

ZEALOUS ADVOCACY: A CLIENT PERSPECTIVE

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A ZEALOUS ADVOCATE

“I was convinced that I would never require his advice, and that if I were in real need I would undoubtedly go to a younger and cleverer lawyer than he.”¹ With these words, Erwin Sommer, the protagonist in Hans Fallada’s book, *The Drinker*, said what many clients think. They aren’t looking for the smartest lawyer, the most respected lawyer, or even the most ethical lawyer. They want the lawyer who will do whatever it takes to win their case.

Government clients are no different. They too want what they perceive to be the best lawyer. Client perceptions in this regard may not always be consistent with the lawyer’s perception. To be sure, the Oklahoma Rules of Professional Conduct² state that “[a]s advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”³ But sometimes, “difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and the lawyer’s own interest in remaining an ethical person while earning a satisfactory living.”⁴ This paper addresses some of those ethical dilemmas facing lawyers who represent the government. And it does so from the perspective of a lawyer whose career has been devoted primarily to government law, but who now also serves as a member of a governing board, and therefore sees these issues a bit differently, from a client’s perspective.

¹ Fallada, Hans, *The Drinker*, Melville House Publishing, 2009: Brooklyn, at 258.

² 5 O.S., Ch. 1, App. 3-A. Throughout this paper, the Oklahoma Rules of Professional Conduct are sometimes referred to as “RPC”.

³ RPC, Preamble, ¶ 2.

⁴ RPC, Preamble, ¶ 9.

ETHICS AND THE GOVERNMENT ATTORNEY.

The practice of government law substantially differs in many respects from the practice of law in the private sector. The special status of governmental entities creates a special set of ethical dilemmas for their lawyers.

Government law is a noble calling. In the republican form of government the United States Constitution guarantees,⁵ we know that the government's lawyer actually is the people's lawyer. As the Oklahoma Constitution puts it, "All political power is inherent in the people; and government is instituted for their protection, security, and benefit, and to promote their general welfare[.]"⁶ The Preamble to the Oklahoma Rules of Professional Conduct, the ethical rules that apply to all lawyers in this state, specifically enjoins lawyers "to exemplify the legal profession's ideals of public service,"⁷ something which government lawyers do on a daily basis.

Of course, with special standing sometimes come special responsibilities. Even in the context of a lawyer's professional ethics, from time to time the rules apply differently between practitioners of public and private law. Indeed, the commentary contained in the "Scope" of the RPC 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. *** Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.⁸

⁵ U. S. Const., Art IV, § 4: "The United States shall guarantee to every State in this Union a Republican Form of Government[.]"

⁶ Okla. Const. Art. II, § 1.

⁷ RPC, Preamble, ¶ 7.

⁸⁸ RPC, Scope, ¶ 18.

In other words, government lawyers have both special ethical privileges and special ethical responsibilities.

Two areas of ethical concern are especially difficult for government attorneys. One is the attorney-client privilege. The other involves conflicts of interest. This article reviews these two issues. It also comment briefly on the issue the Open Meeting Act and Open Records Act in the context of the attorney-client privilege. Finally, it concludes with a section on the sometimes thorny issue of identifying who the government lawyer actually represents, particularly in light of the conflicts of interest issue.

THE GOVERNMENT LAWYER'S ATTORNEY-CLIENT PRIVILEGE DILEMMA.

The attorney-client privilege is a foundation stone of our legal system. Without it, our clients cannot trust us sufficiently to confide in us all that is necessary for us to represent them properly.⁹ Over a century ago, the United States Supreme Court put it this way:

The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.¹⁰

One court stated the necessary qualifications to assert the privilege as follows:

The privilege applies only if (1) the asserted holder of the privilege is or sought to be come a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the

⁹ Cf. RPC 1.1: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

¹⁰ *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.¹¹

Perry Mason, put it this way:

I'd rather have my hand cut off than betray the interests of a client.¹²

Yet, where the lawyer represents the government, the normal attorney-client privilege rules may not apply.

