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What Local Government Lawyers Need to Know About Identifying and Defining Their Client: An Ethical and Practical Approach

About the Speaker

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- Tort litigation, commercial litigation and appeals
- Focus in government entity defense

Who is my client?

- Municipal entity as a whole?
- City council?
- City manager?
- Mayor?
- Supervising attorney?
- Department head?
- Various city boards, departments or commissions?
- City employees?
- Public at large?

Why is defining the client important?

- Once a person or organization is determined to be a client, the lawyer's ethical and fiduciary obligations kick in:
  - Confidentiality
  - Loyalty (avoidance of conflict of interest)
  - Diligence
  - Zeal
  - Competence, etc.
- Identifying the client allows us to know to whom we owe our ethical duties

Outline of Today's Discussion

- Questions of client identity are sure to arise in at least the following 3 areas:
  - Decision making authority – whose instructions must I ethically follow?
  - Duty of confidentiality and attorney-client privilege
    - Scope of A-C privilege with respect to communications with entity constituents
    - Which constituents can claim/invoke privilege
  - Duty of loyalty and avoidance of conflicts of interest
    - How does employee or official malfeasance affect my duty of loyalty?
    - What is my role as an attorney for the government when I learn of malfeasance?
- Hypothetical and real life examples based on case law
- Practical suggestions

Disclaimer!

- Unsettled issues
- Variable/conflicting decisions from jurisdiction to jurisdiction
- Each local government client is unique
- No "black and white" answers
- In practice, look foremost to guidance from Utah Supreme Court and Utah Rules of Professional Conduct
- Today's discussion will consider other authorities

Problems in Defining the Client

- A municipal lawyer at various times serves different interests within the municipal organization
- Allegiance to varying interests within the city is governed by:
  - constitutional provisions
  - statutes
  - ethical rules
  - local ordinances
  - Regulatory obligations
  - Practice, history and custom of a given entity
  - Individual expectations
- Ethical rules assume lawyer is representing an individual client or an uncomplicated organization with undivided unity in goals/policy
- Rules don't always give concrete guidance

Sources of Authority for Answering the Question, Who's My Client?

- Ethical rules and ethics opinions
  - Utah Rules of Professional Conduct
  - Restatement of Law Governing Lawyers
  - ABA Model rules
  - Ethics opinions
- Case law interpreting ethical rules
  - Not a wealth of case law
  - Variable and conflicting decisions
- Law review articles and academic literature

The Starting Point:

Rule 1.13 of the Utah Rules of Professional Conduct

"Read the Rule"

- Chapter 13 of the Utah Judicial Council Rules of Judicial Administration contains Utah Rules of Professional Conduct
- Utah Rules of Professional Conduct dictate the ethical obligations of attorneys in Utah
- Under the Rules, attorneys' ethical responsibilities are owed to the client and the client alone

Rule of 1.13 "Organization as a Client" – Applies to Government Lawyers

- Rule 1.13 of the Utah Rules of Professional Conduct governs attorneys' representation of an "organization"
- Subparagraph (h) specifically applies this rule to government lawyers
  - A government attorney "shall be considered for the purpose of this rule as representing an organization."
- Rule 1.13 controls government attorneys' representation of the government, including local government

Rule 1.13 – A clear-cut answer?

- When providing legal services, "[t]he government lawyer's client is the governmental **entity** except as the representation or duties are otherwise required by law."
- However, an organization or entity cannot act on its own accord, no "**literal**" direct interaction with legal entity
  - Thus, Rule 1.13 contemplates that an attorney "represents the organization acting through its duly authorized constituents"

Rule 1.13 – It's Not So Simple

- The rule recognizes an exception to the general rule that the entity as a whole is the lawyer's client:
  - **"…except as the representation or duties are otherwise required by law**."
- What does this mean?
- Other laws (e.g., provisions of Utah Code, city ordinances, administrative rules) and can vary the requirements of Rule 1.13
- "[T]he relationship between the government lawyer …and the client may be further defined by statute, regulation, ordinance or other law. This Rule does not limit that authority."

