2015

Revisiting the Client Conundrum: Whom Does Lawyer for a Government Represent, and Who Gives Direction to that Governmental Lawyer?

Hugh D. Spitzer
University of Washington School of Law

Washington State Association of Municipal Attorneys
Spring Conference 2015
Vancouver, Canada

Revisiting the Client Conundrum: Whom Does Lawyer for a Government Represent, and Who Gives Direction to that Governmental Lawyer?

(Answer: The Governmental *Entity* is the Client, and Most of the Time Someone Else is Giving the Orders—*Not* the Lawyer)

Hugh Spitzer*
University of Washington School of Law
Foster Pepper PLLC

The issue of identifying a government attorney's client is age-old, and Washington's Rules of Professional Conduct provide somewhat different answers for lawyers who are government employees and for those who are with private firms. The matter becomes even more interesting when a government entity's attorney is a publicly-elected legal official: an attorney general, prosecuting attorney, or city attorney in the case of Seattle and a number of other cities around the country. Others have written thoughtful pieces on the topic from a national perspective,[1] and there is at least one excellent but slightly outdated piece by District of Columbia municipal attorney Wayne Witkowski that focuses on the issue in Washington State.[2]

This paper reviews the key professional responsibility rules and Washington cases that affect the analysis, and updates Witkowski's work with a discussion of *Goldmark v. McKenna,*[3] *Seattle v. McKenna,*[4] and various other materials. It observes that

---

*Acting Professor of Law at the University of Washington School of Law. Professor Spitzer teaches Local Government Law, State Constitutional Law, and Professional Responsibility. He is also a public finance lawyer at Foster Pepper PLLC in Seattle. The author thanks Steve DiJulio at Foster Pepper for portions of this paper discussing alternative models of client identification. The views expressed in this paper are the author's alone and do not reflect the views of any client.

1 Wayne Witkowski, *Who is the Client of the Municipal Government Lawyer*? (Municipal Law Institute, 2007, PLI No 10925); Ivan Legler, *Once Again: Choosing the Model that Determines Who Are the Municipal Attorney's Clients* (NIMLO [IMLA] 1994).

2 Wayne Witkowski, *Thoughts on Who is the Client of an Elected State Attorney General, Prosecuting Attorney, and City Attorney* (Symposium Paper presented at The Prosecutorial Ethic: A Tribute to King County Prosecutor Norm Maleng, May 30, 2008).

3 172 Wn.2d 568, 259 P.3d 1095 (2011).

4 172 Wash.2d 551, 259 P.3d 1087 (2011).

Washington State, like many states, follows the "entity model" of identifying public lawyers' clients. That means that the governmental *entity* itself is the client—the State, a county, or a city, for example. But within that model, it is still necessary to identify the "duly authorized constituent" or "representational authority" who may serve as the voice of the client for an attorney. Who that authorized representative is will depend in large part on the situational facts and the relevant statutory framework. In most circumstances a lawyer for a governmental entity (including an elected law officer) should look to another person as the authorized representative of the client for policy direction. In narrow circumstances, usually determined by statute (or by charter in the case of a city attorney), the elected law officer will himself or herself be the authorized representative of the governmental client. While on a day-to-day basis we continue to think of the relevant government agency through its duly authorized constituent, as the "client." But we should keep in mind that usually the entire governmental entity is the ultimate client.

Question: What are the Relevant RPCs?
Answer: Lots of Them! (Here are a Few)

Almost all of the Washington Rules of Professional Conduct ("RPCs") apply to state and local government attorneys practicing here, including, importantly, confidentiality and conflict-of-interest rules. The following are arguably the RPCs most directly relevant to the issue of whom a public lawyer represents.

Preamble and Scope

> *Comment* [18] 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. Also, lawyers under the supervision of these officers 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.

RPC 1.0(e) "Informed Consent"

> (e) "Informed consent" denotes 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.

RPC 1.0(c) "Firm"

> (c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

Proposed *Comment [13] to RPC 1.0(c)*

> [13] An office or subdivision of an organization employing lawyers who are appointed or assigned to represent indigent members of the public is considered a separate law firm if it is fully independent from other units of the organization including physical separation and no shared access to client information.
>
> [This proposed new Comment [13] to RPC 1.0 was approved on March 19, 2015, by the WSBA Board of Governors, for submission to the State Supreme Court for the Court's consideration.]

RPC 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

> (a) [A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
>
> (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

RPC 1.4. Communication

> (a) A lawyer shall:
>
> (1) promptly inform the client of any decision of circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RPC 1.11(d). Special Conflicts of Interest for Former and Current Government Officers and Employees

(d) Except as law may otherwise expressly permit, **a lawyer currently serving as a public officer or employee**:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) 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 writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(Emphasis added)

Comment [2] to RPC 1.11

Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. **Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.**

(Emphasis added)

Comment [5] to RPC 1.11

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be

regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13, Comment [9].

RPC 1.13 Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(h) 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.

(Emphasis added)

The above-quoted RPCs clearly presuppose that any lawyer (including an elected law officer) has a client, and that there is some "authorized constituent" with whom the

public lawyer can consult, and who can then make "informed decisions" and communicate decisions concerning the objectives of representation.

