CHAPTER TWO

THE NEW RULES OF PROFESSIONAL CONDUCT REVISITED~ ETHICS FOR GOVERNMENTAL LAWYERS AND OUTSIDE COUNSEL FOR GOVERNMENTAL ENTITIES

Conflicts & Outside Counsel

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MARK J. FUCILE of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark is a past chair and a current member of the Washington State Bar Association Rules of Professional Conduct Committee, is a former member of the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark was also a member of the WSBA's Special Committee for the Evaluation of the Rules of Professional Conduct that developed the new Washington RPCs adopted in 2006. He writes the quarterly Ethics & the Law column for the Washington State Bar News and the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer. Mark is a contributing author/editor for the current editions of the WSBA's *Legal Ethics Deskbook* and the OSB's *Ethical Oregon Lawyer*. He is admitted in Washington, Oregon, Idaho, Alaska and the District of Columbia. Mark received his B.S. from Lewis & Clark College and his J.D. from UCLA.

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I. "We the People: Representing the Government" by Mark J. Fucile
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At various points in my career, I've been both a prosecutor and represented government agencies as outside counsel. From the perspective of the Rules of Professional Conduct, government counsel (whether internal or outside) are subject both to some unique rules and those of general application to all lawyers. In this column, we'll look at both. On the former, we'll focus on RPC 3.8, which applies to prosecutors, and RPC 1.11, which involves lateral-hire screening from government positions. On the latter, we'll survey conflicts and the "no contact" rule. It is also important to note at the outset that although we'll discuss the RPCs in this column, government lawyers are also subject, depending on their position, to a variety of federal and state statutes and regulations and local ordinances (*see* RPC Scope, cmt. 18). The ABA's influential Standards of Criminal Justice offer further guidance for prosecutors as well (*see* RPC 3.8, cmt. 1).

Specific Rules

Although RPC 3.8 applies specifically to prosecutors and RPC 1.11 applies specifically to government lawyers, government lawyers are not held to a different *standard* under the RPCs than lawyers in private practice. *See, e.g., In re Bonet*, 144 Wn.2d 502, 29 P.3d 1242 (2001). Rather, the RPCs apply equally to all lawyers. What is unique about government lawyers is that they represent entities that embody the public as a whole in the case of federal or state lawyers or a significant part of it in the case of counsel for local governments. That, in turn, highlights the special responsibilities and obligations of representing the government. As Comment 1 to RPC 3.8 puts it for prosecutors: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."

Prosecutors. RPC 3.8 focuses on six specific areas, all of which are stated as affirmative (*i.e.*, "shall") obligations: (1) to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause"; (2) to "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel"; (3) "not to seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing"; (4) to make timely disclosure of evidence that "tends to negate" or mitigate the guilt of an accused or evidence in mitigation on sentencing; (5) generally (subject to very narrow exceptions) not subpoena defense lawyers to a grand jury or other criminal proceeding to provide evidence against their current or former clients; and (6) generally refrain from making out-of-court statements that might influence proceedings except as permitted in RPC 3.6 (governing trial publicity) and the accompanying guidelines for applying RPC 3.6 that are an appendix to the RPCs.

Screening. RPC 1.11 essentially extends the lateral-hire screening rule found in RPC 1.10 to government attorneys. Like its private practice counterpart, RPC 1.11(a) generally prohibits a former government lawyer from "switching sides" in the same matter if the lawyer moves from the government to a firm representing the opposing party (absent a waiver by the former governmental employer). Again like its private practice counterpart, RPC 1.11(b) also allows a hiring firm to avoid disqualification if it timely screens the lawyer who is joining it from the government. RPC 1.12 takes the same general approach with former judges and their law clerks.

General Rules

Conflicts. A cornerstone of all conflict analysis is first to define who your client is because without multiple adverse clients a lawyer or law firm cannot, by definition, have a multiple client conflict. The 2006 amendments to the RPCs brought with it a new rule—RPC 1.13—that specifically addresses 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. Comment 9 to RPC 1.13 frames both the clear issue and the imperfect answer:

> "The duty defined in this Rule applies to governmental organizations. Defining 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. . . . 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 outside counsel representing a government agency, RPC 1.13(h) (first adopted in 1995 as RPC 1.7(c)) provides a very useful, Washington-specific corollary that allows agencies and their lawyers to define precisely who the client will be:

> "For purposes of this Rule, when a lawyer who is not a public officer or employee represents a discrete governmental agency or unit that is part of a broader governmental entity, the lawyer's client is the particular governmental agency or unit represented and not the broader governmental entity of which the agency or unit is a part, unless:
>
> "(1) otherwise provided in a written agreement between the lawyer and the governmental agency or unit; or

> "(2) the broader governmental entity gives the lawyer timely written notice to the contrary, in which case the client shall be designated by such entity. Notice under this subsection shall be given by the person designated by law as the chief legal officer of the broader governmental entity, or in the absence of such designation, by the chief executive officer of the entity."

