Representing the Government:
Identifying Your Clients and Conflicts

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The Role of Public Lawyers:
Some General Observations

- The traditional rules of professional conduct governing the conduct lawyers are not easily applied to government lawyers.
- These rules assume an attorney-client relationship typical to private lawyering and rely on responsibility to a single client. When a lawyer is employed by the government, however, the picture becomes murkier.
- Representing the government often involves undelineated clients with conflicting interests. Government attorneys must exercise greater discretion with respect to policy questions and apply often abstract, transsubstantive (one-size fits all) values.
The Role of Public Lawyers: Some General Observations

• By comparison, lawyers who represent private clients, represent a distinct client who ordinarily forms objectives and goals prior to retaining counsel. The rules of professional conduct are premised on this type of representation.
• These rules prohibit a lawyer from imposing personal goals or agendas in the course of litigation or counseling. Rather, an attorney should act as a conduit of the client’s own goals.

The Role of Public Lawyers: Some General Observations

• The rules require that an attorney know exactly who his or her clients are and the specific content of their goals.
• However, both of these elements can be unclear in agency representation. An agency lawyer may define his or her client narrowly or broadly. The government lawyer may have similar latitude in defining the agency’s goals.
The Role of the Attorney General

- The rules are even more difficult to adapt to the practice of attorneys general than to other government or agency lawyers.
- In addition to the reactive work done in representing the nation or state and the nation or state agencies in a more traditional attorney-client relationship, an attorney general often serves as a self-initiating plaintiff's attorney.
- In either role, the attorney general may be required to prioritize the rights or interests of certain groups of constituents over those of other groups. In addition to these groups of clients with conflicting interests, the attorney general must aim to serve the interests of the nation or state as a whole – interests which themselves compete and may be defined in numerous formulations.

The Role of the Attorney General

- An attorney general may weigh the nation's or state's overall economic welfare, for example, against the economic welfare of a class of citizens or individual citizens. Economic interests must at times be weighed against issues of human dignity, health, and fundamental fairness.
- An attorney general may exercise extraordinary discretion, and the more discretion he or she exercises, however, the further he or she departs from the reach of the rules.
I HCC § 8
3. Mission

"Mission. The Ho-Chunk Department of Justice shall protect the legal rights and interest of the Nation and the collective rights and interests of Tribal Members. In doing so, the Department shall safeguard the interests of the Nation, enhance the sovereignty of the Nation, and exercise stewardship over those resources committed to it by the Nation and foreign jurisdictions."

I HCC § 8
4. Functions

Functions. The Department of Justice shall:

- a. Defend the sovereignty of the Ho-Chunk Nation.
- b. Provide expert legal advice and competent representation for all the Branches of the Nation on those matters that concern the Nation’s interest and welfare.
- c. Represent the Nation in Tribal, State, and Federal forums.
- d. Coordinate all available and necessary professional resources required to carry out its mission.
- e. Ensure prosecutorial enforcement of the Nation’s laws.
- f. Provide for effective communication and dissemination of Tribal information to the Tribal population.

- "(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."
- The government is an organization under SCR 20:1.13.
- ABA Comment [9], which follows SCR 20:1.13, provides the following guidance: "The duty defined in this Rule applies to governmental organizations."

Defining Precisely the Identity of the Client

ABA Comment [9], which follows SCR 20:1.13, provides additional guidance:
- "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."
Defining Precisely the Identity of the Client

ABA Comment [9], which follows SCR 20:1.13, provides additional guidance:

- "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 this Rule."
- "Moreover, in 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."

Defining Precisely the Identity of the Client

ABA Comment [9], which follows SCR 20:1.13, provides additional guidance:

- "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."
- "In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority."
Who is the Government Lawyer’s Client?

- Defining whom the government lawyer represents is an essential first step because traditional concepts of professional responsibility are based on the relationship with a represented client.
- Four possible clients have been identified for the government lawyer:
  1. the agency official,
  2. the agency itself,
  3. the government, and
  4. “the people,” sometimes termed “the public interest.”

SCR 20:1.13(g): Dual Representation

- “(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of SCR 20:1.7. If the organization’s consent to the dual representation is required by SCR 20:1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.”
SCR 20:1.11
Special conflicts of interest rules for current and former government lawyers

SCR 20:1.11 governs conflicts of interest for both current and former government officers and employees. Other rules also apply. We will concentrate our discussion today with the rules that apply to current government officers and employees.

