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## THE GOVERNMENT ATTORNEY'S CONFLICTING OBLIGATIONS

by Anna P. Hemingway\*

Government attorneys in the American legal system hold a very unique position.<sup>1</sup> Not only are they subject to the code of ethics of their respective state bar, they also have attorney-client obligations to the government which they serve. It is this attorney-client obligation between the attorney and the attorney's employer, the government, that causes a special situation. In representing a governmental entity, one of the first questions that must be asked, especially by an attorney employed by a public agency, is "Who is my client?" Professor Geoffrey C. Hazard, Jr.'s excellent article, *Conflicts of Interest in Representation of Public Agencies in Civil Matters*,<sup>2</sup> provides valuable insights into answering this question.

Professor Hazard notes that although the rules governing all lawyers are for the most part the same, in some ways "the client-lawyer relationship between government lawyers and government entities is 'different' from the counterpart relationship in private practice."<sup>3</sup> He suggests that there are two special ethical problems facing lawyers in the public service.<sup>4</sup> First, public-employee lawyers are governed by laws, as are all public employees, which

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<sup>1</sup> Although the position is unique, some would say the job itself is not. The federal government employs over 40,000 lawyers, and approximately fifteen percent of all lawyers employed in the United States are employed by the government. *E.g.*, Adam M. Chud, *In Defense of the Government Attorney-Client Privilege*, 84 CORNELL L. REV. 1682, 1683 & nn.3, 4 (1999).

<sup>2</sup> See Geoffrey C. Hazard, Jr., *Conflicts of Interest in Representation of Public Agencies in Civil Matters*, 9 WIDENER J. PUB. L. 211 (2000).

<sup>3</sup> *Id.* at 212.

<sup>4</sup> *Id.* at 217.

apply only to public officials.<sup>5</sup> Because local, state and federal governments all have rules and regulations that pertain only to government employees, the government attorney may be imposed with additional obligations beyond those found in the ethical standards that, as members of the bar, they must uphold. Second, public-employee lawyers must consider the identity of their client.<sup>6</sup> Is the client the government, an agency official, the agency itself, or the public interest?<sup>7</sup> This second ethical dilemma becomes increasingly complex when the complicated and at times conflicting responsibilities of the government attorney are considered.

In private practice a lawyer normally can easily identify his or her client; the client is an individual who is ultimately responsible for all legal decisions. The client is a human being, a person who can articulate how a legal problem should be handled.<sup>8</sup> This client identification may not always be such a simple matter for the attorney representing a governmental entity. As Professor Hazard indicates, for the government lawyer, the client is not an individual; rather, the client is an organization.<sup>9</sup> Because the government can be classified as an organization, Professor Hazard goes on to correctly analogize the government lawyer's ethical obligation to the client to one particularly difficult attorney-client setting: the lawyer's ethical responsibilities in representing a private organization.<sup>10</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 SO. CAL. L. REV. 951, 1004 (1991).

<sup>8</sup> Although this is usually the case in private practice, the identity of the person who should be responsible for making the decisions is not always clear. *See United States v. Locascio*, 6 F.3d 924 (2d Cir. 1993) (holding that a criminal defense lawyer retained to represent a defendant by a third party, an alleged member of an organized crime family, was disqualified because the acceptance of payment from a third party could cause undesirable outside influence); *In re Adoption of Vincent*, 602 N.Y.S.2d 303 (N.Y. Fam. Ct. 1993) (holding that a lawyer for an agency sponsoring a child's adoption should not represent a prospective adoptive parent).

<sup>9</sup> Hazard, *supra* note 2, at 220.

<sup>10</sup> Hazard, *supra* note 2, at 220-22.

Developing this analogy one step further, the position of the government lawyer can also be compared to the position of in-house counsel.<sup>11</sup> In representing organizations, the concerns are often the same whether the attorney represents the client as corporate counsel or as hired outside counsel.<sup>12</sup> The one significant difference, however, is that while outside counsel is an employee of a third-party firm, in-house counsel is directly employed by the artificial organization, just as the government attorney is also employed by an organization, the government. Both in-house counsel and the government attorney owe their livelihood to a single client-employer. This difference is especially important in considering the second ethical dilemma posed by Professor Hazard: identifying the client. The government attorney and in-house counsel must identify the client first so that the attorneys and their respective employing organizations recognize to whom the attorneys owe the primary obligations of loyalty and confidentiality.<sup>13</sup>

The duty of loyalty can cause particularly difficult conflicts of interest for government attorneys and corporate counsel. As are all practicing attorneys, in-house counsel is also subject to the code of ethics imposed by the practice of law.<sup>14</sup> What is unique and shared by in-house counsel and government attorneys is the additional obligations imposed by their particular employer. In-house counsel may be subject to accompanying fiduciary obligations required by the employer<sup>15</sup> just as the government attorney is subject to rules that apply only to government employees. These additional obligations can conflict with the duty of loyalty.