Question: Who is the Client of a Lawyer for a Local Government?
Answer: Surprise! It's Usually the Entire Local Government

Who is the client of a public lawyer? The "**entity model**" is clearly followed in Washington, but it is but one of a number of theories of legal representation that have been considered by legal professionals.[5] Under the entity model, the lawyer has principally the *organization* as a client, and not its individual elected officials, department heads, agents or other constituents (including the elected law officer himself or herself). *Legler*, citing Hazard & Hodes, *The Law of Lawyering*, 387.[6] This is the dominant approach in the United States for corporations and other entities that are not natural persons—particularly since the corporate scandals that led to the Sarbanes-Oxley Act of 2002,[7] and changes to the ABA's Model Rules in response to Sarbanes-Oxley. As discussed below, the entity model has been formally adopted as the standard in the State of Washington.

For a number of years various authors have suggested either the "group model**"** or the "public interest model" for identifying organizational clients. As discussed in Legler's article, under the group model, an organization itself "shares" attorneys with some or all of the individuals that comprise the organization. For example, a city attorney could be said to represent the mayor, council, board of adjustment, civil service commission, municipal court judge and any other city department. The group model assumes all of the individual clients within the organization consent to the lawyer's representation of each, even in the face of conflict. But the group model breaks down when an individual (*e.g.*, the planning director) disagrees with another individual or agency (*e.g.*, the Office for Civil Rights, or the Planning Director), and refuses to waive the conflict between the two. Even though the entity model is the accepted approach in Washington State, there are instances when an officer has acted on behalf of the public entity but is later individually sued along with that entity. It may be appropriate for both the officer and the local government to share the same lawyer because of their common interests. But the lawyer should advise both that officer and the government (through its other authorized representatives) of the potential conflict of interest inherent in advising both the entity and a constituent, describe the potential risks of dual representation, inform the officer that if adversity later arose the lawyer

---

[5] *See* Legler's and Witkowski's papers, *supra* note 1.

[6] Legler is quoting from G. Hazard & W. Hodes, *The Law of Lawyering* (2nd Edition 1993) (together with later editions and supplements, "The Law of Lawyering"). The current edition of *The Law of Lawyering* is the 3rd Edition 2001.

[7] Sarbanes-Oxley Act of 2002 (Pub.L. 107–204, 116 Stat. 745, enacted July 30, 2002). Sarbanes-Oxley was known as the "Public Company Accounting Reform and Investor Protection Act" in the U.S. Senate, and the "Corporate and Auditing Accountability and Responsibility Act" in the House of Representatives.

will represent the governmental body alone, and obtain the written consent of the dual representation from both the officer and the government involved (acting through the other appropriate officials).

A second alternative model, most often advocated by academics (and few others), is the "public interest" model. This model is based on the belief that government lawyers should act "in furtherance of the governmental and public interest." *See,* for example, University of New Mexico Law School Professor Maureen Sanders, *Government Attorneys and the Ethical Rules: Good Souls in Limbo*, 7 BYU J. Pub. L. 39, 77 (1993). In the public interest model, according to Sanders, either the government's or public's interests are the public lawyer's "client." Obviously, a public lawyer has an obligation to the public and participates in advancing the public interest.[8] But that begs the question of determining what the "public interest" *is* in any particular transaction or dispute. The obvious concern with the "public interest" model is that the attorney must determine, among other things, who the authorized representative of the client is, what the public interest is, and then what position to take in order to further that identified public interest. Depending on the constitutional and statutory framework, this model may find some application in the criminal law or civil enforcement context for an elected prosecutor or a state attorney general. But it is impractical for most lawyers serving as in-house or outside legal counsel for a municipality. As discussed below, for elected lawyers the public interest model raises ethics issues and, in Washington, usually conflicts with statutory frameworks that circumscribe elected law officers. Further, as Witkowski points out,[9] many (including this author) believe that "the very concept of 'public interest' is unintelligible and cannot provide a workable guidepost for government attorneys." Determining the "public interest" is about as easy as identifying the content of "natural law" and trying to apply it in day-to-day situations.

Washington courts have addressed from time to time the argument that government lawyers are held to a higher standard than lawyers representing the private sector (there are particular standards that apply to criminal prosecution that are not addressed in this paper). When acting as regulator, the Washington Supreme Court has stated that government is to act "scrupulously just" when dealing with its citizens. *State ex. rel. Shannon v. Sponburgh,* 66 Wn.2d 135, 143; 401 P.2d 635 (1965). But that standard does not have a practical application in the normal course of a lawyer's representation of a government client. In *Lybbert v. Grant County*, the Washington State Supreme Court held:[10]

---

[8] *See*, *The Restatement (Third) of the Law Governing Lawyers*, §97 (2007)("*Restatement")*, Comment f: "Courts have stressed that a lawyer representing a governmental client must seek to advance the public interest in the representation and not merely the partisan or personal interests of the government entity or officer involved…."

[9] Witkowski, note 2, at 40.

[10] 141 Wn.2d 29, 37-38 (2000).

> While we agree with the basic proposition that the government should be just when dealing with its citizens, we do not believe that an attorney representing the government has a duty to maintain a standard of conduct that is higher than that expected of an attorney for a private party. If we were to impose such a heightened duty on an attorney for the government we would be creating a two-tiered system of advocacy, one for legal representatives of the government and the other for counsel of private parties.

While the entity model was not formally adopted until 2006 by the Washington State Supreme Court, the Court's 2000 decision in *Lybbert* signaled that municipal lawyers in their civil representation would not be subject to a "public interest" model.

