Chapter 6B

Legal Ethics in Dealing with the Government: Who is the Client? & Conflicts

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Note: This paper is drawn from Mark's Chapter 5 in the Oregon State Bar's *Ethical Oregon Lawyer* (2006), "Identification of the Client in Organizational Settings," and his contribution to the new ethics chapter in the forthcoming 2008 revision of the Oregon State Bar's *Land Use* treatise.

I. INTRODUCTION

This subchapter looks at two areas that are often intertwined. The first examines who the lawyer's client is when representing government agencies. The "who is the client?" question is often a cornerstone of conflict analysis because without multiple adverse clients a lawyer or law firm cannot, by definition, have a multiple client conflict. The second outlines three kinds of conflicts that can arise in governmental practice: current client conflicts; former client conflicts; and "issue" conflicts.

II. WHO IS THE CLIENT?

The change from the Disciplinary Rules of the former Code of Professional Responsibility to the Rules of Professional Conduct in 2005 brought with it a new rule—RPC 1.13—that focuses on entity representation. It applies to entity representation generally and includes within that general scope entities that are governmental units and agencies. RPC 1.13(a) adopts the "entity approach" to representing organizations. Under that approach, the "client" is the governmental entity and not its constituent members such as agency administrators as individuals (although the agency acts through them).

The often more difficult question in the governmental context is which agency or level of government a lawyer will be deemed to represent. OSB Formal Ethics Opinion 2005-122 frames both the clear issue and the imperfect answer:

> "Within the context of the governmental entity, the client will sometimes be a specific agency, will sometimes be a branch of government, and will sometimes be an entire governmental level (e.g., city, county, or state) as a whole. ABA Model Rule 1.13 comment [9] ('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.'). In essence, it is up to the lawyer and the government 'client' to define who or what is to be considered the client, much as the process works in private-side representations of for-profit entities." *Id.* at 322 (footnote omitted).

OSB Formal Ethics Opinion 2005-122 also notes that "[r]epresentation of a state does not constitute representation of political subdivisions of the state, and vice versa." *Id*. at 322 n.2. Therefore, representation of the State of Oregon would not mean that a lawyer was deemed as a matter of law to also represent its counties. The same would apply to cities. *Id. See generally* ABA Formal Ethics Op 97-405 (1997) (discussing governmental representation); Restatement (Third) of the Law Governing Lawyers (2000), § 97, cmt c (addressing client identity in the governmental context).

III. CONFLICTS

A. Current Client Conflicts

Conflicts of interest among current clients are governed by RPC 1.7(a):

"(a) Except as provided in paragraph (b) [waivers], a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

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

"(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[.]"

Under the RPC 1.7(b), current client conflicts are effectively divided into two categories, nonwaivable and waivable:

"(b) Notwithstanding the existence of a current client 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 obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

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

As defined in RPC 1.7(b)(3), a nonwaivable conflict exists if a single lawyer (or law firm) attempts to represent both sides in the same case or transaction. *See, e.g.*, *In re McKee*, 316 Or 114, 133-35, 849 P2d 509 (1993) (Peterson, C.J., concurring) (decided under the analogous provision of the former Oregon Code of Professional Responsibility and finding a nonwaivable conflict where the attorney involved represented both spouses in a marital dissolution proceeding); *In re Harrington*, 301 Or 18, 29-31, 718 P2d 725 (1986) (disciplining an attorney for representing both the lender and the borrower in the same transaction). More subtly, a nonwaivable conflict also exists when a lawyer represents two clients competing for a fixed pool of resources *and* that fixed pool is not large enough to satisfy each of the clients' individual claims to that fixed pool. *See, e.g.*, *In re Barber*, 322 Or 194, 196, 904 P2d 620 (1995) (finding a nonwaivable conflict where an attorney represented two claimants in an automobile accident case in which the available insurance proceeds were not sufficient to satisfy their claims); *In re Claussen*, 322 Or 466, 478-79, 909 P2d 862 (1996) (holding that a nonwaivable conflict existed when the same law firm represented both the debtor and the principal secured creditor in a bankruptcy proceeding); *see generally* OSB Formal Ethics Ops 2005-72, 2005-158 (discussing the presence or absence of sufficient resources to satisfy claimants in determining whether a nonwaivable conflict exists).