SCR 20:1.11(d)
A Current Government Lawyer

This Rule applies to two distinct situations:

- Conflicts that arise from the lawyer’s role as a current public officer or employee; and

- Conflicts that arise from a private lawyer moving into his or her role as a public officer or employee.
SCR 20:1.11(d)
A Current Government Lawyer

"d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:
(1) is subject to SCR 20:1.7 and SCR 20:1.9; 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 in writing; or . . . ."

A Lawyer Currently Serving as a Government Lawyer Is Bound by SCR 20:1.7

SCR 20:1.7 Conflicts of interest current clients
"(a) Except as provided in par. (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
(1) the representation of one client will be directly adverse to another client; or
(2) 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."
Directly Adverse: ABA Comment [6]

- “[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client’s informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer’s ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client’s case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer’s interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.”

Directly Adverse: ABA Comment [7]

- “[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.”
Significant Risk That Lawyer Will Be Materially Limited: ABA Comment [8]

"[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."

Lawyer's Responsibilities to Third Persons and Lawyer's Personal Interests: ABA Comment [9] and [10]

"[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

"[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest..."
A Lawyer Currently Serving as a Government Lawyer Is Bound by SCR 20:1.9

SCR 20:1.9 Duties to former clients
- "(a) 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 a writing signed by the client."
- ABA Comment [3], which follows SCR 20:1.9, defines "substantially related."

Substantially Related: ABA Comment [3]
- "[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent."
Substantially Related: ABA Comment [3] continued

- "Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services."

SCR 20:1.9 Duties to Former Clients (continued)

“(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by sub. (c) and SCR 20:1.6 that is material to the matter; unless the former client gives informed consent, confirmed in a writing signed by the client.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as these rules would permit or require with respect to a client."
Conflicts of Interest in the Government: Imputation

- SCR 20:1.11(f) states:
  "The conflicts of a lawyer currently serving as an officer or employee of the government are not imputed to the other lawyers in the agency. However, where such a lawyer has a conflict that would lead to imputation in a nongovernment setting, the lawyer shall be timely screened from any participation in the matter to which the conflict applies."

Effective Screening for Government Lawyers

- SCR 20:1.0(n) defines "screened" and establishes the requirements for an effective screen.
- "(n)Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these rules or other law."
Erecting an Effective Screen

ABA Comments [10] to SCR 20:1.0 provides guidance.
- "In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening."

Erecting an Effective Screen

ABA Comment [9] following SCR 20:1.0 provides further guidance:
- "The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected."
- "The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter."
- "Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter."
- "Additional screening measures that are appropriate for the particular matter will depend on the circumstances."
Erecting an Effective Screen

"To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as:

- a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter;
- written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter; and
- periodic reminders of the screen to the screened lawyer and all other firm personnel."

Obligations of Organizations under SCR 20:1.13

- Reporting Up and Out, SCR 20:1.13(b)
- Identity of the Client and Constituent Warnings, SCR 20:1.13(f)
- Dual Representation, SCR 20:1.13(g)
SCR 20:1.13(b): Reporting Up and Out

• "(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 which 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 in behalf of the organization as determined by applicable law."

SCR 20:1.13(f): Constituent Warnings

• "(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."
SCR 20:4.2
Communication with Represented Persons

- "(a) In representing the client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.
- (b) An otherwise unrepresented party to whom limited scope representation is being provided or has been provided in accordance with SCR 20.1.2(c) is considered to be unrepresented for purposes of this rule unless the lawyer providing limited scope representation notifies the opposing lawyer otherwise."

SCR 20:4.2
Communication with Represented Persons

- ABA Comment [7]
  "In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare SCR 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4."
SCR 20:4.3
Dealing with Unrepresented Persons

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall inform such person of the lawyer's role in the matter. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

(b) An otherwise unrepresented party to whom limited scope representation is being provided or has been provided in accordance with SCR 20.1.2(c) is considered to be unrepresented for purposes of this rule unless the lawyer providing limited scope representation notifies the opposing lawyer otherwise.

SCR 20:3.3 Candor to the Tribunal

(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.
SCR 20:3.3 Candor to the Tribunal (continued)

"(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in pars. (a) and (b) apply even if compliance requires disclosure of information otherwise protected by SCR 20:1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse."

Thank you!