For example, both corporate counsel and the government attorney could face an ethical dilemma caused by tension between the Model Rules of Professional Conduct and the rights conferred by Title

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<sup>11</sup> See Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 EMORY L.J. 1011 (1997), for a description of employment and a review of ethical problems facing in-house counsel.

<sup>12</sup> See Carole Basri, *The Client—Ethical Considerations*, 1178 P.L.I. 285 (2000).

<sup>13</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (2000).

<sup>14</sup> *Id.* Although the Model Rules do not seem to address the issue of whether they are applicable to in-house counsel, courts have treated the Rules as being applicable to all members of the bar. See *In re Capps*, 297 S.E.2d 249 (Ga. 1982).

<sup>15</sup> Basri, *supra* note 12, at 287.

VII of the 1964 Civil Rights Act.<sup>16</sup> Title VII prohibits an employer's unlawful discrimination of an employee;<sup>17</sup> yet in accordance with the Model Rules, an attorney may not pursue interests adverse to a client.<sup>18</sup> Therefore, a female in-house attorney subjected to a hostile work environment created by unwanted sexual advances from a male senior manager could find herself with a conflict.<sup>19</sup> Although Title VII would allow the female in-house attorney to bring a discrimination claim against her employer, the Model Rules may prohibit her from filing this claim since it would be adverse to her client's interests.<sup>20</sup>

Although this conflict would not present itself to a female attorney working for a private firm,<sup>21</sup> a female government attorney could face the same dilemma. Due to potentially conflicting obligations and duties, both corporate counsel and the government lawyer could find themselves in situations unique to their employment. These conflicts could arise because of the tension potentially caused by ethical obligations associated with the practice of law and special obligations imposed by being employed by a particular organization, be it the government or not.<sup>22</sup>

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<sup>16</sup> Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994); *see generally* Rachel S. Arnov Richman, *A Cause Worth Quitting for? The Conflict Between Professional Ethics and Rights in Discriminatory Treatment of Corporate Counsel*, 75 IND. L.J. 963 (2000) (providing an extensive review of this conflict as applied to corporate counsel and advocating that corporate counsel has a professional obligation towards the corporation, and the corporation, in turn, has an accompanying obligation to protect counsel's ability to perform job duties).

<sup>17</sup> 42 U.S.C. §§ 2000e-1-17.

<sup>18</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (2000).

<sup>19</sup> *See* Richman, *supra* note 16, at 965. This article reviews several situations that could arise in this context.

<sup>20</sup> Rule 1.7(b) provides that

[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (2000).

<sup>21</sup> *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 751 F. Supp. 1175 (E.D. Pa. 1990), *rev'd*, 983 F.2d 509 (3d Cir. 1992) (female attorney brought a Title VII action against her employer for not admitting her to the law firm's partnership).

<sup>22</sup> *See* *Verney v. Pennsylvania Turnpike Comm'n*, 903 F. Supp. 826 (M.D.

Unlike corporate counsel, however, the government attorney may be able to pursue a Title VII claim because of the attorney's additional responsibilities to the public. If the public interest is the client, then the government attorney may also have an obligation to do justice.<sup>23</sup> Justice may be so required because of the lawyer's distinctive professional obligation to the government. Where corporate counsel's duties primarily lie in seeking the best result for the corporation, the government attorney's best result may involve serving the government's interest in seeking justice. Since justice may not be served by the government harboring a violator of the law, the harasser, the government attorney's obligation to do justice may permit the government attorney to pursue a Title VII claim while corporate counsel may be precluded from doing so.