The entity model of representation is now "almost universally" accepted. *The Law of Lawyering*, 17-11 (2004-2 Supplement). This universe includes Washington State. Importantly, it was embodied in Washington State's RPCs that became effective September 1, 2006. The entity approach clearly applies to the representation of governments. *See, e.g.*, WSBA Ethics Advisory Opinion 2173 (2007)("RPC 1.13 provides that a lawyer employed by an organization represents the organization rather than its constituent members. This rule applies to government organizations"). As noted above, **RPC 1.13 states** simply in its initial sentence that **"a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."** However, after restating the prevalence of the entity approach today, U.W. Professor Tom Andrews notes:[11]

> The simplicity of the concept…belies the complexities in its application. The challenge for a lawyer dealing with an organizational client, of course, is that the organization can only speak through its employees and agents, and ambiguities may arise regarding the duties owed to the legal entity that is the organization, as opposed to those owed to the constituents with whom the lawyer deals for direction and advice.

Under RPC 1.13(h), the duty to the entity under RPC 1.13 normally applies to lawyers representing governmental organizations. RPC 1.13, Comment [9]. But Professor Andrews notes: "Whether the presumption set out in RPC 1.13(h) will help resolve hard cases remains to be seen."[12] And Comment [9] to the RPC candidly recognizes the dilemma for government lawyers:

> Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the governmental context and is a matter beyond the scope of these Rules.

---

[11] Tom Andrews et al., *The Law of Lawyering in Washington* 4-3 (2012).

[12] *Id.* at 4-4.

In other words, RPC 1.13, Comment [9] essentially scratches its head in puzzlement. But the confusion comes from trying to discern the "client" of the governmental lawyer, when the answer is already clear: the entity is the client. As Hazard and Hodes put it in *The Law of Lawyering*, the entity is the client but "can only interact with its lawyer through human agents, [and] the legal construct is intended to be treated seriously, at least so far as the client-lawyer relationship is concerned."[13] This means that while from a day-to-day working standpoint we often treat a specific agency as "the client," we should never forget that the ultimate client is the entire entity (except for certain circumstances under RPC 1.13(h) discussed below, when a private sector lawyer is representing a specific agency.) And normally, a governmental entity carries out its responsibilities through agencies and ultimately through natural persons who serve as the authorized constituents. The importance of keeping the entity in mind as the ultimate client is highlighted by the example of the mayor who is empowered, in the instance of two departments in a dispute with one another, with the ability to order them both to settle, or to order one to accede to the other's demands. This is on-the-ground proof of the existence of a *single* entity client, notwithstanding the fact that the lawyer treating each of the two departments viewed his or her department as the "client."[14]

So the only remaining question is who speaks for the entity client in any particular situation. That question is not always so easy to answer.

Question: Entities Aren't Real People. They Don't Talk. Who Speaks for Them?

Answer: "Duly Authorized Constituents" or "Representational Authorities" (If you Can Find Them. Happy Hunting!)

The Restatement, at §§ 96 and 97, tries to address the problem. Under the *Restatement*, when a lawyer is employed or retained to represent a governmental organization, the interests of the organization (and the attorney's role) are defined by the organization's "responsible agents acting pursuant to the organization's decision-making procedures." Correspondingly, the lawyer must follow the instructions as given by governmental officials authorized to act on behalf of the organization. *See* Comment b to *Restatement* § 97. But, "those who speak for the governmental client may differ from one representation to another." *Restatement* § 97 at Comment c. The *Restatement* notes one succinct statement of the chain of authority: "A government

---

13 *The Law of Lawyering* at 17-6.

14 Governmental lawyers also need to be cautious when a representative of an entity client seeks to "loan" them to an intergovernmental body of which the entity is a member. That intergovernmental entity may be organized as a municipal corporation, a nonprofit corporation, an LLC, or a loose joint board. But the intergovernmental grouping should be treated as a separate client, and appropriate consents obtained. *See*, Hugh Spitzer, *Ethics Issues in Representing Intergovernmental Entities,* Proceedings of the Washington State Association of Municipal Attorneys, Spring Conference 5-1 (2014).

lawyer must follow lawful directions of authorized superiors with respect to the scope and implementation of the representation…." *Restatement* § 97 at Comment f.[15]

OK. How do we identify the "responsible agents"? Who are the "persons authorized to act on behalf of the organization"? Note that the terms for these responsible agents vary in the literature and in cases—we see them labeled variously as "representational authorities," "authorized representatives," or "constituents." But the concept is the same—if a government lawyer's client is "the state," "the county," "the city" or "the district," who makes the "client's decisions concerning the objectives of representation" under RPC 1.2? With whom does that lawyer consult as to the means by which those objectives are to be pursued?

The comments to RPC 1.13 give several examples. Comment [9] to RPC 1.13 observes that sometimes "the client may be a specific agency,…a branch of government, such as the executive branch, or the government as a whole." If an action requiring legal counsel involves a particular department head or "bureau" (*i.e.* a department), that department may be treated as the client for purposes of the Rule. But the example does not solve this riddle: in the event of a lawsuit involving a claim of police misconduct, does the city attorney represent the individual officer? The police department? The city? All of the above? Some of the above? And who, if anyone, is to give direction to the city attorney?

One thing in the above-quoted language of Comment [9] causes conceptual confusion. It is sloppily worded in terms of *who the client is*, which departs from the firm direction of RPC 1.13 itself, which is that the entire *entity* is the client. The correct approach is to think in terms of who is authorized to *speak* for the client in any particular situation. It is true that there are situations where government agencies are adverse to each other, and, as discussed below, we allow them separate representation (sometimes by the same governmental law office). But we can reduce confusion by talking about the client as, for example, "The City of Seattle *acting through* the City Light Department," or "The City of Seattle *acting through* the Department of Finance and Administrative Services."