Rule 1.13 – Special Status for Government Lawyers

- Comment 13a to Rule 1.13 provides additional guidance for the government attorney
- "[D]efining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context."
- A government lawyer "may have a legal duty to question the conduct of government officials and perform additional remedial or corrective actions including investigation and prosecution."
- We'll come back to this issue when we discuss conflicts of interest and the duty of loyalty

Other Laws May Vary Rule 1.13's Dictate that the Entity is the Client

- Consider sources of other laws pertaining to issue of client ID
- Utah Code § 10-3-928 – Powers of city attorneys
- Utah Code § 10-3b-101, *et seq.* – Forms of municipal government, and form your city has adopted
- Municipal ordinances
  - Set forth functions of office of city attorney and roles of various other players in city government
  - *E.g.*, Salt Lake City Ordinance § 2.08.040 (Office of City Attorney); Provo City Ordinance § 2.10.110 (Office of Legal Services)
- Regulations and rules
- Consider how laws applicable to your situation affect the determination of client identity

Utah Supreme Court Weighs In:

Salt Lake County Commission v. County Attorney Douglas R. Short

Utah Supreme Court "Weighs In:" *Salt Lake County Comm'n v. Short*

- *Salt Lake County Commission v. Salt Lake County Attorney Douglas R. Short*, 1999 UT 73, 985 P.2d 899
- USC interprets Rule 1.13 within the context over a dispute between the SL County Attorney and the SL County Commission
- County Attorney took position that he was attorney for COUNTY *only*, and did not represent County Commission or its individual members
- Dispute arose out of County's contribution of $ to charitable organizations
- County Attorney opposed such expenditures, claiming they were improper

Utah Supreme Court "Weighs In:" *Salt Lake County Comm'n v. Short*

- County Commission (through independent counsel) filed declaratory judgment action, seeking a declaration that County Attorney had attorney-client relationship with Commission and individual commission members
- County Commission and County Attorney filed cross-motions for SJ
- Trial court found that County Attorney represented 1) County, 2) County Commission and 3) every single individual commissioner, and that County attorney had attorney-client relationship with each
- Trial court also found that expenditures to charity were valid

Utah Supreme Court "Weighs In:" *Salt Lake County Comm'n v. Short*

- USC **Reversed** the District Court, analyzing Rule 1.13 (*Id.* at ¶ 15)
- "…in the absence of any contradictory statutes, the County Attorney is the legal adviser only to the County as an entity. The County Attorney represents the County, which acts through the County Commissioners, agents of the County."
- "Critical to the correctness of this analysis is whether there are any statutes that alter the relationship of the County Attorney to the County or add duties beyond those set out in the rules." (*Id.* at ¶ 16) (citing Rule 1.13)
- USC concluded that there are no such other laws varying general rule
- **disagreed** with trial court's conclusion that statutes governing county attorneys "broaden the County Attorney's role and [] establish[] an attorney-client relationship between the County Attorney and the Commission."

Utah Supreme Court "Weighs In:" *Salt Lake County Comm'n v. Short*

- "There is certainly nothing explicit in the statutes suggesting that a county attorney has an attorney-client relationship with each individual commissioner, or with the commission as a group of individuals."
- The statutes "merely state[] the necessary effect of this relationship — the County Attorney does act under the direction of the Commission, the agent of the entity, when handling litigation to which the entity is a party."
- Although the statutes "specify duties of the County Attorney relating to officers and agents of the County and its subdivisions, [] those duties are in no way inconsistent with the basic scheme of Rule 1.13."
- "The County Attorney has an attorney-client relationship only with the County as an entity, not with the Commission or the individual Commissioners **apart from the entity on behalf of which they act.**"

Utah Supreme Court "Weighs In:" *Salt Lake County Comm'n v. Short*

- **Three** primary lessons of this case:
  - Local attorneys represent the local government entity as a whole, and merely interact with the entity through its duly authorized constituents, i.e. "the agents"
  - Representation of the entity does not automatically give rise to an attorney-client relationship with the individual constituents or the entity's discrete agencies/boards/commissions/councils
  - There are instances in which a local government attorney may be conflicted from representing a constituent or discrete agency with the local government, which may warrant retention of outside counsel

Theoretical Models for Defining the Client

Major Theoretical Models for Defining the Client

- Utah law provides that a government attorney represents the entity unless governing law requires a different conclusion
- It is helpful to understand this question from a jurisprudential and theoretical standpoint
- Case law and scholarly consideration identify numerous possible clients of the government lawyer:
  - The public at large a.k.a. public interest approach
  - The government as a whole
  - Employing branch of government (executive, legislative)
  - Employing agency of government
  - Supervisory government official

Models for Defining the Client – Are they Relevant to Municipalities?