With waivable conflicts under RPC 1.7(b), a lawyer may represent one current client against another current client in unrelated business or litigation matters if *both* clients give their informed consent. "Informed consent" is, in turn, defined in RPC 1.0(g) as "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." *See also In re Brandt/Griffin*, 331 Or 113, 132-37,10 P3d 906 (2000) (outlining analogous standards under the former Oregon Code of Professional Responsibility). RPC 1.0(g) requires that conflict waivers include a recommendation that the client seek independent counsel concerning the waiver and RPC 1.7(b)(4) requires that the client's consent be confirmed in writing.

In governmental practice, current client conflicts arise with greatest frequency if the agency involved uses outside counsel. In that situation, the agency's outside attorney faces the same range of conflict issues present in any context. *See* OSB Formal Ethics Op 2005-122; *see also* ABA Formal Ethics Op 97-405. Therefore, if outside counsel is asked to represent an agency adverse to one of the outside counsel's current clients on an unrelated matter, the outside counsel can only proceed if both clients agreed after full disclosure.

OSB Formal Ethics Opinion 2005-122 allows a lawyer in private practice to obtain an advance ("blanket") waiver from the State or local government agencies that allow the lawyer to handle a discrete matter or set of matters for an agency while giving advance consent for the lawyer and the lawyer's firm to represent other clients adverse to the agency on unrelated matters. Even when an advance waiver is in place with the agency, however, RPC 1.7(b)(4) requires disclosure of the agency representation and informed, written consent from the other clients being representing adverse to the agency. For example, if a firm wishes to represent the State in specialized environmental or bankruptcy matters under an advance waiver, the firm would still need the consent of all of its other clients being represented in matters adverse to the State such as contested regulatory proceedings or real estate condemnation litigation.

OSB Formal Ethics Opinion 2005-122 also counsels that not all involvement of the government will give rise to sufficient adversity in a relationship to create a conflict. It notes, for example, that if a lawyer represents the State in other matters "merely giving a private client advice about structuring a transaction to minimize state taxes" would not constitute a representation adverse to the State nor would appearing before a State agency on an unrelated matter where the agency was sitting in an adjudicative capacity.

B. Former Client Conflicts

Former client conflicts are governed by RPC 1.9(a) and (c):

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

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

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

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

Under RPC 1.9, there are two kinds of former client conflicts. First, former client conflicts arise when a new matter for a current client is the same or is substantially related to a matter the lawyer (or the lawyer's firm) handled for a former client. Under RPC 1.9(d), matters are "substantially related" if "the lawyer's representation of the current client will injure or damage the former client in connection with the same transaction or legal dispute in which the lawyer previously represented the former client . . . or . . . there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation of the former client would materially advance the current client's position in the subsequent matter." *See generally* OSB Formal Ethics Ops 2005-11, 2005-17, 2005-174 (discussing former client conflicts). Second, former client conflicts arise when a new matter for a current client would require the lawyer (or the lawyer's firm) to use a former client's confidential information adversely to the former client. *Id.* Unlike conflicts between current clients, former client conflicts are always capable of waiver if the clients involved give their informed consent. RPC 1.9(a), (c). Given the sensitivity of the subjects involved, however, it is very difficult as a practical matter to obtain waivers of most former client conflicts.

As with current client conflicts, former client conflicts arise most frequently where the agency uses outside counsel.

An example of "substantially related" former client conflict is a situation in which a lawyer is asked by a government agency to assist it in the land use aspects of a condemnation proceeding involving property that the lawyer had formerly assisted the present owner in acquiring. *See, e.g., In re Ronnau*, 8 Or DB Rptr 153 (1994) (attorney disciplined under the analogous provision of the former Oregon Code of Professional Responsibility for representing buyers in an amendment of the legal description to a land sale contract in which he had formerly represented the sellers).