In Oklahoma, a statute creates and defines the evidentiary rule regarding the attorney-client privilege. The specific statute is located in the Oklahoma Evidence Code. According to that provision:

- B. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
1. Between the client or a representative of the client and the client's attorney or a representative of the attorney;
 2. Between the attorney and a representative of the attorney;
 3. By the client or a representative of the client or the client's attorney or a representative of the attorney to an attorney or a representative of an attorney representing another party in a pending action and concerning a matter of common interest therein;
 4. Between representatives of the client or between the client and a representative of the client; or
 5. Among attorneys and their representatives representing the same client.¹³

Subsection A defines the key terms "attorney," "client," "representative of an attorney," "representative of the client," and "confidential."

¹¹ *U.S. v. United Shoe Machinery Co.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950).

¹² Gardner, Erle, *The Case of the Singing Skirt*, Ballentine Books, 1992 (originally published in 1959): New York, at 98.

¹³ 12 O.S. § 2502.

Similarly, we lawyers all know that, to determine our ethical obligations to maintain the confidentiality of client information, we also look to the terms of RPC 1.6, which provides:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) to prevent reasonably certain death or substantial bodily harm;
 - (2) to prevent the client from committing:
 - (i) a crime; or
 - (ii) a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
 - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services, provided that the lawyer has first made reasonable efforts to contact the client so that the client can rectify such criminal or fraudulent act, but the lawyer has been unable to do so, or the lawyer has contacted the client and called upon the client to rectify such criminal or fraudulent act and the client has refused or has been unable to do so;
 - (4) to secure legal advice about the lawyer's compliance with these Rules;
 - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
 - (6) as permitted or required to comply with these Rules, other law or a court order.

Yet, we quickly learn that all is not necessarily as it at first appears. The Comments to RPC 1.6 begin the process of elucidation. They state:

The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply 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, for example, applies not only 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.¹⁴

And, in the government context, the Comments state:

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.¹⁵

So here we see the first hint that there may be at least two¹⁶ different areas of law that provide an answer – not only the lawyer’s professional ethics, but also the laws of evidence.

The problem for the municipal attorney is that the Oklahoma Evidence Code, the law that creates the evidentiary attorney-client privilege, also restricts the privilege insofar as the

¹⁴ RPC 1.6, Comments, ¶ 3.

¹⁵ RPC 1.6, Comments, ¶ 4A.

¹⁶ In 2007, Oklahoma amended its Rules of Professional Conduct. One amendment involved RPC 1.6, Comments, ¶ 3, which, *inter alia*, eliminated the reference to “two related bodies of law” and replaced it with the innumerate “related bodies of law.” Despite this broadening language, the Comments continue to omit other bodies of law that apply in the government setting, such as the Oklahoma Open Meeting Act, 25 O.S. §§ 301 *et seq.*, and the Oklahoma Open Records Act, 51 O.S. §§ 24A.1 *et seq.* Note also that RPC 1.11 contains special rules regarding successive Government and private employment by an attorney and contains its own definition of the term “confidential government information:”

(c) As used in this Rule, the term “confidential government information” means information that has been obtained under the governmental authority and which, at the time this Rule 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.

government is concerned. According to subparagraph D of section 2502:

(D) There is no [attorney-client] 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.¹⁷

In other words, there is no privilege unless two conditions exist: (1) there is an ongoing action and (2) disclosure will seriously impair the ability of the public entity making the claim to conduct the action.

The language of the provision seems to indicate that the burden is on the party claiming privilege to show that the prerequisite conditions exist. This understanding also accords with the general rule that a person asserting a privilege “has the burden of establishing its claim of privilege or protection; *a baldfaced assertion is insufficient.*”¹⁸ Moreover, one who asserts a privilege must make a clear showing that it applies.¹⁹

Obviously, there are significant consequences to this limitation on what would otherwise be a clear case, in the non-governmental context, of the application of the attorney-client privilege. These include discovery in the course of litigation, the simultaneous representation of a governmental client and another, and even the confidentiality of governmental communications under special statutes.

DISCOVERY OF CONFIDENTIAL COMMUNICATIONS IN GOVERNMENT LITIGATION.

Discovery strategies in the course of litigation may change based upon the unusual nature of the attorney-client privilege in the government setting. Note that, under both federal and state

¹⁷ 12 O.S. § 2502(D)(7).

