Wednesday, June 20
The Rules of Professional Conduct in the Government Law Office

NAAG 2018 Summer Meeting
Portland, Ore. | June 19-21, 2018
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RPCs in the Government Law Office

Conflicts of Interest

» Conflict of Interests within the AG office – are the agencies separate entities or one?
  - Separate governance and interests?
  - 1.7: Current client conflict of interest includes when the representation of one client materially impairs the presentation of another current client. Where state agencies are in conflict with one another.
[9] The duty defined in this Rule applies to governmental organizations. 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. See Scope [18]. 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 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. 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.
Conflicts With Outside Counsel

» Agency by agency a single client for outside counsel?
  - Review engagement letters and consider outside counsel guidelines.
  - Take care with confidentiality and privilege.

» Practical approach is appropriate, but you are the client.
Personal Interest Conflicts

» Participating in legal matters in which the lawyer or the AG has prior personal or professional involvement.

» Business relationships.

» “I also have a medieval Christianity that says if you violate an oath, you're going to hell. You all may not share that, but I'm planning to populate hell.”

» A DOJ attorney was assigned a criminal case with 15 months remaining under the statute of limitations. He allowed the “clear and unambiguous” time limit to expire without filing charges or alerting the Department about the impending deadline. Why?

» A DOJ prosecutor developed a “close personal relationship” with the defendant in a case he was prosecuting, “had numerous personal contacts” with the defendant without the consent of the defendant’s lawyer, and, without telling his supervisors at the Justice Department, negotiated a plea agreement permitting release of the defendant from custody.
Lawyers Can’t Lie

- **Maintaining The Integrity Of The Profession**
  - Rule 8.4 Misconduct
    - It is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

- **Transactions With Persons Other Than Clients**
  - Rule 4.1 Truthfulness In Statements To Others
    - In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

- **Advocate**
  - Rule 3.3 Candor Toward 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;
Most Common Bar Discipline Complaints for Government Lawyers

- **RPC 3.5: Impartiality and Decorum of the Tribunal**
  - Ex parte communications with the judge

- **RPC 3.6: Trial Publicity**
  - Media communications

- **RPC 3.8: Special Responsibilities of a Prosecutor**
  - Brady violations
  - Malicious prosecution
  - Improper media contact/commentary

- **RPC 4.2: Communication with Person Represented by Counsel**
  - Witnesses

- **RPC 8.4: Misconduct**
  - Conduct prejudicial to the administration of justice
The Government Law Office is a Law Firm
Creating a Culture of Risk Management from the Top Down

- Management must encourage transparency
  - We have your back
  - Everyone makes mistakes and you could be next
  - Know the difference between honest mistakes and knowing or intentional misconduct and treat them accordingly
  - Have a plan and share it
- Risk Management and Ethics are not the same thing, you need both

Telling The Boss

- To whom do you report?
- Reputational concerns
- Job security

Distinguishing Political Influences From a Well Run Law Office
Discipline

- **Formalize Office Policies**
  - You would be surprised how many of your deputies call us before they call you
  - Have a policy and communicate it internally

- **Formalize an Office Response Plan**
  - Who will respond?
  - Never respond yourself
  - Maintaining the file

- **Understand Who Pays the Costs of Responding**
  - Staff attorneys qualified? Conflicted?
    - Joint representation
  - Insurance analysis (who to call, what is the coverage)
  - Self-insured (county counsel, DOJ, budget impact)
  - Hiring outside counsel
  - Employer-employee defense obligations
» **Nature of Obligation to respond to Bar inquiry (RPC 8.1)**
  - To respond fully and completely
  - To make records available
    - Public records laws and exceptions
  - Do you have to disclose everything? (e.g., do you have to “turn yourself in”)

» **Other considerations:**
  - Confidentiality of collateral proceedings
  - Collateral Proceedings
Allison Martin Rhodes is a partner in Holland & Knight’s Portland and Los Angeles offices and the co-chair of the Holland & Knight Legal Profession Team. She focuses her practice on legal ethics and risk management, law firm organization and attorney disciplinary defense. Ms. Martin Rhodes advises both law firms and lawyers on ethical and fiduciary issues related to lateral hiring, law firm dissolution and expulsion matters. In that context, she represents lawyers and law firms in litigation among themselves.

National Association of Attorneys General

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