An example of a former client conflict based on confidential information is where a lawyer had acquired confidential information about environmental conditions affecting a property through an earlier representation of the property's owner and then the lawyer is later asked to represent a government agency acquiring the property (either in a transactional or

condemnation setting) where the environmental condition would be an issue as to the property's value and permitting. *See, e.g., In re Mammen*, 9 Or DB Rptr 203 (1995) (attorney disciplined under the analogous provision of the former Oregon Code of Professional Responsibility for representing a property owner in a lease transaction in which he had gained confidential information concerning the property involved from the lessees through a prior representation of them). (This would also be a "substantially related" matter.)

C. Issue Conflicts

Unlike the former Code of Professional Responsibility, the Rules of Professional Conduct adopted in 2005 do not have a specific provision addressing "issue" conflicts that arise when a lawyer is asked to argue both sides of the same legal issue in the same forum at the same time for different clients albeit in different matters. Instead, the Oregon State Bar released an ethics opinion earlier this year that provides a comprehensive analysis of issue conflicts under the new rules. The opinion, OSB Formal Ethics Opinion 2007-177, looks at both what issue conflicts are and what they are not. In doing so, it draws on both the new Oregon RPCs and helpful interpretative guides from the ABA Model Rules and their accompanying comments from which the Oregon rules are now patterned.

Under the former Oregon DRs, issue conflicts were treated as a separate category of conflicts. Former DR 5-105(A)(3) found that issue conflicts only occurred in a relatively narrow setting: "[When a lawyer takes conflicting legal positions for different clients in separate cases and the] lawyer actually knows that the assertion of the conflicting positions and also actually knows that an outcome favorable to one client in one case will adversely affect the client in another case[.]" Again under former DR 5-105(A)(3), conflicts of this kind could be waived by the clients involved.

Like the ABA Model Rules on which they are based, the new Oregon RPCs do not include a specific rule on issue conflicts. In both, issue conflicts are treated as a subset of the general rule on current, multiple client conflicts: RPC 1.7. Under RPC 1.7, current client conflicts exist 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[.]"

Unlike the ABA Model Rules, however, Oregon did not adopt the accompanying comments as have many other states. ABA Model Rule 1.7 includes a specific comment (Comment 24) addressing issue conflicts:

> "Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that the lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case

> . . . If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters."

The ethics opinion adopted this year essentially fills the gap left when Oregon moved from the old rules to the new but did not also adopt the comments. In doing so, OSB Formal Ethics Opinion 2007-177 takes an approach that is very similar to both the old rule and the current ABA comment. It defines an issue conflict in very narrow terms:

> "The critical question is whether the outcome in Client A's matter will or is highly likely to affect the outcome of Client B's matter. This test would be met if, for example, one case is pending on appeal before the Oregon Supreme Court or the Oregon Court of Appeals and the other case is pending at the trial court level and will necessarily be controlled by the forthcoming decision."

Again like both the old rule and the current ABA comment, OSB Formal Ethics Opinion 2007-177 also finds that most (but not all) issue conflicts are waivable.

2007-177 also outlines when issue conflicts do not exist:

> "[Issue conflicts do not exist] every time there are two cases pending at the trial court level in different counties or judicial districts. Whether [they exist] …when, for example, two cases are simultaneously pending before two different trial court judges in the same county or judicial district will depend on what the lawyer reasonably knows or should know about the likelihood that one case will affect the other under the circumstances in question. For example, the outcome may depend in part on whether the issue is likely to be dispositive in one or both cases or constitutes only a remote fallback position."

OSB Formal Ethics Opinion 2007-177 also stresses that issue conflicts do not arise when different lawyers at the same firm in different cases take conflicting legal positions for different clients without knowing of the contrasting positions and their impact: "[I]t would be inappropriate to hold that on pain of discipline, all lawyers at a firm are chargeable with full 'issue conflict' knowledge of every other lawyer at the firm. Actual knowledge, or at least negligence in not knowing, must first be proved."

Issue conflicts can arise for both internal and outside governmental counsel. As with the other conflicts discussed earlier, however, they usually arise more frequently for outside counsel because they often have a mix of both governmental and nongovernmental clients. For example, if a lawyer is handling two appeals at the same time in the Court of Appeals or the Supreme Court, one challenging the constitutionality of an ordinance for a nongovernmental client and one seeking to uphold the same ordinance for a governmental client, then that closely parallels the situation described as presenting an issue conflict in OSB Formal Ethics Opinion 2007-177.