- Consider that models may not squarely suit the city attorney's representation of the municipality
  - Kimmel, Heather E., *Solutions to the City Attorney's Charter-Imposed Conflict of Interest Problem*, 66 OHIO STATE LAW JOURNAL 1075 (2005)
- "The city attorney represents, by city law, the mayor and the city council, both policy-making bodies that have little authority over one another."
- "When the mayor's interests and the council's interests are the same, the city attorney can fulfill her responsibilities. When those interests diverge, however, an ethical question is raised: whose interests should the city attorney advance?"

Public Interest Approach

- The government lawyer is the servant of the public at large
  - His responsibilities therefore include special consideration of the "public interest"
- Attorney must consider how the public will be impacted by client's decisions and attorney's work to carry out decisions
- This approach has been disfavored by scholars
  - Fails to provide any meaningful guidance in regulating attorney conduct
  - Conceptions of "public interest" vary greatly from person to person
  - Too subjective a standard to form the basis for a lawyer's actions
- "If attorneys could freely sabotage the actions of the agencies out of a subjective sense of the public interest, the result would be a disorganized, inefficient bureaucracy, and a public distrustful of its own government."

"Government as a whole"

- Lawyer represents the government as a whole
- Most similar theory to Utah Supreme Court's interpretation of Rule 1.13 in *Short*
- Similar criticisms as public interest approach:
  - Does not define from whom a government attorney should take direction and guidance
  - Raises question of whether loyalty to government client can be at odds with loyalty to public interest
  - Ignores separation of powers inherent in American government (especially federal government)
  - Ignores reality that branches of government are frequently at odds with one another

"Government as a whole" Approach

- Academic Geoffrey Miller argues against notion that attorney's ethical duties can be broadly owed to entire government
  - In a government with separated powers, lawyers in the executive branch do not generally represent Congress or the Judiciary
  - "In a system of checks and balances it is not the responsibility of an [executive branch] attorney to represent the interests of Congress or the Court. Those [branches] have their own 'constitutional means and personal motives' to protect their prerogatives."
- To represent the entire government, the government lawyer must identify a single government position to advance, or at least non-conflicting positions. According to Miller, that is an impossible task
- Under this model, the attorney cannot know what position to advocate in the case of conflicting positions taken by individuals or branches within the government as a whole

Agency Approach

- The Agency Approach requires allegiance to a particular agency within the government versus a broader entity of the government as a whole
- Representing employing agency only
  - narrows down the client's identity
  - lessens the possibility of conflicts of interests
- Like a corporation, the actual client is the agency, but the interests of the agency are determined by the agency officer or department head who has decision-making authority
- The Restatement of the Law Governing Lawyers recognizes this position:
  - "The preferable approach . . . is to regard the respective agencies as the clients and to regard the lawyers working for the agencies as subject to the direction of those officers authorized to act in the matter involved in the representation."

Agency Approach

- Not without criticism
- Professor Cramton: the approach fails to recognize that government lawyer's responsibilities are shaped by bureaucratic and institutional practice/custom and other laws
- For example, an obligation to report past wrongdoing such as whistleblower laws that require reporting of bribes within the lawyer's agency, supersedes the lawyer's ethical obligations to the agency
- Government lawyer must have a larger role in responding to public values rather than undivided loyalty to agency
- This approach does not allow for consideration of public interest

Modern Approach: Structural/Functional Analysis

- The identity of the client is determined by examining the structure of authority within the government and the relevant factual circumstances
  - Dictated by laws, custom, policy and practice
- Criticisms include that it proves more useful for after-the-fact determinations than up-front guidance for lawyer to follow

Modern Approach: Structural/Functional Analysis

- Restatement (Third) of Law Governing Lawyers §§ 96-97 notes this approach
  - Identification of client depends on circumstances
  - Considerations include understandings between lawyer and hiring authority
  - Anticipated scope and nature of the lawyers' services
  - Relevant law
  - History and traditions of the office

