the public interest.

**B. Rule 1.11. Successive Government and Private Employment**

**Rule 1.11** provides:

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private 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 consents after consultation. 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 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.

(b) 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. 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.

(c) Except 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 attorney 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).

(d) 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.

(e) As used in this Rule, the term "confidential government information" means information which 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.

The Comments to this rule state:

This Rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.

A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the

prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

Paragraphs (a)(1) and (b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

Paragraph (b) operates only when the lawyer in question has knowledge of the information, which Rule means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

**C. Public officer's name on private firm stationery. Rule 7.5.**

The relatively recent case of *Oklahoma Bar Association v. Sheridan*, 84 P.3d 710, 2003 OK 80 (Okla.2003), addressed Rule 7.5, holding that an attorney's use of letterhead listing an assistant district attorney as a member of the firm did not violate the Rule, which prohibits the use of the name of a lawyer holding a public office in the name of a law firm in which the lawyer is not actively and regularly practicing law, because the assistant district attorney was not a public officer. His duties were defined by the district attorney and could be changed at the will of the district attorney.

The Court further held that for purposes of the Rule, a public office is defined by its characteristics. A public officer is required by law to be elected or appointed, has a legal designation or title, and exercises governmental functions assigned by the law.

**PART IV: CASES OF INTEREST**

**A. *Hart v. Blalock*, 932 P.2d 1124 (Okla.1997).**

This case dealt principally with allegations of defamation in relation to a judicial election campaign. The contrast in the Court's analysis of the defamation claim versus its statements about the role of professional ethics, however, is important. Compare Rule 8.2 of the Rules of Professional Conduct ("A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office") with the test of *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) and *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), as discussed below.

Hart, who was the incumbent candidate for district judge, brought a defamation action against his opponent, Blalock, seeking to recover for his opponent's publication of allegations that Hart had acted fraudulently in a prior real estate transaction. The Supreme Court held that Hart had failed to establish that Blalock had actual knowledge of the falsity of allegations, as required to maintain a defamation action against a public figure.

The Oklahoma Supreme Court expressed the issue as follows: "Was there evidence in the record that would have supported a jury finding that Ms. Blalock published defamatory falsehoods with a reckless disregard for whether they were false?"

For purposes of professional ethics, what is interesting about this decision is the analysis of the defamation claim in light of the virtually identical duty set forth in Rule 8.2 of the Rules of Professional Conduct. With respect to the defamation claim, the Court repeated the familiar analysis that in *New York Times*, the U.S. Supreme Court held that guaranteeing the public's interest in robust discussion of public affairs called for a rule in defamation cases that would require public officials to show that defamatory comments made about them were both false and made in reckless disregard of their falsity. Subsequently, in *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), the Court amplified the definition of "reckless disregard" to include a requirement that the statement was made, although the publisher "entertained serious doubts" concerning its truthfulness. *Hodges v. Oklahoma Journal Publishing Company*, 617 P.2d 191, 194-95 (Okla.1980).

The Court stated that Blalock had satisfied herself that Champion's statements were substantially true; that Blalock testified at trial that she continued to believe Champion; and that Hart's non-specific denial of Champion's charges was not evidence of Blalock's actual knowledge of the falsity of Champion's charges. The Court went on to say that the plaintiff's

failure to state facts that would specifically inform his opponent that the statements the opponent was making about the plaintiff were false defeated the plaintiff's suit.

Significantly, for purposes of possible application of Rules 8.2, the Oklahoma Supreme Court found that "several" of Champion's charges were true, but others were exaggerated or untrue. "The trial court observed, accurately in our estimation, that Mrs. Champion's charges were confusing. Mr. Hart, Ms. Blalock, Mr. Agee, and Mrs. Champion all placed political spin on the facts of the controversy so that the ads of the parties were filled with half-truths and self-serving statements. For example, Mr. Hart did everything in his power to paint Ms. Blalock, Mr. Agee, and Mrs. Champion as having published nothing but 'lies,' while Ms. Blalock and Mr. Agee strove with equal fervor to paint Mr. Hart as a fraudfeasor. Nevertheless, absent proof of actual knowledge of the falsity of Mrs. Champion's accusations, Ms. Blalock's republication of those accusations was not actionable.

After addressing the law of defamation, the Supreme Court went on to discuss the obligations of lawyers and judges in campaigns for judicial office. First, the court noted that Rule 8.2 of the Rules of Professional Conduct, Title 5, Ch. 1, App. 3-A, provides as follows:

- (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(Emphasis added.) The Court also cited Canon 7.B of the Code of Judicial Conduct referred to in Rule 8.2

The Court correctly noted that the defamation litigation was not the proper forum to pass on the conduct of the lawyers and judge involved in the subject judicial campaign. Complaints against any judge must be referred directly to the Chief Justice of this Court for action. Nevertheless, the Court, commenting on the possible application of the rules to the

same facts, seemingly suggested a standard different than that used in the defamation case, might be applied. The Court stated:

The foregoing statute and Rules require lawyers who are involved in campaigns for judicial office, whether as candidates, incumbents, or supporters, to be scrupulously honest in what they say about candidates. They must conduct themselves in a way that “maintains the dignity appropriate to judicial office.”

(citing 5 Okl.St.Ann. § 13; Rules of Prof.Conduct, Rule 8.2, 5 O.S.A. Ch. 1, App. 3-A; Code of Jud.Conduct, Canon 7, subd. B, 5 O.S.A. Ch. 1, App. 4; Disciplinary Proceedings Rule 1.6, 5 O.S.A. Ch. 1, App. 1-A.)