¹⁸ *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 542 (10th Cir. 1984) (emphasis added).

¹⁹ 748 F.2d at 542.

law, discovery is broadly available “regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action” under state law,²⁰ or “regarding any nonprivileged matter that is relevant to any party's claim or defense,” under federal law. In other words, discovery of privileged matters is simply not allowed. However, the determination of whether a privilege applies depends on the law of privilege.

The Federal Rules of Evidence now contain two provisions concerning the law of privilege. One, the general rule, is a remarkably unhelpful reference to state law:²¹

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

The other rule, added only two years ago, is an even less helpful rule that merely limits certain waivers of the attorney-client privilege.²² The prudent attorney would do well to assume that it will not broaden the relatively narrow provisions of section 2502 insofar as the government's attorney-client privilege is concerned.

Because the scope of the attorney-client privilege in the governmental attorney context is narrower, the scope of discoverable evidence is broader. Thus, in conducting the business of the government, the municipal lawyer must be aware that substantial portions of the discussions between attorney and client may not be privileged, and therefore will not be protected from discovery, even though, if the client were a private person the information would clearly be outside the scope of discoverable matters. This lack of protection has several serious

²⁰ 12 O.S. § 3226(B)(1).

²¹ Rule 501, Fed. R. Ev.

²² Rule 502, Fed. R. Ev.

consequences.

OPEN MEETINGS/OPEN RECORDS.

Under the Oklahoma Open Meeting Act, executive sessions may be held for several reasons. One such reason tracks the attorney-client privilege exception:

(B) Executive sessions of public bodies will be permitted only for the purpose of:

- (4) Confidential communications between a public body and its attorney concerning a pending investigation, claim, or action if the public body, with the advice of its attorney, determines that disclosure will seriously impair the ability of the public body to process the claim or conduct a pending investigation, litigation, or proceeding in the public interest.²³

Given how closely this provision tracks Section 2502(D), it would be advisable to make communications which the attorney desires to cloak with the confidentiality of the attorney-client privilege in the course of such executive sessions. Given that courts pay great deference to findings by duly authorized governmental entities,²⁴ such a determination at the time of the executive session should provide a strong basis for the subsequent claim that information exchanged in the executive session is privileged.

The Oklahoma Open Records Act provides for the confidentiality of certain litigation files:

Except as otherwise provided by state or local law, the Attorney General of the

²³ 25 O.S. § 307(b)(4).

²⁴ See, e.g., *Gladstone v. Bartlesville Ind. Sch. Dist. No. 30 (I 30)*, 2003 OK 30, ¶ 12, 66 P.3d 442, 447 (“Rational-basis scrutiny [under Equal Protection Clause] is a highly deferential standard that proscribes only that which clearly lies beyond the outer limit of a legislature’s power”); *Sublett v. City of Tulsa*, 1965 OK 78, ¶ 32, 405 P.2d 185, 195 (municipality’s legislative determinations entitled to great weight); *Riedt v. City of McAlester*, 1953 OK 286, ¶ 10, 262 P.2d 152, 154 (certain municipal legislative determinations deemed conclusive); But see *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 411-413 (1978) (in an antitrust case, the Supreme Court stated that municipal action is not entitled to same deference as state action, because, unlike the state, a city is not a sovereign).

State of Oklahoma and agency attorneys authorized by law, the office of the district attorney of any county of the state, and the office of the municipal attorney of any municipality may keep its litigation files and investigatory reports confidential.²⁵

Note, however, the introductory qualifying phrase. Obviously, one such other state law is section 2502(D).

SIMULTANEOUS REPRESENTATION.

The governmental exception to the attorney-client privilege affects the advisability of engaging in the simultaneous representation of the government and another client. If the other client is not the government, there may be a different standard as to confidentiality of client communications with counsel.

RPC 1.7 contains the general standard regarding conflicts of interest:

- (a) A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same

²⁵ 51 O.S. § 24A.12.

litigation or other proceeding before a tribunal; and

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

This rule raises three concerns for city attorneys:

1. May one lawyer simultaneously represent both the city and some of its employees;
2. May one lawyer simultaneously represent both the city and some of its related entities; and
3. What is the proper relationship between the lawyer who is paid for legal services from one source while representing a different person or entity.

