Legal Ethics Issues Unique to Government Lawyers and Social Media

October 2015

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A. Legal Ethics Issues Unique to Government Lawyers

1. Who is the client?

a. "[T]he identity of the government client (like the identity of the corporate client) is 'not primarily a question of legal ethics,' but rather is a matter to be decided in the first instance between the lawyer and the person or persons authorized to speak for the government in the matter, 'in accordance with the general precepts of client autonomy embodied in Rule 1.2,' citing [ABA] Formal Opinion 95-390 (a corporate client may specify, when engaging a lawyer, whether or not 'the corporate client expects some or all of its affiliates to be treated as clients for purposes of Rule 1.7')." D.C. Op. 268 (quoted with approval in ABA Op. 97-405).

> Decision should be memorialized in writing at outset of representation. ABA Op. 97-405.

b. "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 example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of [Colo. RPC 1.13]." Cmt. [9], *Government Agency,* Colo. RPC 1.13; Restatement (Third) of the Law Governing Lawyers § 37 Cmt. c (2000) ("No universal definition of the client of a governmental lawyer is possible.").

c. "In analyzing conflict and confidentiality issues pertaining to government lawyers, courts and ethics committees have relied upon several factors, including:

• what entity hired the lawyer;
• what the relevant individuals' expectations were when the lawyer was hired;
• how the governmental entity is constituted under applicable constitutional, statutory, and regulatory or administrative provisions;
• how the entity's constituent parts relate to each other; and
• how the matter affects different parts of the entity."

ABA/BNA Lawyers' Manual on Professional Conduct 91:4101.

d. Cases

People ex rel. Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003) (Colorado Attorney General did not violate RPC when he sued sometime client Colorado Secretary of State, because AG represented "government as a whole"—language deleted from Cmt. [9] above in 2008).

Civil Service Comm'n v. Superior Court, 209 Cal. Rptr. 159 (Cal. App. 1985) (in action by Civil Service Commission against County, disqualifying county attorney because county attorney previously advised Commission in same matter and Commission had authority to act independently of county and was therefore a former client)

Gray v. Rhode Island Dep't of Children, Youth and Families, 937 F. Supp. 153 (D.R.I. 1996) (denying motion to disqualify plaintiffs' counsel because his clients in unrelated matters were two different state agencies and not the state as a whole)

2. Conflicts of Interest

a. "Except as law may otherwise expressly permit," government lawyers must comply with Colo. RPC 1.7 (current clients).

i. "Direct adversity [under Rule 1.7(a)(1)] should not be equated with discussions in which there are differing opinions. A city, its entities, or its officials may express different views without being directly adverse to each other. Expression of different views while discussing an issue or topic is part of the process of city government. Determination of a direct adversity conflict of interest is fact and circumstance specific." Ohio Op. 2007-4 (June 8, 2007).

ii. A material limitation conflict under Rule 1.7(a)(2) exists where "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."

b. Conflicts are waivable 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 involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

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

c. Colo. RPC 1.10 on imputation of conflicts of interest does not apply to government lawyers. Colo. RPC 1.10(d).[1] *E.g., People v. Shari,* 204 P.3d 453, 459 (Colo. 2009) ("a government attorney's individual conflicts are not imputed to the entire government agency for which he works").

i. A current government lawyer who is disqualified under Colo. RPC 1.11(d)(2) need not be screened in order for the lawyer's department to carry on the representation. Cmt. [5], Colo. RPC 1.11.

d. "[L]awyers under the supervision of these officers [e.g., attorney general] may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority." Scope [18], Colo. RPC.

e. Colo. RPC 1.9(a)[2] and Colo. RPC 1.11(d)(2)[3] are both applicable to government lawyers.

3. Settlement Decisions

[1] Effective January 1, 2008, the Colorado Supreme Court adopted in the Colorado Rules of Professional Conduct changes in the ABA Model Rules of Professional Conduct that eliminated the imputation of individual government lawyers' conflicts of interest to other lawyers in their government law office or department. *Compare People ex rel. Peters v. District Court In and For County of Arapahoe,* 951 P.2d 926, 928 (Colo. 1998) ("The rule of imputed disqualification applies to both private firms and public law firms such as a district attorney's office or the office of the state public defender.") *with People v. Shari,* 204 P.3d 453, 459 (Colo. 2009) "a government attorney's individual conflicts are not imputed to the entire government agency for which he works").

[2] "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 the former client gives informed consent, confirmed in writing." Colo. RPC 1.9(a).

[3] "Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee: . . . shall not:. . . participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing. . . ." Colo. RPC 1.11(d)(2)(i).

"Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers." Scope [18], Colo. RPC.

4. Whistleblowing

"[I]n a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved." Cmt. [9], Colo. RPC 1.13.

5. Direct Communications with Represented Persons

Government lawyer may have direct communications with represented persons during the investigative stage of criminal and civil regulatory enforcement proceedings; such communications are "authorized by law" under Colo. RPC 4.2.

Such communications are not authorized by law, and therefore are prohibited, once formal proceedings have commenced.

CBA Formal Op. 96 (Rev. March 2012), "Ex Parte Communications with Represented Persons During Criminal and Civil Regulatory Investigations and Proceedings."