Modern Approach - Structural/Functional Analysis

- Criticisms of the structural/functional approach:
  - Still doesn't identify whose interests are at stake
  - Remains a subjective question, takes into account discretionary factors, can be subject to disagreement regarding correctness of conclusion
  - Replaces one form of uncertainty with another
  - May be useful to resolve issue after a dispute over the lawyer's breach of her ethical responsibilities has begun
  - But, as a restrictive measure it is ineffective
  - Provides the government lawyer with minimal guidance how to conduct her day-to-day representation

D.C. Bar Report – Considerations in Defining the Government Client

- Report by the District of Columbia Bar Association Special Committee on Government Lawyers and The Model Rules of Professional Conduct addresses the various approaches to defining the client
- Private attorneys donated pro bono assistance to the District of Columbia to combat the crowded civil docket
- Issue was whether private sector lawyers representing the District of Columbia under a *pro bono* program were conflicted out of handling other matters relating to:
  - 1) The same District agency
  - 2) Other agencies within the District, or
  - 3) The District itself

D.C. Bar Report – Considerations in Defining the Government Client

- Rejected conclusion that attorneys represented entire District rather than discrete agencies
- Defining client as District as a whole "would raise serious questions regarding client control and confidentiality."
  - Lawyers would not have sufficient guidance or control
  - No "focus of responsibility"
  - Lawyer free to perform as he or she saw fit, subject only to the practical constraint of internal agency discipline."
- Concluding client was entire District
  - created "sweeping" conflicts problems, administrative burdens, undermined purposes of the program
- Client can be "defined as narrowly as a single agency" but would ultimately need to be decided on an ad hoc, totality of the circumstances basis

D.C. Bar Report – Considerations in Defining the Government Client

- Relevant considerations:
  - *Client autonomy*. Interests of other clients and effort to avoid conflicts with preexisting clients. (Mostly relevant for private practice attorneys)
  - *For whom is the matter relevant*?
    - "Common sense" inquiry into the "interests at stake"
  - Functional considerations.
    - "[O]rganizational structure of the City"
    - Including how the parts of the City are related in "form and function," and the degree of their separation of programs or activities between one part and another

D.C. Bar Report – Considerations in Defining the Government Client

- The narrower the interest at stake in representation, the narrower the client
- D.C. counsel should work with potential participants in the program to determine the scope of the client-lawyer relationship
- Must evaluate potential for conflicts based on the noted factors (client autonomy, interests at state, functional considerations)

Brown & Williamson Tobacco Corp v. Pataki, 152 F. Supp. 2d 276 (S.D.N.Y. 2001)

- Issue: who is the client of the government for purposes of a conflict of interest analysis?
- Facts: Law firm of Covington & Burling was under contract for twenty-five years with the State of New York to provide representation for a variety of social welfare programs and agencies of State of New York
- C&B also simultaneously represented a variety of private clients including the Tobacco Institute and Brown & Williamson Tobacco Corporation
- While C&B was suing the federal government on behalf of the State of New York, C&B was also suing the State of New York on behalf of client Brown & Williamson Tobacco

Brown & Williamson Tobacco Corp v. Pataki, 152 F. Supp. 2d 276 (S.D.N.Y. 2001)

- AG moved to disqualify C&B from representing Brown & Williamson Tobacco
  - Claimed C&B's client was not the discrete agency that it worked for, but rather the state of New York as a whole
- The state relied on ABA Model Rule 1.13 and Comment 6, and asserted an attorney-client relationship because C&B consulted with the general counsel of various state agencies, who in turn consulted with the counsel to the governor, that this was evidence that C&B represented the state as a whole
- The state also argued that because the Division of the Budget is an executive branch agency, C&B represented the executive branch as a whole

Brown & Williamson Tobacco Corp v. Pataki, 152 F. Supp. 2d 276 (S.D.N.Y. 2001)

- Court rejected those arguments
- The fact that C&B's bills were paid using state funds was alone not enough to support a finding that the state as a whole was a client
- Although the court found that the client of C&B was not the state as a whole, the court went on to apply a substantial relationship test to determine whether C&B's representation of Brown & Williamson Tobacco was adverse to the interests of their government representation.
- The court found that the representation was not adverse
- Further, there was no confidential information C&B gleaned from the state that could be used against the state in its current representation of Brown & Williamson

Rule 1.2 – Duty to Follow Client Instruction

Who's the Boss?