Underlying these concerns, as well as RPC 1.7 as a whole, is the need to identify the client.

Particularly in the municipal context, determining the identity of the client is paramount.

RPC 1.7 is much more permissive than was Canon 5 of the Model Code. The ethical considerations under Canon 5 had indicated that “[a] lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests.”²⁶ RPC 1.7 liberalizes this flat prohibition.

According to the Comment to RPC 1.7:

A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question.²⁷

Especially in the tort and tort related cases in which cities so often seem enmeshed, the problem of simultaneous representation may be considerable.

Much of the litigation involving municipal attorneys in simultaneous representation

²⁶ EC 5-15.

²⁷ RPC 1.7, Comments, ¶ 23.

claims has arisen under the Civil Rights Act of 1871,²⁸ where one attorney jointly defends both the government as an entity and its employees. In *Dunton v. County of Suffolk*,²⁹ the Second Circuit held that the simultaneous representation of a county and its police officer in an excessive force case created a conflict of interest so great as to deprive the individual defendant of a fair trial. Defense counsel provided an absolute defense for his entity client by subverting the immunity claim of his individual client. He urged at trial that the officer acted not as a police official, but instead as an irate individual.

Since *Dunton*, most reported decisions have limited the Second Circuit's holding. Courts have uniformly agreed that there is no *per se* requirement of multiple attorneys for multiple defendants.³⁰ Courts have also generally agreed that if the government agency admits that the employee acted within the scope of employment, no disqualifying conflict exists.³¹

The nature of the litigation, and the applicable substantive law, may be determinative. There is no single answer applicable in all contexts.

The potential for a disqualifying conflict in section 1983 litigation is especially strong. This results from the differing bases for liability for the entity and the individual defendant. In one case, the Tenth Circuit stated:

²⁸ 42 U.S.C. § 1983.

²⁹ 729 F.2d 903 (2nd Cir. 1984), *modified on other grounds*, 748 F.2d 69 (2nd Cir. 1984).

³⁰ See, e.g., *Gordon v. Norman*, 788 F.2d 1194 (6th Cir. 1986) (risk of conflict exists, but no conflict ever realized); *Coleman v. Smith*, 814 F.2d 1142 (7th Cir. 1987) (dual representation not improper if there is no divided loyalty); *Ross v. U.S.*, 910 F.2d 1422 (7th Cir. 1990) (recognizing that some conflicts are unavoidable and that separate counsel may be required); *Lee v. Hutson*, 600 F. Supp. 957 (N.D. Ga. 1984), *aff'd in part, rev'd in part*, 810 F.2d 1030 (11th Cir. 1987) (defense counsel must explain implications of joint representation to all defendants).

³¹ See, e.g., *Smith v. City of New York*, 611 F. Supp. 1080 (S.D.N.Y. 1985) (no disqualifying conflict where entity admits that officials acted in discharge of their public duties); *Manganella v. Keyes*, 613 F. Supp. 795 (D. Conn. 1985) (state statute holding public employees harmless from negligent, wanton, willful, malicious or *ultra vires* acts mitigates harm from possible conflict). But cf. 51 O.S. § 160 (government has right of recovery against employee who acted outside the scope of employment).

Given the potential conflict between the defenses available to a government official sued in his individual and official capacities, we have admonished that separate representation for the official in his two capacities is a “wise precaution.”³²

Although the court rejected the existence of a *per se* rule of disqualification, it cited *Dunton* with approval, and held that “if the potential conflict matures into an actual material conflict, separate representation would be required.”³³

The United States Supreme Court has held that a local government has no liability for the acts of its employees under the doctrine of *respondeat superior*. “Instead, it is when execution of a government’s policy or custom [] inflicts the injury that the government as an entity is responsible under § 1983.”³⁴ Indeed, the Court has stated that it is impermissible to “infer the existence of a city policy from the isolated misconduct of a single, low-level officer, and then to hold the city liable on the basis of that policy.”³⁵ The first inquiry “is the question of whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation.”³⁶ Local governing bodies will “be held responsible when, and only when, their official policies cause their employees to violate another person’s constitutional rights.”³⁷