B. New Technology and Social Media Issues

1. Proposed New Rules of Professional Conduct or Comments under Consideration by Colorado Supreme Court (Public Hearing November 4, 2015 at 2:30 p.m.; written comments by October 15, 2015)

a. "Document" includes e-mail or other electronic modes of communication subject to being read or put into readable form.

b. Added phrase in Comment to Rule 1.1 (Competence): "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, practice, and changes in communications and other relevant technologies. . . ."

c. Added subsection in Rule 1.6 (Confidentiality): "(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

d. Revised Comment to Rule 1.4: "Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use)."

e. Revised Comment to Rule 1.4: "A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules."

f. Revised Comment to Rule 4.4: "A document is inadvertently sent when it is accidentally transmitted, such as when an e-mail or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted."

2. Websites

a. Website information generally constitutes "communications" about the lawyer or the lawyer's services governed by Rule 7.1(a).

b. Communications may not be "false or misleading," which is a communication that:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or

(3) is likely to create an unjustified expectation about results the lawyer can achieve;

c. Information may become false or misleading if not updated.

d. Use on website of "[s]pecific information that identifies current or former clients or the scope of their matters" requires clients' "informed consent" under Rule 1.6(a) and 1.9(c).

e. General information about the law may not be false or misleading; disclaimers may avoid "unjustified expectations" or misleading a prospective client.

f. Answering a fact-specific legal question reasonably understood to refer to the inquirer's circumstances may give rise to attorney-client relationship.

g. Rule 1.18 requires lawyers to treat information provided by "prospective clients" as confidential; "prospective client" is a "person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter"

    a. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client." Cmt. [2], Rule 1.18.

    b. If the website invites the submission of information concerning a possible attorney-client relationship, the website visitor becomes a "prospective client" when she submits the requested information

    c. Merely providing a lawyer's contact information on a website does not constitute an "invitation"

    d. If the website does not invite submission of this information, the website visitor will become a prospective client if the lawyer responds to an inquiry by engaging in a discussion of possible representation

h. When someone communicates with a number of lawyers with the intent to disqualify them, that person "should have no reasonable expectation of confidentiality or that the lawyer would refrain from an adverse representation"

i. Disclaimers <u>may</u> avoid (1) formation of an attorney-client, (2) obligating the lawyer to keep the visitor's information confidential, (3) the giving of legal advice, or (4) disqualification of the lawyer from representing an adverse party, but only if "reasonably understandable, properly placed, and not misleading," or the lawyer acts contrary to the disclaimer.[4]

[4] Source: ABA Formal Op. 10-457 "Lawyer Websites" (Aug. 5, 2010).

j. If the website of a represented person or party does not require permission to gain access, gaining access to that website does not violate Colo. RPC 4.2.[5]

3. Blogs

a. Kristine Ann Peshek, Illinois: 60-day suspension for Assistant Public Defender for violating Rule 1.6 by revealing sufficient information about her cases in her blog so as to be able to identify them.

b. Sean Conway, Florida: Reprimand for violating Rule 8.2(a) (making false or reckless statements regarding the qualifications or integrity of a judge) for stating about a judge in a blog that she was "evil, unfair witch," "seemingly mentally ill," and "clearly unfit for her position and knows not what it means to be a neutral arbiter."

4. Facebook

a. Whether judges may "friend" lawyers who appear before them: split of authority. *See* California Judges Association Judicial Ethics Committee Opinion 66 (November 2010) (judges may not include in their social network lawyers who have a case pending before the judge): Supreme Court of Ohio, Advisory Opin. 2010-2 (judges may friend lawyers who appear before them but must be careful how much interaction they have); N.Y. Advisory Committee opinion 08-176 (judges free to "friend" lawyers as long as they comply with rules governing judicial conduct); Florida Judicial Ethics Advisory Committee opinion No. 2009-20 (judges may not ethically "friend" lawyers who may appear before them); South Carolina Advisory Comm. on Stands. of Jud, Conduct, Op. 17-2009 (judges may friend lawyers as long as they do not discuss anything related to the judge's judicial position).[6]

b. Private investigator hired by defendants in "dog bite" case allegedly obtained the username and password of one of the twelve year-old plaintiff's "Facebook friends" to gain access to plaintiff's Facebook page and view hundreds of photographs and messages.

c. Lawyer sanctioned for instructing client to "clean up" Facebook page and deactivate it after receiving discovery request seeking screen prints of photographs, profile, message board, status updates and messages as of date of discovery request

d. An attorney or her agent may use her real name and profile to send a "friend request" to obtain information from an unrepresented person's social

[5] Or. State Bar Ass'n Bd. of Governors, Formal Op. 2005-164 (2005).

[6] Source: M. Baldwin, "Ethical and Liability Risks Posed by Lawyers' Use of Social Media," *Prof. Liab. Litig.* (July 28, 2011).

networking website without also disclosing the reasons for making the request. NYC Op. 2010-02. *Contra* Phila. Op. 2009-2 (deceptive for third person unknown to witness to seek to "friend" witness without disclosing that purpose is to share information to be used by lawyer to impeach witness); San Diego Op. 2011-2 (violation of equivalent of Rule 4.2 to ask to "friend" represented person without referring to subject matter where communication was "motivated by the quest for information about the subject of the representation").

e. In Texas, a lawyer requested a continuance due to her father's death. The judge discovered by viewing her Facebook page that she was partying.