[15] See also, Miller, Gov*ernment Lawyers' Ethics in a System of Checks and Balances*, 54 U. Chi. L. Rev. 1293, 1296, n. 7 (1987).

The City is the single entity served by the lawyers representing each respective agency, say, in a lease negotiation between those two agencies. But in that situation the authorized representatives are different for each lawyer. Is this a distinction without a difference—as lawyers don't we treat the specific agency as the client from a practical standpoint? The answer is "yes…but." The "but" is the fact that in the example given, the Mayor, as chief executive, can supersede a decision made by the director of either department, for example ordering a specific settlement in a lease dispute. Even a difference of opinion between different branches of government (executive versus legislative) can be resolved in the next election by the ultimate decision-makers, the voters.

In any event, we recognize that a government lawyer needs to determine who makes the judgment calls on behalf of "the client." Who is that? As usual, it depends. As recognized by Comment [9] to RPC 1.13, and as thoughtfully laid out by Wayne Witkowski,[16] no one approach works in all circumstances. It depends on the constitutional, statutory and charter framework. It depends on the character of the work (*e.g.*, tort litigation where a government litigator represents the public entity as a whole, compared with a situation where a lawyer might serve as counselor to the speaker of the house, or a city council, in connection with a dispute with the governor or a mayor). In Witkowski's words, the identity of the client (or client representative), and the lawyer's loyalty:[17]

> …may change according to the lawyer's role as advisor or litigator, the subject matter, the interests represented, the bureaucratic hierarchy, the lawyer's statutory authority, the anticipated scope and nature of the lawyer's services, the practices of the office, and the political level of the actors involved.

RPC 1.13(h) says that for a lawyer who is **not** a public officer or employee, a "discrete governmental agency or unit" can be treated as a client unless that agency provides otherwise in a written agreement or "the broader governmental entity gives the lawyer timely written notice to the contrary." Limiting a governmental client to a single agency is convenient for private sector lawyers who represent a specific department of the State or a local government. For example, a lawyer (and thus the lawyer's entire firm) representing the Department of Licensing, will not automatically be treated as having a conflict if that firm files an unrelated lawsuit against the Department of Health. RPC 1.13(h) had its origin in former RPC 1.7(c), adopted in 1995. The commentary to that provision, when it was proposed, focused solely on outside lawyers for the State of Washington and did not discuss the concept of single-agency representation in the context of a local government. Most State of Washington agencies are large, and interact with each other at arms' length (often by interlocal

---

16 Witkowski, note 2, at 52.

17 *Id*.

agreements under Chapter 39.34 RCW). In most circumstances an attorney who represents one State department, such as the Department of Transportation, will not learn confidential information that would be of any relevance to a client that is adverse to another department, such as the Department of Social and Health Services. Furthermore, the representation of one agency will typically not cause employees in another department to feel betrayed if that attorney assists a client in suing an unrelated State department. But many cities are noticeably different. The departments are much smaller, and often deal with overlapping functions. They all report to a city manager or a mayor. A private lawyer assisting a parks department with three employees, may encounter difficulties representing another client who desires to sue the public works department with five employees just down the hall from the parks staff—and all of them share the same coffee maker in the same break room! Only the largest cities and counties might feel comfortable routinely allowing outside counsel for one department to assist other clients adverse to separate agencies of those cities and counties. It might be appropriate for RPC 1.13(h) to be adjusted so that it is applicable solely to lawyers representing agencies of the State of Washington.

In addition, RPC 1.13(h) provides no guidance for lawyers who **are** public officers or employees, *i.e.,* who not outside private firm lawyers. For that, they must wend their way to RPC 1.11, which primarily (but not entirely) deals with conflicts created by attorneys moving in and out of government positions.[18] Comment [2] to RPC 1.11 tells us that because of "the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers." This provides the RPC basis for the standard practice of separating ("screening") lawyers and divisions within the Attorney General's office—an office that often represents agencies that are adverse to one another. It would be helpful to have more explicit language in RPC 1.13 that addresses the common phenomenon of lawyers within a public law office representing separate departments adverse to each other. But Comment [2] to RPC 1.11 probably does the job.[19]

---

[18] On March 19, 2015, the Board of Governors of the Washington State Bar Association approved proposed amendments to RPC 1.10 and 1.11 to clarify that public defenders represent individuals rather than their governmental employees and are therefore subject to Rule 1.10 rather than Rule 1.11. These proposed changes are being submitted to the Washington State Supreme Court for its consideration.

[19] Joint representation of criminal defendants is particularly troublesome and "bears a high likelihood of giving rise to a consentable conflict of interest involving direct adverseness." Tom Andrews et al., *The Law of Lawyering in Washington* 7-16 to 7-17 (2012). Recently the State Supreme Court held that attorneys with competing nonprofit public defender agencies in King County were to be deemed "county employees" eligible for retirement benefits. *Dolan v. King County*, 172 Wash.2d 299 (2011). This decision led to the realization that as county employees, those defenders, formerly in separate "firms" (see RPC 1.0(c)) might now all be in the same firm and representing criminal defendants adverse to one another. Consequently, the Court has been asked to consider a new Comment [13] to RPC 1.0(c) which would provide that a subdivision of an organization employing lawyers who represent

Finally, a lawyer for any entity should bear in mind that whoever is the representational authority on a day-to-day basis, RPC 1.13(b) requires that if a lawyer for an organization knows that an officer or employee of the entity is violating the law, that attorney normally must "refer the matter to higher authority in the organization, including, if warranted…to the highest authority that can act on behalf of the organization as determined by applicable law." Under RPC 1.13(c), under some circumstances that lawyer may reveal confidential information to law enforcement agencies if the lawyer reasonably believes it necessary to prevent substantial injury to the organization.