The problem is remoteness. If the government does not have a deficient policy, it has no liability under Section 1983. This is so even though an employee, acting within the scope of employment, deprives a person of some federally protected right.³⁸

³² *Johnson v. Bd. of Cty. Comm’rs for Cty. of Fremont*, 85 F.3d 489, 493 (10th Cir. 1996), cert. den’d sub nom. *Greer v. Kane*, 519 U.S. 1042 (1996), quoting *Medina v. Housing Auth. of San Miguel Cty.*, 974 F.2d 1345, 1992 WL 218990 (10th Cir. 1992) (unpublished disposition).

³³ *Johnson*, 85 F.3d at 493.

³⁴ *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978).

³⁵ *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 831 (1985) (Brennan, J., concurring in the judgment).

³⁶ *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989).

³⁷ *St. Louis v. Praprotnik*, 485 U.S. 112, 122 (1988).

³⁸ *D.T. by M.T. v. Independent School Dist. No. 16 of Pawnee Cty., Okla.*, 894 F.2d 1176 (10th Cir. 1990).

An individual capacity suit against a government official does not create entity exposure. To prove the case against the government, the civil rights plaintiff must demonstrate a direct causal link between a municipal policy and the alleged harm. No such requirement, however, applies to individual capacity suits. Only the normal tort requirements of causation apply. Thus, the plaintiff must prove that the individual defendant committed the unconstitutional act, and that the bad act caused the plaintiff damage.

Unlike the government, however, an individual defendant may claim absolute or qualified immunity.³⁹ “[Q]ualified immunity protects ‘all but the plainly incompetent or those who knowingly violate the law.’”⁴⁰ A public official has liability only if the law was clearly established at the time of the violation.⁴¹

Where the individual defendant plainly qualifies as the government’s policy maker, the law will likely impute the challenged action to the entity.⁴² In most such situations, it is unlikely that a conflict exists. This is so because of RPC 1.13, which states:

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

* * *

- (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization’s consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

³⁹ *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

⁴⁰ *Anderson v. Creighton*, 483 U.S. 635, 638 (1987), quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

⁴¹ *Davis v. Scherer*, 468 U.S. 183 (1984).

⁴² Cf. *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (single act of person whose actions represent city policy suffices to impose government liability).

The import of RPC 1.13 is straightforward. The Rules adopt the entity approach to determining the duties of an entity’s attorney. Thus, the lawyer who represents the government does not represent any individual, but rather the entity “acting through its duly authorized constituents.” Unfortunately, as the comments accompanying RPC 1.13 not so helpfully testify, “[d]efining precisely the identity of the client and prescribing the resulting obligations of such lawyers *may be more difficult in the government context and is a matter beyond the scope of these Rules.*”⁴³ That this is true should not be surprising.

The conceptual background of RPC 1.13 is a synthesis of two areas of private business law – corporate law and the law of agency. Governments, however, differ significantly from private corporations. Virtually every branch of government law recognizes that there are times that a public entity exercises quasi-business⁴⁴ functions. But to apply business law to the public setting often proves unsatisfactory. Indeed, the comments make this clear:

Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for the 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.⁴⁵

This is one of those situations.

The comments to RPC 1.13 also state:

Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purpose of this Rule.⁴⁶

⁴³ RPC 1.13, Comments, ¶ 9 (emphasis added).

⁴⁴ I.e., proprietary. See, e.g., 51 O.S. § 166 (distinction between governmental and proprietary functions is preserved under the Governmental Tort Claims Act); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (calling into question the validity of a governmental/proprietary distinction).

⁴⁵ RPC 1.13, Comments, ¶ 9.

⁴⁶ *Id.*

In a civil rights action, the words, “duly authorized constituent,” certainly include those with policymaking authority for the challenged activity. Other, lower level employees also occasionally qualify.