- Rule 1.2 – "[A] lawyer shall abide by a client's decisions concerning the objectives of representation and…shall consult with the client as to the means by which they are to be pursued."
- Lawyers are ethically obligated to follow their client's direction
- From a practical standpoint, who are the duly authorized constituents/agents of a municipality, and who has the final word?
- The answer to the question "Who's the Boss" largely depends on your city's form of municipal government (council-mayor, council-manager, 5-member council, 6-member council, charter) and whether powers have been delegated to other individuals or bodies
- What happens when the boss constituent isn't acting in the entity's best interest?

Rule 1.6 – Duty of Confidentiality

Duty of Confidentiality & Attorney-Client Privilege

- One of the main areas the issue of "defining the client" arises is within the context of the duty of confidentiality, the A-C privilege and the work-product doctrine
- Is a particular communication confidential and privileged?

Duty of Confidentiality & Attorney-Client Privilege

- Rule 1.6 – "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 law
- Utah R. Evid. 504 – sets forth lawyer-client privilege
- Ethical duty of confidentiality is broader than evidentiary privileges, and encompasses all items subject to evidentiary privileges (and more)

Duty of Confidentiality & Attorney-Client Privilege

- Is there even a government A-C privilege?
  - Scholars note that "it is far from clear whether the attorney-client privilege applies to municipal governments and under what circumstances."
  - Courts and practitioners commonly "assume" that the attorney-client privilege should apply to government clients and that government could assert the attorney-client privilege in much the same way as corporations and other organizations
- Evidentiary rules don't specifically extend privilege to municipal government (but don't disallow, either)
- Generally speaking, communications between entity lawyer and entity's constituents related to legal matters involving the entity are confidential and privileged under the rules of evidence

Standards for Assessing Applicability of the Privilege

- Control group test – privilege applies to any officer or employee who is in a position to control or take a substantial part in the decision abut any action
- United States Supreme Court has questioned control group test, suggests subject-matter test – *Upjohn Co. v. United States*, 449 U.S. 383 (1981)
- Subject-matter test adopted by U.R.E. 504

Duty of Confidentiality & Attorney-Client Privilege

- Exceptions to duty of confidentiality: malfeasance, official wrongdoing, criminal conduct
- Rule 1.13, Comment 13a:
  - "The lawyer may also have an obligation to divulge information to persons outside the government to respond to illegal or improper conduct of the organizational client or its constituents. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and ensuring that the wrongful act is prevented or rectified, where public business is involved. The obligation of the government lawyer may require representation of the public interest as that duty is specified by law.

Duty of Confidentiality & Attorney-Client Privilege

- Is there a formal duty to maintain confidences amongst constituencies within entity?
  - Informal or custom based
  - Encourage full and frank discussion
- Disclaimers are important
  - Attorney must make clear to entity constituents that attorney represents the entity and not the constituent individually, and that communications with the attorney are not necessarily confidential
- Ethics opinions (although not Utah – yet) state that a municipal attorney is under an ethical obligation to inform constituents/employees of entity that lawyer does not represent him or her and only represents entity

Attorney Client Privilege - *In re Lindsey*

- The D.C. Circuit Court of Appeals in *In re Lindsey*, 148 F. 3d 1100, 1102 (D.C. Cir. 1998) considered this issue
- Independent Counsel Kenneth Starr was conducting a grand jury investigation of President Clinton's relationship with Monica Lewinsky
- Starr sought to compel the grand jury testimony of Deputy White House Counsel Bruce Lindsey regarding certain conversations that Lindsey had with President Clinton
- Lindsey had refused to answer questions regarding such conversations on grounds of the attorney-client privilege

Attorney Client Privilege - *In re Lindsey*

- Issue:
  - Whether a White House lawyer could refuse to appear before a federal grand jury on the basis of attorney-client privilege in a case involving possible crimes by government officials within the executive branch
- Held:
  - The Court of Appeals for the District of Columbia Circuit was willing to accept the existence of an attorney-client privilege that protects from disclosure certain communications between government attorneys and individuals working within executive branch agencies
  - However, the court was **not** willing to extend that privilege to the context of grand jury questions relating to the possible commission of federal crimes by government officials and others
  - Attorney-client privilege did not apply

Attorney Client Privilege - *In re Lindsey*

- Government lawyer Bruce Lindsey could not invoke the privilege because government lawyers must be seen in a different light than the typical private lawyer
- The government lawyer's "duty is not to defend clients against criminal charges ... [but] to 'take care that the laws be faithfully executed.'"
- In short, "[u]nlike a private practitioner, the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency."