Question: Don't Statutes and Charters Often Identify the Authorized Representative of a Local Government?

Answer: Yes. (Sometimes)

In Washington State, a law officer's responsibilities and the identity of the client's authorized representative "is dependent upon the constitution and statutes of Washington,"[20] and, in the case of a first-class city, by the charter.

There are often answers to the conundrum in statutes relating to local governments. For example, for **code cities** that use the council-manager form of government, there is little doubt that in most cases the manager will be the authorized representative who has the power to decide upon a course of action. RCW 35A.13.120. But the city manager reports to the council, and most city managers regularly consult with their councils and seek direction on major litigation decisions. A city council ultimately has the authority to approve lawsuits, including in those code cities that use the mayor-council ("strong mayor") form of government. RCW 35A.12.100.[21]

Many cities contract for legal services. See RCW 35A.12.020. Most cities contract through and under the authority of the city council. RCW 35A.11.010. But the authority of the council to contract for legal services cannot deprive the mayor of the right to such services. This is addressed by the Office of Attorney General in *AGO 1997 No. 7*. There the Attorney General recognized that the mayor is the "chief executive and administrative officer of the city," citing RCW 35A.12.100.

---

indigent members of the public is to be considered a separate law firm if it is fully independent from other similar units of the organization, including physical separation and no shared access to client information.

20 *State v. Herrmann*, 89 Wn.2d 349, 352, 572 P.2d 713 (1977).

21 It should be noted that sometimes specialized city boards or commissions might have statutory authority to give direction to a city attorney within the subject matter domain of those boards. For example, under RCW 41.08.140 and RCW 41.12.140, police and fire civil service commissions are vested with the responsibility to "to begin and conduct all civil suits which may be necessary for the proper enforcement" of those chapters, with the "chief legal officer of the city" being charged with representing each commission in its enforcement actions.

> That the mayor will require legal services from time to time in fulfilling official duties cannot seriously be questioned. Nothing in chapter 35A.12 RCW authorizes the city council to exercise general supervision over the mayor's performance of these duties…
>
> For these reasons we conclude the city council generally lacks authority to contract for the provision of legal services solely under the direction of the city council.

AGO 1997 No. 7 at 4. The Attorney General Opinion balances the executive authority of the mayor over ongoing administration of the city, with that of the city council's authority to contract. The authority to contract did not limit the mayor's power to serve as the "officer who has the legitimate power to decide upon a course of action" within the scope of that executive authority. The city attorney must follow that direction under the entity model. If the council disagrees with the mayor (and the city attorney) in such circumstances, the council may be faced with the difficult question of its authority to engage separate legal counsel. For an example of such a situation see *State ex. rel. Steilacoom Town Council v. Volkmer, supra* (Supreme Court found city council without authority to pay for outside legal services).

For a **first class city**, charter provisions can add an overlay to whatever statutes or RPCs control an elected city attorney's responsibilities to his or her municipal client. One of the most interesting examples of this is provided by Seattle's charter, which currently states, at Art. XIII, §3:[22]

> The City Attorney shall have full supervisory control of all the litigation of the City, or in which the City or any of its departments are interested, and shall perform such other duties as are or shall be prescribed by ordinance.

No state statute prescribes the powers of the city attorney of a first class city, so it is left to the charter (and in some instances, to ordinance) to outline that officer's duties. Versions of Seattle's charter since 1890 provided the city's Corporation Counsel (now, "City Attorney") fairly strong control over litigation. Some type of disagreement over the control of litigation between the Corporation Counsel and the City Council led the latter body in 1913 to propose a charter amendment that would have enabled the Corporation Counsel to institute lawsuits only "upon direction of the city council."[23] The then-Corporation Counsel spoke out vociferously against the proposal,[24] and it was defeated by a three-to-two margin.[25] Voter rejection of the Council's proposal suggests that the Seattle charter

---

22 The Charter of The City of Seattle, adopted 1946, amended through November 5, 2013, Article XIII, Sec 3.

23 Seattle City Council Resolution 4282 (1913).

24 "Corporation Counsel Opposes Amendment," Seattle Times, March 2, 1914, p. 9.

25 Election Results reported in Seattle Times, March 5, 1914, p.5.

language giving the city attorney "full supervisory control of all the litigation" suggests that the city attorney might have more control over the course of city litigation than does the Attorney General with respect to some types of state litigation.

A city attorney legitimately may reject (as a matter of law, but perhaps not for political considerations) a request for legal services by an individual councilmember. In *Ethics Opinion 2002-02* (2002), the Rhode Island Supreme Court applied that state's RPC 1.13 and held that the city attorney's client was the council as a whole. As a result, the municipal lawyer could comply with the council's request for a redacted itemized statement of prior bills, but the lawyer could not comply with an individual councilmember's requests for unredacted bills unless the full council, which was the client, consented. See *Annotated Model Rules of Professional Conduct*, 228 (ABA, 6th Edition 2007). Lawyers may often draft ordinances at an individual councilmember's request. But the city, not an individual councilmember, controls the provision of legal services.