In some contexts, such as police misconduct litigation, however, the likelihood of a conflict is strong. This is so because the standard for holding an officer individually liable includes some degree of ill will. If the police officer has liability at all, both actual and punitive damages may be appropriate. If the court makes that type of finding, it almost certainly must mean that the officer acted individually, not officially.⁴⁷

In other types of lawsuits, other rules of practice might apply. Consider, for example, litigation under the Governmental Tort Claims Act.⁴⁸ Under that law, the state and its political subdivisions have liability for the torts committed by their employees acting within the scope of their employment. They have no liability, however, for acts committed by employees acting outside the scope of their employment.⁴⁹ Employees, on the other hand, have absolute sovereign immunity for their own torts if they committed the torts while acting within the scope of their employment.⁵⁰

Tort claims litigation would seem to present a fairly straightforward situation for the municipal lawyer’s ethical consideration. The Act is explicit. It specifically bars the prosecution

⁴⁷ Cf. *Houston v. Reich*, 932 F.2d 883 (10th Cir. 1991) (concerning definition of “scope of employment” under the Governmental Tort Claims Act, and its relationship to section 1983 litigation); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (municipalities are immune from Section 1983 liability for punitive damages); *Smith v. Wade*, 461 U.S. 30 (1983) (individuals have section 1983 exposure to punitive damages for their willful or malicious conduct).

⁴⁸ 51 O.S. §§ 151 *et seq.*

⁴⁹ 51 O.S. § 153(A). See also 51 O.S. § 152(11) (defining the term, “scope of employment”).

⁵⁰ *Id.* See also 51 O.S. § 152.1(A).

of claims against an employee who was acting within the scope of employment.⁵¹ This prohibition would appear to create a fairly easy determination regarding whether to represent several clients simultaneously.⁵²

Liability of the government or the individual employee should be an either/or proposition. In other words, if the government is liable, the individual actor cannot be liable. Conversely, if the individual acted in an individual capacity, the government did not act. Indeed, this dichotomy is merely an extension of the rule that the government cannot act unless it is for the purpose of benefiting the public health, safety or welfare.

Looks, however, can be deceiving. Courts have defined the term, “scope of employment,” as often requiring a jury determination.⁵³ This reading can place the defense lawyer between a rock and a hard place. The lawyer who successfully represents the entity may face allegations of improper conflict of interest where the individual defendant is liable.⁵⁴ Because the primary duty is to represent the government as an entity, the government attorney must determine the advisability of representing multiple defendants from both an ethical and a government powers perspective.⁵⁵

The existence of a conflict does not end the matter. In such situations, disqualification

⁵¹ 51 O.S. § 163(c).

⁵² Cf. 11 O.S. §§ 23-101 *et seq.* (city attorney defends employees in certain civil action).

⁵³ See, e.g., *Holman by and through Holman v. Wheeler*, 1983 OK 72, 677 P.2d 645 (superseded on other grounds by statutory amendment).

⁵⁴ Cf. *Houston v. Reich*, 932 F.2d 883 (10th Cir. 1991) (city has no duty to pay judgment against individual employee who acted outside the scope of employment). See also 51 O.S. § 162 (concerning duty to indemnify employee for federal law violations).

⁵⁵ The officially adopted comment to RPC 1.7 states:

[S]imultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties’ testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question.

RPC 1.7, Comments, ¶ 23.

may nevertheless be unnecessary. This is so because of what is perhaps the most significant reform in the Rules of Professional Conduct – the ability of clients to give informed consent.⁵⁶

Of course, informed consent alone does not make a simultaneous representation appropriate.⁵⁷ In addition, the representation must not be prohibited by law, the representation cannot involve the assertion of claims by one client against the other, and the lawyer must reasonably believe “the lawyer will be able to provide competent and diligent representation to each affected client.”⁵⁸

Moreover, use of the word, “reasonably,” implies that the determination of whether the representation of a client will be adversely affected is determined on an objective basis. That is, it is not only the individual lawyer’s determination, but also that of a reasonably prudent and competent lawyer.⁵⁹

Interestingly, when the Rules revisions went into effect, missing was the prior injunction of the Comments that “when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.” It was replaced by the simple statement that “some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.”⁶⁰

⁵⁶ Note also that the Second Circuit decided *Dunton* under the Code of Professional Responsibility. Given the relative liberality of the Rules of Professional Conduct, it is at least debatable whether the Second Circuit would have decided the case differently had the newer code of conduct been the applicable law.