Attorney-Client Privilege - *In re County of Erie*, 473 F.3d 413 (2nd Cir. 2007)

- *In re County of Erie* involved a class action lawsuit challenging the constitutionality of a strip search policy enforced upon every detainee who entered the County Correctional Facility or Holding Center
- In the course of discovery, the County withheld the production of certain emails between an assistant county attorney and her county clients, offering a privilege log instead
- The emails in question "reviewed the law concerning strip searches of detainees, assessed the County's current search policy, recommended alternative policies, and monitored the implementation of these policy changes."

Attorney Client Privilege - *In re County of Erie*, 473 F.3d 413 (2007)

- District court held that no privilege applied:
  - The emails went beyond the rendering of legal analysis because they contained proposals for changing existing policy to comply with the constitution, and included drafting new policy regulations
  - Drafting and subsequent oversight of the implementation of a new policy crossed the line between legal advice and policymaking and administration
- Second Circuit reversed, adopting a "predominate purpose" test for assessing application of evidentiary privilege

Attorney Client Privilege - *In re* County of Erie, 473 F.3d 413 (2nd Cir. 2007)

- The Second Circuit focused on the question of whether the communications at issue were made for the purpose of obtaining or providing legal advice
- The Court said that "[t]he predominant purpose of a particular document—legal advice, or not—may also be informed by the overall needs and objectives that animate the client's request for advice."
- Erie County's objective in soliciting advice was to determine how to meet the constitutional limitations on a strip search policy, rather than to determine public policy

Attorney-Client Privilege - *In re County of Erie*, 473 F.3d 413 (2007)

- In concluding that each of the emails in question was sent for the "predominant purpose" of soliciting or rendering legal advice, the Court noted:
  - "It is to be hoped that legal considerations will play a role in governmental policymaking," and
  - "When a lawyer has been asked to assess compliance with a legal obligation, the lawyer's recommendation of a policy that complies (or better complies) with the legal obligation—or that advocates and promotes compliance, or oversees implementation of compliance measures—is legal advice."
- Held: A-C privilege applied, trial court reversed

Attorney-Client Privilege - *In re* Grand Jury Subpoena, 886 F.2d 135, 137-138 (6th Cir. 1989)

- Issue: client identification and application of A-C privilege in municipal setting
- Federal grand jury subpoenaed minutes of closed sessionsof Detroit's city council
- Federal prosecutors argued that privilege was waived, and no client relationship existed, because the city attorney was present and, according to the feds, the city attorney represented only executive branch of Detroit, not city council

Attorney-Client Privilege - *In re* Grand Jury Subpoena, 886 F.2d 135, 137-138 (6th Cir. 1989)

- Lower court held that no privilege applied because various players had separate counsel and operated in a bifurcated structure of government
- The Sixth Circuit reversed and held that the A-C privilege could be applied
- Analyzing the structure and function of the Detroit municipal government, court found that:
  - By law and structure of government, city attorney did indeed advise city council on condemnation related matters, and
  - This was a condemnation-related executive session
  - Thus, client relationship and privilege could exist
- Court remanded for additional facts

Reed v. Baxter, 134 F.3d 351 (6th Cir. 1998)

- Involved a claim of attorney client privilege in municipal representation involving the Murfreesboro, Tennessee city council
- Sixth Circuit found that facts did **not** support a finding of client relationship, and thus no A-C privilege existed
- Facts:
  - Two council members asserted A-C privilege for communications that took place between two council members, city attorney, city manager and fire chief
  - Meeting discussed alleged race-based promotions without merit in fire department

Reed v. Baxter, 134 F.3d 351 (6th Cir. 1998)

- Facts:
  - City promoted an African American fire fighter to the position of captain
  - Caucasian fire fighters passed over for promotion claimed reverse discrimination
  - Day after the promotion, city councilman called a meeting to discuss circumstances of promotion
  - Present at meeting were city attorney, two city council members, city manager, and retiring fire chief
  - Meeting discussed alleged race-based promotions without merit in fire department
  - Two council members asserted A-C privilege for communications that took place