The basic duties of **county prosecuting attorneys** in Washington State are set forth in RCW 36.27.020. Those responsibilities include, among other things: serving as the legal adviser of the county commissioners or council "when required by the legislative authority or the chairperson thereof;" advising school districts; representing the state, county and school districts in criminal and civil proceedings, "subject to the supervisory control and direction of the attorney general;" and seeking "to reform and improve the administration of criminal justice." In addition, at Chapter 36.27 RCW the Code Reviser cross-references more than 65 other statutes that prescribe various duties to the prosecuting attorney. These include everything from approving professional baseball contracts with minors (RCW 67.04.110) to enforcing weed control district regulations (RCW 17.04.210). But most of these do not provide express guidance as to whom a prosecutor should treat as the authorized representative of the various county and district clients.

In the civil context, a majority of the board of county commissioners may direct a certain course of action. The board (or a county council) can even employ legal counsel separate from the elected prosecutor, but that requires court approval. RCW 36.32.200. *See, AGLO 1974 No. 69* (authority to contract for legal services limited to the term of the board). *See also*, *State ex. rel. Steilacoom Town Council v. Volkmer,* 73 Wn. App. 89 867 P2d 678 (1994); *Tukwila v. Todd* 17 Wn. App. 401, 563 P2d. 223 (1977) (setting forth standards when a city council may hire its own lawyer and pay for such legal services, separate from the city attorney). It is unlikely that an individual commissioner would be a separate client, unless named separately in a lawsuit. In such an event the prosecuting attorney would determine whether the office of prosecuting attorney could represent the commissioner, without creating conflict with representation of the client county. As noted above, if the prosecuting attorney represents both the officer and the county, it is important to advise both that officer and the other commissioners of the potential conflict, describe the potential risks of dual representation, inform the officer

that if adversity later arose the prosecutor would represent the county alone, and obtain a written consent letter from both the officer and the county (acting through the other county commissioners).

In sum, a prosecuting attorney needs to consult statutes and county charters (when applicable), and then consider both who the client is (a county or a special district, or even the state) and the context of the matter in order to nail down the identity of the client and the authorized constituent.

Question: The AG is an Independently Elected Official, So He Can Do Whatever He Wants, Right?

Answer: Wrong. (In Washington, Attorney General's Duties and Source of Client Direction Are Circumscribed by State Law.)

There have been several Washington cases addressing the extent of the elected Attorney General's authority to control litigation, most recently *Goldmark v. McKenna*,[26] which in 2011 held that the Attorney General could not decline the Commissioner of Public Lands' request to appeal a case that the Department of Natural Resources had lost in trial court. But before discussing *Goldmark v. McKenna*, it is worth reviewing an earlier case, *State ex rel. Attorney General v. Seattle Gas & Electric Co.,*[27] which held that the Attorney General, having no common law powers but only statutory, powers, could not on his own commence a *quo warranto* proceeding to determine whether a corporation exercising a public franchise had usurped its authority. *Seattle Gas & Electric* further held that the authority to bring such a proceeding rested with a county's prosecuting attorney. In his opinion, Justice William White wrote:[28]

> The appellant assumes that the attorney general of this state, by virtue of his office, is, like the attorney general of England, clothed with common-law power to institute this suit, as it was the duty of the attorney general under the common law to represent the crown in such actions as this, and that therefore the attorney general of this state on his own motion can institute this suit. Political power in this state inheres in the people, and by constitutional or statutory authority the exercise of this power in behalf of the people is delegated to certain officers. In the exercise of power the officer is controlled by the law theretofore declared. The attorney general of the state, although bearing the same title as the attorney general of England, is not a common-law officer. There is nothing in a mere name.

---

26 *Goldmark v. McKenna*, 172 Wn.2d 568, 259 P.3d 1095 (2011).

27 28 Wash. 488, 68 P. 946 (1902). *See also, State ex rel. Hamilton v. Superior Court of Whatcom County,* 3 Wn.2d 633, 101 P.2d 588 (1940).

28 *State ex rel. Attorney General v. Seattle Gas & Electric Co.*, 28 Wash. at 495-96, 68 P. at 949.

> Because the particular office filled by the relator is called the office of 'attorney general,' it does not follow therefrom that he has the same powers as the attorney general of England under the common law. Every office under our system of government, from the governor down, is one of delegated powers. 'It is a well-settled doctrine that officers of the state exercise but delegated power, and this is particularly true of the attorney general. His office is created by statute, and he, as such officer, can only exercise such power as is delegated to him by statute.

Justice White's opinion thus held that the Attorney General cannot be his "own client" except when authorized by statute. This provides background to *Goldmark v. McKenna,* which arose because the Attorney General refused to appeal a superior court ruling that the Okanogan Public Utility District had sufficient authority to condemn a power line right-of-way over DNR-managed land. Presumably, the Attorney General declined to take the matter to an appellate court because his office had determined that there was not sufficient merit to an appeal. The Attorney General's Office never explicitly said why they preferred not to continue the case—presumably they concluded that they would commit an RPC 1.6 confidentiality violation if they made the reason public, and perhaps also injure the client commissioner's interests if an appeal proceeded (an RPC 1.7 duty-of-loyalty violation). A June 8, 2010 press release from that office hinted slightly at the reason, but no more than that. ("This decision was thoroughly processed in the manner in which we handle all appeal decisions. The legal underpinnings of an appeal were researched and analyzed by attorneys assigned to DNR and by our Solicitor General's Office, staffed by some of the finest appellate lawyers in the nation.")

The decision not to appeal the Okanogan County Superior Court decision was based, as all of our appellate decisions are, on whether legal error was made by the trial court judge, consideration of the trial court record, and the likelihood of the appeal's success. This process for handling appeals has been in place for many years.