B. ***Wesley v. Don Stein Buick, Inc.***, 987 F.Supp.884 (D.Kan.1997).

The plaintiff in this civil action sought leniency of the court as a pro se litigant. Defendant raised what the court characterizes as “a legitimate concern” that the pleadings and submissions of the pro se plaintiff reflected a likelihood that she was an attorney or that an attorney served as a ghostwriter for her. Held: These concerns justified requiring the plaintiff to disclose whether she was or has been licensed to practice law in any jurisdiction in the United States, whether she has had legal training, and whether she has received or was receiving substantial legal assistance on her pleadings or in presentation of claims. Any attorney assisting her should be identified so as to enter an appearance as counsel of record and thereby accept accountability for participation pursuant to Rule 11.

C. ***State ex rel. Oklahoma Bar Association v. Worsham***, 957 P.2d 549 (Okla.1998).

Worsham, a member of the bar, represented two plaintiffs in suits against a licensed professional counselor. The clients had accused the counselor of sexual misconduct. In addition to their lawsuit, they had filed complaints related to the allegations with the counselor’s licensing board, resulting in revocation of the counselor’s license.

Before contacting Worsham, one client had talked about her allegations with a

detective for the local police department. The client testified that for her the possibility of filing criminal charges continued through the course of the civil litigation. Likewise, the second client had contacted an investigator with the district attorney's office but had decided not to press criminal charges at that time.

Worsham wrote letters containing settlement offers, addressed to the counselor's attorney and insurance company. In the letters she stated the settlement offers would remain open until a specific date, then, in one letter, stated that after that date "my client will proceed with trial preparation and will contact the District Attorney concerning the filing of criminal charges," and in the other letter, that if the case could not be settled "my client has advised she intends to have criminal charges filed[.]"

The Court's opinion states that the presiding master before the Professional Responsibility Tribunal (the PRT) noted, and the counsel for the OBA agreed, that the threat to file criminal charges was an empty threat because the district attorney had been previously contacted and could have filed charges without permission of the clients or Worsham. The PRT's findings were that Worsham was not making a threat but merely stating her clients' intent. The PRT found that neither the Rules of Professional Conduct nor the Rules Governing Disciplinary Proceedings specifically prohibit a lawyer from threatening criminal prosecution, and that the Respondent had not committed a crime so as to warrant discipline.

The OBA had agreed with the PRT that the threat of criminal prosecution is not specifically prohibited by rules that govern the practice of law, but posited that the attorney had violated state laws against blackmail, and that it is not "good practice to allow lawyers to use the threat of prosecution in litigating a civil matter."

The Court, in rejecting the OBA's position, noted that prior to 1988, the Code of

Professional Responsibility prohibited a lawyer from threatening to present criminal charges solely to obtain an advantage in a civil matter, but that the provision has no counterpart in the current Rules. The drafters of the new rules believed, the Court said, that the Model Rules' general provisions sufficiently covered "extortionate, fraudulent, or otherwise abusive threats." The Court quoted with approval from ABA Formal Ethics Opinion 92-363:

The Model Rules do not prohibit a lawyer from using the possibility of presenting criminal charges against the opposing party in a civil matter, to gain relief for a client, where the criminal matter is related to the client's civil claim, the lawyer has a well-founded belief that both the civil claim and the criminal charges are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process.

The Oklahoma Court noted that a threat of criminal prosecution without a basis in fact or law violates Rule 3.1 which prohibits the assertion of frivolous claims; Rule 4.1, the duty regarding truthfulness (unless the lawyer intends to proceed with the charges); Rule 4.4, prohibiting a lawyer from making a threat which has no substantial purpose other than to embarrass, delay, or burden a third person; and Rule 8.4, which prohibits a threat that a lawyer can influence a governmental official.

The Court held that the letters did not constitute blackmail because there was no evidence that the attorney intended to extort a settlement or any other thing of value by the letters. The attorney's motive, the Court said, was to get the litigation "back on track." The Court also said that the letters did not constitute blackmail because the threat did not "tend to disgrace or degrade the person accused." The Court reasoned that reporting the counselor's conduct once again to law enforcement would not have subjected him to additional disgrace or degradation since the counselor's license had already been revoked and the facts regarding the revocation had been published in the newspaper, the improper conduct had already been reported to law enforcement authorities, and the petition in the civil suit was already on file.

The charges against Worsham were therefore dismissed, and Worsham was exonerated.

### **Conclusion**

For years, I have quoted Alexis DeToqueville, who after touring the United States 150 years ago, observed:

In America there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers, consequently, form the highest political class. . . . As the lawyers form the only enlightened class whom the people do not mistrust, they are naturally called upon to occupy most of the public stations. They fill the legislative assemblies and are at the head of the administration; they consequently exercise a powerful influence upon the formation of the law and upon its execution.

While DeToqueville's comments were once appreciated as astute observations of American society, they are now merely ironic. Today the public's cynicism is not limited only to lawyers, but the administration of justice and government in general. Only a few years ago, a state legislator was elected on the platform, "I ain't no lawyer."

The topic of ethics cannot be limited to specific rules, or how they are to be interpreted. Ethics must include our way of thinking about ourselves, our jobs, our government, and our system of justice (whether administered in a court of law, an administrative tribunal, a congressional hearing, or the principal's office at the local grade school). Our approach to our own ethics is one avenue by which we may reassure society's collective sense of whether justice has been done. The underlying inquiry of ethical conduct should be: "Is it the right thing to do?"

An old Chinese proverb says, "It is easier to protect you feet with slippers than to carpet the whole earth." The single most important ingredient for ethics--whether in the practice of law, or in government--is the one most often overlooked. The best way to ensure ethical behavior is to attract ethical people to the practice of law, to government, or to

whatever our job or profession, to applaud their ethical conduct, and to openly disapprove of conduct that offends not only the explicit rules of ethics, but our own sense of what ethical conduct may be.