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We the People: Representing the Government

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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 to both 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 governmental positions. On the latter, we'll focus on conflicts and the "no contact" rule.

Specific Rules

It is important to stress at the outset that 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. The Supreme Court put it this way in *In re Gustafson*, 333 Or 468, 488 n.10, 41 P3d 1063 (2002): "[W]e decline to hold the accused (a prosecutor) in this matter to a standard different from that which we apply to other lawyers." This becomes especially important when analyzing both these government-specific rules and general rules such as the so-called "Gatti

Rule,” now found at RPC 8.4(b), which have particular application to government practice.

Prosecutors. RPC 3.8 focuses on two areas. RPC 3.8(a) prohibits a prosecutor from pursuing “a charge that the prosecutor knows is not supported by probable cause[.]” RPC 3.8(b) requires a prosecutor to make timely disclosure of discovery materials during both the liability and sentencing phases of cases. Both provisions are very similar to their counterparts under former DR 7-103 (see, e.g., *In re Leonhardt*, 324 Or 498, 930 P2d 844 (1997) (applying the former rule)).

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 waivers). Again like its private practice counterpart, RPC 1.11(b) also allows a firm to avoid disqualification if it timely screens the lawyer who is joining it from the government.

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 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 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.

In governmental practice, lawyers can face a full spectrum of conflict issues: current multiple client conflicts under RPC 1.7; former client conflicts under RPC 1.9; and “issue” conflicts under RPC 1.7 and OSB Formal Ethics Opinion 2007-177. As a practical matter, however, conflict issues will arise with greatest frequency if 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, conflicts involving government agencies are subject to the same waiver standards as those applying to nongovernmental clients, including, under OSB Formal Ethics Opinion 2005-122, advance waivers.

“No Contact” Rule. The “no contact” rule, RPC 4.2, applies with equal measure in governmental settings. In that context, however, the often more

difficult question is: who falls within the scope of the representation of agency counsel? OSB Formal Ethics Opinion 2005-152 answers that question and, in doing so, adopts the same basic approach as Formal Ethics Opinion 2005-80 does for corporations and other private organizations. Under those opinions, organizational constituents are divided into four broad categories and then each is designated as either “off limits” or “fair game.”

Current officers, directors and managers are swept under the entity’s representation and, therefore, are “off limits” outside formal discovery such as depositions. Applying the rule to agency officers and directors is fairly straightforward. Deciding who is a “manager” for purposes of the rule, however, can be more difficult: 2005-80 notes (and 2005-152 by implication concurs) that it is a fact-specific exercise and depends largely on the duties of the individual in relation to the issues in the litigation.

Current employees whose conduct is at issue are treated as falling within the entity’s representation. Therefore, an employee whose conduct is attributable to the agency will fall within the representation of agency counsel. For example, if a city road crew driver runs a red light, causes an accident, jumps out of the cab and yells “it’s all my fault,” that employee will fall within the city attorney’s representation and will be off limits outside formal discovery.

Current employees whose conduct is not directly at issue and who are not otherwise separately represented are generally “fair game.” See *also* RPC 3.4(a)

(a lawyer cannot unlawfully obstruct another party's access to evidence). To return to the road crew example, let's add the twist that another city road crew driver was following behind and both witnessed the accident and heard the admission. The second driver would simply be an occurrence witness and would not fall within the city attorney's representation.

Former employees of all stripes are fair game as long as they are not separately represented in the matter by their own counsel. The only caveat is that a contacting lawyer cannot use the interview to invade the former employer's attorney-client privilege or work product protection. See *Brown v. State of Or., Dept. of Corrections*, 173 FRD 265, 269 (D Or 1997) (applying former DR 7-104(A)(1) in the entity context); see also RPC 4.4(a) (prohibiting methods of gathering evidence that violate the legal rights of another).

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