The Washington State Constitution, at Art. III, §21, says simply that the Attorney General "shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law." But the relevant statute, RCW 43.12.075, explicitly prescribed the Attorney General's duties with respect to the Commissioner of Public Lands: "It shall be the duty of the attorney general, to institute, or defend, any action or proceeding to which the state, or the commissioner…is or may be a party….when requested so to do by the commissioner…or upon the attorney general's own initiative."[29] In *Goldmark v. McKenna,* the Attorney General argued that because the statute authorized him to institute or to defend an action upon his own initiative, he could affirmatively act over the commissioner's objection. Justice Charles Johnson's opinion rejected that argument.

[29] Quoted at 172 Wn.2d 572.

The Court also rejected the assertion that because Washington's constitution names the Attorney General as the state's chief legal officer, and independently elected, he could serve as a check on other elected officers.[30] Justice Johnson's opinion stated that "there is nothing inherent in this structure that permits the attorney general to refuse to represent state officers when statutorily required to do so. It simply means that he may also institute proceeds against state officers in other situations."[31] At the end of that sentence we find one of the most interesting aspects of the court's opinion in *Goldmark v. McKenna*, footnote 5, which directly addressed the ethics issues involved in determining whether such a public attorney must follow the legitimate directives of the authorized representative of a client agency:[32]

> Moreover, the attorney general, like every lawyer in the state, is bound by RPC 1.2(a), which provides that "a lawyer shall abide by a client's decisions concerning the objectives of representation" and "shall abide by a client's decision whether to settle a matter." If the attorney general feels unable to do so, then he has the authority to appoint a SAAG under RCW 43.10.065 so the state officer is still provided with counsel. The attorney general argues that an appointed SAAG would have the same ethical obligations as the attorney general, and so would also be precluded from pursuing a harmful appeal. But RPC 1.13(h) provides a private lawyer's client would only be the particular agency, not the broader governmental entity, unless otherwise notified by the chief legal officer of the broader governmental entity. This implies that the attorney general may enlarge the scope of the private lawyer's attorney-client relationship, but need not do so.

The bottom line is that in the applicable statutory context, the Attorney General was required to "abide by [the] client's decisions" concerning the appeal, and could not substitute his judgment.[33] Justice Gerry Alexander's concurring opinion pointed out that the Attorney General, consistent with RPC 3.1, "should…have discretion to decline such representation if the appeal is frivolous." We hope that this is obvious, and that others on the Court would agree with Justice Alexander's position. We simply do not know why Justice Johnson did not include a similar statement in his majority opinion.

On the same day that *Goldmark v. McKenna* was decided the Washington Supreme Court ruled in *Seattle v. McKenna*[34] that the Attorney General had sufficient statutory

---

30 172 Wn.2d at 579.

31 172 Wn.2d at 579-80.

32 172 Wn.2d at 580, note 5.

33 In the underlying case that sparked *Goldmark v. McKenna,* t*he* Commissioner of Public Lands proceeded with his appeal, represented by a private sector lawyer appointed as a special assistant attorney general. The appeal was unsuccessful, and the State Supreme Court unanimously ruled in 2015 that the Okanogan Public Utility District had ample statutory authority to condemn the right-of-way it desired. *Pub. Util. Dist. No. 1 of Okanogan County v. State*, ___Wn.2d ___, 342 P.3d 308 (2015).

34 172 Wn.2d 551, 259 P.2d 1087 (2011).

authority to join the State of Washington as a party to a multi-state lawsuit challenging the Affordable Care Act.[35] The decision in *Seattle v. McKenna* reiterated that the Attorney General was without common law powers, but reasoned that there was enough basis in existing statutes to enable him to determine on his own to appear on behalf of the State in that litigation.[36] The Court also held that since he had that authority, and thus had no duty to withdraw the State from the multistate litigation, the City of Seattle's mandamus action must fail. The decision in *Seattle v. McKenna* suggests that at least in some circumstances, the Attorney General has enough statutory authority to be the "authorized representative" for the State and to make the key calls with respect to litigation. Interestingly, and as we shall next see, the elected City Attorney in Seattle also serves as the authorized representative in some instances.

Question: Can an Independently-elected Law Officer, Like the AG, Be the Authorized Representative of a Governmental Entity?

Answer: Sometimes.

In most instances the elected Attorney General, a prosecuting attorney and a city attorney will have his/her client and the identity of the client's authorized representative, determined by statute and/or charter provisions. And usually that authorized constituent is someone other than the elected law officer himself or herself. But in a limited set of circumstances, that elected law officer is authorized or even *directed* by statute to be the decision-maker. This does not mean that the elected legal official *is* the client. As the saying

---

[35] 172 Wn.2d at 563.