In governmental practice, lawyers can face a full spectrum of conflicts: current multiple client conflicts under RPC 1.7 and former client conflicts under RPC 1.9. RPC 1.11(d)(1) notes that both conflict rules apply to internal government counsel and Comment 15 to RPC 1.13 essentially does the same for outside counsel. As a practical matter, however, conflict issues arise most often when the agency involved uses outside counsel. In that situation, the agency's outside counsel faces the same range of conflict issues presented by nongovernmental clients. By the same token, under Comment 38 to RPC 1.7 conflicts involving government agencies are subject to the same waiver standards as those applying to nongovernmental clients: "In Washington, a governmental client is not prohibited from properly consenting to a representational conflict of interest."

"No Contact" Rule. The "no contact" rule, RPC 4.2, applies with equal measure in governmental settings. In that context as with entities generally, the often more difficult question is: who falls within the scope of entity counsel's representation? Comment 10 to RPC 4.2 notes that *Wright v. Group Health Hospital*, 103 Wn.2d 192, 691 P.2d 564 (1984), remains the touchstone on this point. In *Wright*, the Supreme Court drew a relatively narrow circle of employees who fall within the scope of entity counsel's representation — particularly as it relates to a line employee whose conduct is at issue:

> "We hold the best interpretation of 'party' in litigation involving corporations is only those employees who have the legal authority to 'bind' the corporation in a legal evidentiary sense, *i.e.*, those employees who have 'speaking authority' for the corporation. This interpretation is consistent with the declared purpose of the rule to protect represented parties from the dangers of dealing with

> adverse counsel.…We find no reason to distinguish between employees who in fact witnessed an event and those whose act or omission caused the event leading to the action….
>
> "We hold *current* Group Health employees should be considered 'parties' for the purposes of the disciplinary rule if, under applicable Washington law, they have managing authority sufficient to give them the right to speak for, and bind, the corporation. Since former employees cannot possibly speak for the corporation, we hold that CPR DR 7-104(A)(1) [the former 'no contract' rule] does not apply to them. 103 Wn.2d at 200-01 (emphasis in original).

Senior agency officers, directors and managers, therefore, are "off limits" and line-level employees whose conduct is at issue may or may not be "off limits" depending on their status as "speaking agents" under applicable evidence law. By contrast, line-level employees who are simply occurrence witnesses and former employees of all stripes are "fair game." In communicating with a former employee, however, RPC 4.4(a) and its accompanying Comment 1 suggest that the contact cannot be used to invade the former employer's attorney-client privilege.

II. Discussion Hypothetical

You are in private practice in Seattle with the ABC Law Firm. Your practice includes real estate development, land use permitting and eminent domain. Your firm also handles environmental law.

In 1999, you and one of your partners who does environmental law evaluated a vacant parcel for a client, Big Polluter, who was then thinking of marketing it. Your environmental law partner advised Big Polluter that there were significant potential environmental liabilities connected with the property from subsurface soil and water contamination that appear to have been caused by a fuel storage facility that Big Polluter operated there many years before. Big Polluter thanked you for your advice, paid its bill and has never used your firm again.

You have recently been contacted by the City of Puget Sound about handling an eminent domain proceeding for it to acquire the same parcel from Big Polluter. Big Polluter never marketed the property and it has remained vacant since your firm's work 10 years before. In reviewing the public background materials provided to you by the City so that you can run a conflict check, you notice that there is no mention of any environmental problem (present or past) at the site nor is there any record that the contamination your firm advised Big Polluter about earlier has ever been remediated. In fact, it appears the City does not know about the contamination. The fair market value of the property would be affected greatly if its correct environmental status became known. Assume that Big Polluter was not under any obligation (statutory or otherwise) to reveal the contamination in the interim.

Can you represent the City? If not, can you tell the City why?