Reed v. Baxter, 134 F.3d 351 (6th Cir. 1998)

- Plaintiffs sought to compel production of communications, claiming that the communications showed that promotion was solely race-based
- Sixth Circuit reasoned that council members were "third parties"
- Court found that city attorney did not represent individual city council members, because it was not within the scope of the council members' official duties to appear at a meeting without the full council
- Because meeting did not involve full city council, and instead just two members of the council, the attorney client privilege did not attach

Reed v. Baxter, 134 F.3d 351 (6th Cir. 1998)

- Controversial decision
- Commentators argue that attorney-client privilege, or at least common interest privilege, applied
- All parties were present in their official capacities as elected officials or administration officials whose common interest was to best serve the needs of the residents of Murfreesboro in light of the pending litigation
- Dissent argued persuasively that A-C privilege applied

Duty of Loyalty and Avoiding Conflicts of Interest

Duty of Loyalty and Avoiding Conflicts of Interest

- **Rule 1.7** "…a lawyer shall not represent a client if the representation involves a concurrent conflict of interest."
- A concurrent conflict of interest exists if the representation is "directly adverse to another client" or there is a "significant risk" that the representation will be "materially limited" by responsibilities to "another client, a former client or a third person or by a personal interest of the lawyer."

Duty of Loyalty and Avoiding Conflicts of Interest

- A municipal lawyer must carefully examine his personal interests, external interests (e.g. former clients), government interests, and interests of entity's constituents to ensure his representation of city is not "materially limited"
- Objective is to avoid situations where you are conflicted out of representing your city client based upon
  - Confidential information learned from constituents, or
  - The determination that you formed a distinct attorney-client relationship with an constituent adverse to city

City attorney forms A-C relationship with adverse constituent by failing to clarify role - *State v. DeAngelis*, 116 S.W. 3d 396 (Tex. App. 2003)

- Assistant City attorney tape-recorded conversations with an assistant police chief who was a subject of the investigation
- During the assistant chief's subsequent prosecution for aggravated perjury, the trial court suppressed the recordings as privileged communications between an attorney and client
- The Court of Appeals agreed, holding that the conversations were subject to the attorney-client privilege, which is held by the client
- Court first determined that a privileged relationship existed between the officer and the attorney
- The Court next considered the attorney's failure to clarify her role
- By allowing the officer to think that their communications were privileged, a confidential relationship was impliedly formed, and the officer was correct in assuming that the discussions were privileged

Conflicts of interest can arise from:

- Conflicts **between entity constituents**
  - Different NY City departments take opposing positions on HIV testing of public service personnel
  - Usually doesn't rise to level of legal conflict in light of conclusion that you represent entity as a whole
- Conflicts between **entity** and **lawyer**
  - California city attorney refuses to "aggressively" prosecute homelessness based on belief of unconstitutionality
  - Advocating for legally indefensible, frivolous, unfair or unlawful legal or policy decisions
    - Mandates consideration of public interest?

Duty of Loyalty and Avoiding Conflicts of Interest

- **Simultaneous representation** of employees and city where there is adversity
  - Excessive force Section 1983 claim
    - Some defenses are at odds with one another
  - Inadvertently form client relationship with adverse constituent
- Advising and practicing before city adjudicative bodies
  - Potential due process or appearance of fairness challenges
  - Especially in area of land use decisions
    - Acting as counsel for both planning and zoning boards, or for multiple levels of decision-making
    - Advising decision-making body while simultaneously advocating before body when representing city

Government attorney can be conflicted out of representing local government entity

- *Civil Serv. Comm'n v. Superior Co*urt, 209 Cal. Rptr. 159 (Cal. Ct. App. 1985)
- Contention that county attorney who advised county civil service commission was conflicted from representing county itself
- Court recognized that county attorney's client is generally the entire county rather than a constituent agency, even when the lawyer is advising the agency,
- But, there is an exception:
  - Where, by law, the agency has the right to act independently of the county, a separate attorney-client relationship can exist with constituent

Conflicts of Interest - *Civil Serv. Comm'n v. Superior Co*urt, 209 Cal. Rptr. 159 (Cal. Ct. App. 1985)