[36] *Id.* In *Seattle v. McKenna,* the Court relied on RCW 43.10.030, which provides that the Attorney General shall appear and represent the state before various appeal courts. It should be noted that the next statute, RCW 43.10.040, states that the Attorney General represents the state and all officials and agencies in the courts, administrative tribunals, and "in all legal or quasi legal matters…." This raises the question of the status of lawyers who are *not* attorneys general but who serve within various state agencies, often dispensing legal advice. Presumably such a non-AG lawyer should treat the specific agency as his or her "client" for RPC purposes. But in a December 20, 2013, memorandum to all state agency directors, Nicholas Brown, General Counsel to the Governor, warned that "state law prohibits state agencies from hiring attorneys as 'in-house counsel,' 'staff attorneys,' or in any other role as a legal advisor." Browned warned that as a consequence, "*communications between agency employees, including employees who are lawyers, are generally not covered by attorney-client privilege."* He emphasized that only the Attorney General's Office should be relied upon for legal advice. Warnings like Mr. Brown's are periodically issued to Washington State agencies, which nevertheless continue to engage lawyers as staff members because of their legal knowledge and experience. One interesting issue to consider is whether, if state law truly prohibits agencies from obtaining legal counsel from anyone other than an attorney general, the agency "in-house" lawyers are engaging in a violation of RPC 8.4. This author believes that the answer is: probably not. Such a representation does not appear to be a criminal act prohibited by RPC 8.4(b), nor does it constitute dishonesty, fraud, deceit or misrepresentation as prohibited by RPC 8.4(c). Those representations, being so common, likely do constitute violations of practice norms and thus do not constitute "conduct prejudicial to the administration of justice" prohibited by RPC 8.4(d). Finally, RPC 8.4(i)'s ban on acts that reflect "disregard for the rule of law" probably does not extend to this conduct because the Court has been cautious in its application of that vague concept. *See In re Curran*, 115 Wn.2d 747, 801 P.2d 962 (1990). *See generally*, Tom Andrews et al., *The Law of Lawyering in Washington* 12-9 to 12-24 (2012).

goes: "Every man who is his own lawyer, has a fool for a client."[37] The client is the State, or a county, or a city, or a special district. But the elected lawyer is on occasion designated by statute to supervise operations in a specified area of law or administration, and in that instance he or she is the authorized constituent/representative of the client.

The most obvious example is in the area of criminal prosecutions. Under RCW 36.27.020(6), county prosecutors are made responsible to "institute and prosecute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of felonies when the prosecuting attorney has information that any such offense has been committed." This appears to be a sufficient grant of authority to the prosecutor to decide whether and when to bring charges—indeed, it would not make any sense for a prosecuting attorney to be required to consult with county commissioners, councils or county executives as to whether a charge is appropriate. The *Restatement* §97(1) recognizes this and notes that a lawyer representing the government might possess "such rights and responsibilities as may defined by law to make decisions on behalf of the governmental client…."

City attorneys do not have a general statute vesting in them the authority to control the prosecution of misdemeanors and civil infractions. The second class city statute has a general description of a city attorney's duties (RCW 35.23.111: "He or she shall represent the city in all actions brought by or against the city or against city officials in their official capacity.") Through RCW 35A.11.020, code cities may take advantage of this, but that is optional. There are a few statutes expressly authorizing city prosecutors to decide when to prosecute malfeasors—for example, to maintain actions to abate nuisances (RCW 7.48.058 and RCW 7.48A.030); to bring actions against unlawful copycat musical performances (RCW 19.25.100); or to petition for a special inquiry judge during a criminal investigation (RCW 10.27.170). As noted above regarding Seattle, city charters sometimes provide clarity. Ordinances on occasion provide general authority. (*See* Kent City Code §2.20.040: "The city attorney shall supervise the representation of the city in all actions brought by or against the city….The city attorney shall have complete charge of all of the work of the legal department.") Or an ordinance might vest the city attorney with discretion with respect to a specific type of action. (*See* Bellevue City Code §9.20.050 regarding fair housing actions, or Kirkland City Code §11.24.080 relating to recovery of nuisance abatement costs. *But cf.* Bellevue City Code §9.10A.040 giving the police chief the decision over whether to refer a "chronic nuisance" to the city attorney for action.) In order to provide clarity about a city attorney's prosecutorial discretion, it may be prudent for cities to insert provisions in their codes providing the city attorney with general authority to supervise and control legal actions, particularly the filing and prosecution of criminal and civil infraction actions. In considering such an ordinance, a city council might

[37] Henry Kett, *The Flowers of Wit, or a Choice Collection of Bon Mots* (1814).

evaluate how broad the city attorney's discretion should be. Presumably the greatest discretion should be vested in the city attorney in criminal and civil infraction matters.

At the state level, there is a particularly notable example of a specific statute vesting the elected Attorney General with administrative control over certain regulatory activities. Under RCW 19.86.080, the Attorney General "may bring an action in the name of the state" for enforcement of the Consumer Protection Act. RCW 19.86.085 establishes a consumer protection unit within the Attorney General's office. Consequently, it is appropriate to think of the Attorney General as the authorized constituent of the State for purposes of that statute. This does not mean that the Attorney General is his or her "own client," but simply that he or she makes the policy calls and makes the "client decisions" under RPC 1.2.

Question: What's the Bottom Line?

Answer: Stick to the Entity Model (And Normally Look to Someone Else Besides a Lawyer to Make the Calls for the Client)

In this author's view, because Washington firmly follows the "entity model" of identifying public lawyers' clients, an elected law officer is not his or her own client. Instead, the governmental *entity* itself is the client—the State, a county, a city, or a district. Under limited circumstances, RPC 1.13(h) permits a private sector lawyer to treat a specific governmental department as the client, and not the entire entity. And, just because the Attorney General or a prosecuting attorney is elected, doesn't mean that the electors, or "the public" or "the public interest" is the client instead of the governmental entity. Lawyers represent clients and receive direction from clients. Since entity clients are inanimate, that direction must be provided by natural persons, *i.e.*, the duly authorized constituent/representational authority/authorized representative who serves as the decision-maker and the voice of the client. If a governmental law officer ignores that client representative's lawful advice, he or she runs the risk of violating RPC 1.2. Who that authorized representative is will depend in large part on the situational facts and the relevant statutory framework. Only when a statute, charter or ordinance vests explicit line responsibility for a program in an elected law officer (most notably in the criminal prosecution arena) does that lawyer become the authorized constituent who makes the policy calls.