⁵⁷ Cf. *State ex rel. Oklahoma Bar Association v. McNaughton*, 1986 OK 25, 719 P.2d 1279 (holding under Code of Professional Responsibility that simultaneous representation of criminal defendant charged with lewd molestation and of minor victim and her family in matters connected with the prosecution is improper, regardless of consent).

⁵⁸ RPC 1.7(b).

⁵⁹ See RPC 1.0(j) (definition of “reasonable” and “reasonably”).

⁶⁰ RPC 1.7, Comments, ¶ 14.

Another change in revised RPC 1.7 was the replacement of the requirement of “consultation” regarding the “implications of the common representation and the advantages and risks involved” with the concept of “informed consent.” As used in the Rules of Professional Conduct, the term “informed consent” “denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”⁶¹ A further explanation of what “informed consent” might mean also appears in RPC 1.4:

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional conduct or other law.

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

These revisions further liberalize the RPC. Now, for example, the Comments make clear that not only the benefits of separate representation, but also the burden of additional costs, are proper factors “in determining whether common representation is in the client's interests.”⁶² Nevertheless, even under these less restrictive rules, “[i]nformed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably

⁶¹ RPC 1.0(e) (definition of “informed consent”).

⁶² RPC 1.7, Comments, ¶ 19.

foreseeable ways that the conflict could have adverse effects on the interests of that client.”⁶³

Even under these more liberal rules, the requirement is of a forthright explication, detailing all of the benefits and detriments of the proposed joint representation. This can be tricky. It can involve anticipation of all sorts of potential events, from trial strategies to settlement offers.

Additionally, the lawyer must evaluate the differing rules relating to privilege. Now, the Comments make this explicit. They say the obvious, that “a particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege.”⁶⁴

Compare the situation of simultaneous representation with that of joint defense. Where considering whether to enter into a joint defense agreement, the prudent attorney would certainly evaluate whether communications will remain privileged. So too here. The prudent lawyer will determine whether communications with one client will be used against the other client, and must advise both clients as to the advantages and disadvantages of the common representation in this regard.

Obtaining written consent, formerly a preference, is now mandatory.⁶⁵ The consent should be clear and succinct. The requirement that the consent be “confirmed in writing” “denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent.”⁶⁶ The writing should “impress upon clients the seriousness of the decision the client is being asked to make and to

⁶³ RPC 1.7, Comments, ¶ 18

⁶⁴ RPC 1.7, Comments, ¶ 30. See also Comments, ¶¶ 18 (“informed consent” requires information on “the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved”) and 31 (explaining effect of common representation on the duty of confidentiality).

⁶⁵ RPC 1.7(b)(4)

⁶⁶ RPC 1.0(b) (definition of “confirmed in writing”).

avoid disputes or ambiguities that might later occur in the absence of a writing.”⁶⁷

In cases where the potential conflict matures in the course of the litigation, the Tenth Circuit has held:

[W]e embrace the Second Circuit’s procedure whereby counsel notifies the district court and the government defendant of the potential conflict, the district court determines whether the government defendant fully understands the potential conflict, and the government defendant is permitted to choose joint representation. In addition, the defendant should be told it is advisable that he or she obtain independent counsel on the individual capacity claim. We reinforce that, as with many issues relating to the relationship between attorney and client, the crucial element is adequate communication.⁶⁸

Although the Tenth Circuit’s *dictum* arose before the amendments to the Rules of Professional Conduct, city attorneys should be careful not to ignore these statements

IDENTIFYING THE CLIENT.

Who is the city attorney’s client? Which privilege rules apply to communications between the municipal lawyer and individuals who work for the government – the rules that apply to normal clients, or the exception that applies “to a communication between a public officer or agency and its attorney?”