In both situations, a reasonable resolution could hopefully be reached by balancing the purpose of the statute against the client's legitimate concerns for loyalty.<sup>24</sup> Unfortunately, this will most likely be a difficult balance to achieve because each body of law has a fundamentally different purpose. While Title VII is in place to afford protection mostly for the employee, the laws governing loyalty in the Model Rules are in place to protect the client,<sup>25</sup> be it the corporation or the government. The responsibility of being an employee must be weighed against the responsibility of being an attorney. Thus, the result of this dilemma ultimately may be tied with the answer to the question of who the lawyer identifies as the client.

Both the government attorney and corporate counsel also face similar difficulties when dealing with the lawyer's duty of

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Pa. 1995) (in-house attorney filed a charge alleging discriminatory failure to promote against a public employer); *Jones v. Flagship Int'l*, 793 F.2d 714 (5th Cir. 1986) (in-house attorney brought a Title VII claim against employer alleging sexual harassment and the company suspended her for conflict of interest).

<sup>23</sup> See generally Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 WIDENER J. PUB. L. 235 (2000).

<sup>24</sup> See *Rollins v. Florida Dep't of Law Enforcement*, 868 F.2d 397, 401 (11th Cir. 1989) (balancing the purpose of Title VII against the employer's demands for loyalty when an employee claimed denial of a promotion was in retaliation for complaining about racial discrimination).

<sup>25</sup> See Richman, *supra* note 16, at 972.

confidentiality.<sup>26</sup> An organization can speak only through its individual employees. As Professor Hazard notes "[i]n both situations, the client properly speaking is an organization, and the persons with whom the lawyer directly deals are not clients but agents of the client."<sup>27</sup> Because an organization has no flesh-and-blood existence of its own, the lawyer must work through employee agents acting on its behalf. Both private and government lawyers must identify the client and clarify the attorney-client relationship with the organization's agents to ensure that confidentiality is protected.

To put this to work practically, the lawyer must pay special attention to communicate effectively to the agent that the actual client is the organization. For both government and corporate entities, the respective lawyer must make it clear that it is the organization, and not the individual agent, that is protected by the attorney's obligation of confidentiality.<sup>28</sup> The attorney must also make it clear to the employee when this duty of confidentiality arises. Because of the employment relationship fostered between the organization and the attorney, this may be difficult to accomplish. The duty of confidentiality may cause a particularly troublesome situation for the in-house attorney or government lawyer considering a Title VII claim against the employer.<sup>29</sup> As part of their job duties, both will most likely engage in in-depth conversations with other employees involving the organizations' legal practices. As part of simply being employees of an organization, they may also take in information regarding their own status as employees within the organization. The attorneys may obtain information helpful in pursuing a Title VII claim against the employers as a result of conversations with other employees that have nothing to do with the attorneys' duties. Rather, the information may be obtained as a result of conversations between

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<sup>26</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2000).

<sup>27</sup> Hazard, *supra* note 2, at 221.

<sup>28</sup> *In re Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998), *aff'd in part and rev'd in part*, 158 F.3d 1263 (D.C. Cir. 1998) (holding that an attorney in the Office of the President may not rely on attorney-client privilege as a basis for a refusal to answer questions before a grand jury about possible criminal conduct by government officials).

<sup>29</sup> See Richman, *supra* note 16, at 1004-06 (discussing how this situation pertains to in-house counsel).

two employees, one of whom happens to be an attorney.<sup>30</sup> Due to the attorney status of both corporate and government counsel, the employer may require that any information obtained as a result of conversations with other employees be subject to the duty of confidentiality. The problem of separating information related to the attorneys' employment and information related to the attorneys' duties of representation could ultimately impair both the in-house attorney's and the government attorney's ability to pursue a Title VII claim against the employer.

In conclusion, there may be no ethical distinction between the duties in-house and government attorneys owe a client and those owed by outside counsel. The nature of an in-house counsel's and a government attorney's employment along with the proximity to their respective clients, however, could cause the organizations to expect a greater degree of loyalty and confidentiality than from outside counsel. The response to the question, "Who is the client?" can help the lawyer, the employer and other employees to navigate through any misguided expectations and potential conflicts that may arise. Ultimately, that response must help to control the ethical decisions that both government and in-house attorneys make in representing organizations.

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<sup>30</sup> Under the Model Rules, both attorneys would probably need to clarify their roles to the employees if confusion could arise. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 (2000) (providing that a lawyer must be truthful when dealing with others on a client's behalf); *Id.* Rule 4.3 (prohibiting a lawyer from misrepresenting the lawyer's role to an unrepresented person).