- In this case, the law granted the civil service commission independent authority to make civil service determinations that the county could not override without going to court
- Therefore, the civil service commission was a distinct entity from the county itself
- The structure and function of the local government required the finding of an attorney client relationship between the county attorney and the civil service commission
- The county attorney therefore was conflicted from representation of the county

Reporting Disloyal, Harmful and Criminal Acts Within Local Government Organization

Rule 1.13 – Reporting violation of legal obligation to entity

- In order to respond to harmful, illegal or improper conduct of the organizational client or its constituents, Rule 1.13 recognizes that lawyer may have an obligation to divulge confidential information to:
  - Higher constituents or
  - Persons outside the government, i.e., the public
- By Rule, where the "public business" is involved and when the client is government
  - A "different balance may be appropriate between maintaining confidentiality and ensuring that the wrongful act is prevented or rectified"
  - "The obligation of the government lawyer may require representation of the public interest as that duty is specified by law"

Rule 1.13 – Reporting violation of legal obligation to entity

- (b) If a lawyer for an organization **knows** that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a **violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization**, and that is likely to result in **substantial injury to the organization**, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.
- Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer **shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.**

Rule 1.13 – Reporting violation of legal obligation to entity

- (c) ….if,
- (c)(1) despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization **insists upon or fails to address** in a **timely** and **appropriate** manner an action, or a refusal to act, that is **clearly a violation of law**, and
- (c)(2) the lawyer reasonably believes that the violation is **reasonably certain to result in substantial injury to the organization**, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and **to the extent** the lawyer reasonably believes necessary to **prevent substantial injury** to the organization.

Reporting harmful activities within local government

- Consider seriousness of violation, consequences, lawyer's role in matter, motive, internal policies
- Options:
  - Remonstration/reconsideration – "Talk him out of it"
  - Procure second legal opinion
  - Resign
  - Last resort: Public disclosure per Rule 1.13(c)
    - Higher authority must fail to act
    - Must involve clear a violation of law, AND
    - Reasonably certain to result in substantial injury to the organization
    - Limited divulging, only to extent necessary to prevent the harm

Reporting harmful activities within local government

- When should Rule 1.13 reporting procedure be employed?
  - Reporting up the chain but within the entity:
    - Personal wrongdoing of employees
    - E.g., sexual harassment, bribery, improper gifts, violations of Municipal Officers and Employees Ethics Act (U.C.A. 10-3-1301)
  - Reporting outside the entity to the public:
    - Very rarely, only very egregious circumstances satisfy Rule 1.13(c)

Reporting harmful activities within local government

- **Hypothetical**: City attorney learns that head of parks and recreation department has awarded a sizable contract to lowest bidder based on secret information leaked to bidder by department head before bid in exchange for favors and gifts
- If the attorney cannot convince the department head to correct the problem, the department head is not the attorney's client and no confidentiality is owed
- Rule 1.13(b) **requires** reporting to higher constituents unless "the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so"
- What about the public?

Practical Suggestions

Practical Suggestions

- Identify your role as an attorney of the municipality, and not the person individually
- Where there are potential conflicts, confirm in writing your disclaimer to constituents that you only represent the entity and not person individually
- Consider your audience and do not say anything you would not want to be repeated
- Be mindful of the differences between a witness and a client
- In strategy discussions or conversations about relevant issues, invite only those officials who are essential to the decision-making
- Consider whether there is a commonality of interest between various individuals: If not, why not? If yes, why yes?

Practical Suggestions

- Recommend employees or officials retain their own outside counsel when their interests diverge from the city's
- Whenever possible meet in executive session if the meeting involves the legislative body, and meet with full body
- Be mindful that you may be disqualified from representing the city as an advocate in future legal proceedings if you act in an investigatory role
  - Especially with employee misconduct investigations
- Consider culture of your organization and environment as it relates to openness of communication – fostering employees to be honest to you without scaring them away
- If a meeting discussion is heading into privileged areas, do not hesitate to ask non-decision makers and uninvolved persons to leave

Practical Suggestions

- Figure out ahead of time who will be attending a particular meeting, evaluate purpose and subject matter of meeting and who should be excluded from meeting
- Consider screening process for attorneys with knowledge or information that might raise a conflict

The End