If, for example, a city attorney learns from a city staff member certain confidential matters which are contrary to the interests of the city, are the statements subject to disclosure? On the one hand, the Rules of Professional Conduct appear to dictate that the client is the entity, not any individual. On the other hand, where the attorney has had regular contact with the official, the attorney may not be allowed to represent the city in proceedings against the

⁶⁷ RPC 1.7, Comments, ¶ 20.

⁶⁸ *Johnson v. Bd. of Cty. Comm’rs of the Cty. for Fremont*, 85 F.3d at 493, citing *Kounitz v. Slaatten*, 901 F. Supp. 650, 659 (S.D.N.Y. 1995) (denying plaintiff’s motion to disqualify “unless, within ten days, the County Attorney provides an affidavit from either the municipality stating that it does not deny that the individual defendants were acting within the scope of their public employment and in the discharge of their duties, or from each individual defendant stating that she fully understands the nature of the conflict inherent in joint representation of herself in her individual capacity and of the municipality.”).

employee.⁶⁹

Does the city attorney represent city management or the city council?⁷⁰ In planning for litigation, the city attorney usually must confer with city management. If, however, the employee with whom the attorney is conferring is not a duly authorized constituent, and therefore not a client, what are thought to be confidential conversations may be subject to disclosure via discovery or otherwise.⁷¹ Furthermore, in those situations where city management is in conflict with the city council, the city attorney must remember the identity of the client so as to safely navigate through the hazards of the conflict of interest rules.

Individual city council members rely so heavily on the advice of the city attorney that they often consider the incumbent of that position to be their personal lawyer as well. Of course, that is not so. Indeed, city council members often find themselves in opposition to other members, or even to the entire city council or to city staff. Here, too, the attorney must remember that the client is not any individual, but rather the city as an entity.⁷²

CONCLUSION.

Among the most eminent lawyers in American history were two Whig politicians. Both had something to say about lawyers and ethics. Daniel Webster, the two time Senator from Mas-

⁶⁹ See *Perillo v. Advisory Committee on Professional Ethics*, 83 N.J. 366, 416 A.2d 801 (1980).

⁷⁰ Conflicting substantive laws confuse the matter. For some purposes, the city attorney is supposed to act like the state's attorney general. See, e.g., 11 O.S. §§ 15-101 *et seq.* (role of city attorney in initiative and referendum process). Other statutes require the city attorney to defend city employees at the direction of the city council. See, e.g., 11 O.S. §§ 23-101 *et seq.* (city attorney defends employees in certain civil action). Still others make the city attorney a department head, answerable to the city manager. See, e.g., 11 O.S. § 10-119 (council-manager form of government). At times, the city attorney may even represent boards other than the city council. See, e.g., 51 O.S. § 50-108 (city attorney as legal advisor to local police pension board).

⁷¹ Cf. 12 O.S. § 3226; Rule 26, Fed. R. Civ. Proc.; 25 O.S. §§ 301 *et seq.*; 51 O.S. §§ 24A.1 *et seq.*

⁷² Cf. *Krahmer v. McClafferty*, 282 A.2d 631 (Del. 1971); *Silver v. Downs*, 493 Pa. 50, 425 A.2d 359 (1981).

sachusetts and two time Secretary of State, said:

An eminent lawyer cannot be a dishonest man. Tell me a man is dishonest, and I will answer he is no lawyer. He cannot be, because he is careless and reckless of justice; the law is not in his heart, is not the standard and rule of his conduct.⁷³

The other lawyer was a one term Whig Congressman from Illinois who twice fell short of becoming a United States Senator. Addressing a group of young members of the bar, this failed politician said:

There is a vague popular belief that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confidence and honors are reposed in and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty is very distinct and vivid. Yet the impression is common, almost universal. Let no young man choosing the law for a calling for a moment yield to the popular belief – resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer.⁷⁴

The Great Emancipator, Abraham Lincoln, hit the nail on the head.

⁷³ As quoted in Mencken, *A New Dictionary of Quotations on Historical Principles from Ancient & Modern Sources*, 19th Printing, Alfred A. Knopf: New York, 2001 (originally published in 1942), at 668.

⁷⁴ As quoted in Shapiro, *The Oxford Dictionary of American Legal Quotations*, Oxford University Press: New York, 1993, at 128.