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# Government Attorneys and the Ethical Rules: Good Souls in Limbo

*Maureen A. Sanders\**

## I. INTRODUCTION

During the last two decades reported decisions addressing the propriety of the actions of government attorneys have occurred with greater frequency than in the past. The decisions have occurred both within lawsuits in which a government attorney represents a party and within disciplinary proceedings against a government attorney. The increase is due, not to an increase in inappropriate behavior by public sector attorneys, but to the ever increasing complexity of their functions<sup>1</sup> and to the evolution of the ethical rules applicable to attorneys.<sup>2</sup> The current ethical rules of the fifty states are unsatisfactory when applied to government attorneys because they mandate certain behavior while failing to take into account the constitutional and statutory powers and duties imposed upon government attorneys. This failure results in a lack of meaningful ethical guidelines for government attorneys. Government attorneys are often compelled to operate in clouds of uncertainty because the ethical rules fail to relate professional ethical responsibilities to the substantive law related to governmental operations. Consequently, government lawyers must at times disregard the

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1. Joseph Lesser, *The Changing Role of the Public Sector Lawyer—An Historical Overview*, 11 URBAN, STATE & LOCAL LAW NEWSLETTER at 9 (1988).

2. Len Biernat, *Corporate Practice: From the Model Code to the Model Rules to the States*, 34 ST. LOUIS U. L.J. 27 (1989).

technicalities and the underlying rationale of the ethical rules to accommodate the requirements imposed by law.<sup>3</sup>

This article will point out the problems for government attorneys existent with the current rules by focusing on the states' attorneys general. The difficulties for attorneys general and their staff are encountered by every government lawyer. We will begin by examining the powers and duties of the states' attorneys general and then use that examination to point out the ambiguities and inherent conflicts of the existing ethics rules when they are applied to the attorneys general and their assistants. Finally, proposals for changes in the ethical rules will be offered and discussed.

## II. POWERS AND DUTIES OF STATES' ATTORNEYS GENERAL

Every state and territory has an attorney general or similar official.<sup>4</sup> How an individual becomes attorney general differs among them. Forty-two of the attorneys general are elected.<sup>5</sup> Eight are appointed by governors,<sup>6</sup> one by a state legislature<sup>7</sup> and one by a state supreme court.<sup>8</sup>

The powers and duties of the attorneys general vary considerably from state to state. The variances arise from (1) the sources of the powers and duties, (2) the beneficiaries of the duties, and (3) the functions falling within the mandated or allowed powers and duties. The route to the office of the attorney general in some cases impacts the view an attorney general or the courts has as to the powers and duties encompassed by the position.<sup>9</sup> The powers and duties of a state attorney general may be imposed by the state constitution or statutes, or a combination of the two.<sup>10</sup> Additionally, many

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3. Ann Bradford Stevens, *Can the State Attorney General Represent Two Agencies Opposed in Litigation?* 2 GEO. J. LEGAL ETHICS 757 (1989).

4. William C. Haflett, Jr., *Tice v. Department of Transportation: A Declining Role for the Attorney General?* 63 N.C. L. REV. 1051 (1985).

5. Letter from Lynne Ross, Deputy Director, National Association of Attorneys General (March 18, 1987) (on file with the author). The statistics include the Attorneys General of the territories as well as the states.

6. *Id.* The ten are: Alaska, American Samoa, Guam, Hawaii, New Hampshire, New Jersey, Northern Mariana Islands, Puerto Rico, U.S. Virgin Islands and Wyoming.

7. *Id.* The state is Tennessee.

8. *Id.* The state is Maine.

9. See text accompanying notes 74 to 77.

10. At least twenty-four states have constitutional provisions which describe

state courts have decided that the state attorney general has common law powers to protect the public interest.<sup>11</sup> These common law powers have been discussed as including the authority to institute and litigate all suits and proceedings as the attorney general "deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights and interest."<sup>12</sup> In those states recognizing common law powers of the attorney general, the courts have tended to find that the attorney general has certain inherent powers<sup>13</sup> and have allowed the attorney general a great degree of latitude in exercising those powers as long as the attorney general did not abuse them by acting arbitrarily or capriciously.<sup>14</sup> Other courts have taken the position that an attorney general's power is strictly circumscribed by the state constitution and statutes.<sup>15</sup> At least one court has held that the attorney general powers enumerated in the constitution are exclusive and cannot be enlarged or restricted by the legislature except in the manner authorized by the constitution.<sup>16</sup>

The actual functions of the state attorneys general which are mandated or allowed by the law also vary considerably. They may include representation in litigation, the giving of opinions, general advising, criminal prosecutions, appellate advocacy or membership on various boards with other public officials. In some instances the functions may be exclusively the attorney general's and in others it may be shared with other public officials or is delegable.

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some of the duties of their respective attorneys general. See NATIONAL ASS'N OF ATT'YS GEN., COMMITTEE ON THE OFF. OF ATT'Y GEN., THE STRUCTURE OF STATE LEGAL SERVICES (1976).

11. See NATIONAL ASS'N OF ATT'YS GEN., COMMON LAW POWERS OF STATE ATTORNEYS GENERAL 22-23 (1977); see also *Hill v. Texas Water Quality Bd.*, 568 S.W.2d 738 (Tex. 1978).

12. *Pierce v. Superior Court*, 37 P.2d 453, 461 (Cal. 1934).

13. See, e.g., *State v. Thomas*, 297 P.2d 624 (Ariz. 1956) (court recognized that if attorney general had common law powers, attorney general would have duty to represent state whenever state had right to sue). In *Fergus v. Russell*, 110 N.E. 130 (Ill. 1915), the Illinois Supreme Court held that the General Assembly had no power to divest the attorney general of the common law powers inherent in the office because they were constitutionally vested. John W. Freels, *Powers of the Attorney General of Illinois*, 53 CHICAGO BAR RECORD 119, 123-24 (1971).

14. See, e.g., *Commonwealth v. Khorey*, 555 A.2d 100 (Pa. 1989).

15. See, e.g., *State v. Bron*, 537 N.E.2d 534 (Ind. 1989) and *State ex rel Haskell v. Huston*, 97 P. 982 (Okla. 1908).

16. *Garcia v. Laughlin*, 285 S.W.2d 191, 194 (Tex. 1956).

The intended beneficiaries of the powers and duties of the attorneys general also vary considerably. They may include state executive officers, departments and agencies, judicial officers and agencies, county officers and agencies, municipal officers and agencies, district attorneys, state legislators and the general public. Some of the statutory and constitutional provisions are not particularly clear as to whom the attorney general owes duties. For example, a statute may provide that the attorney general is the chief legal advisor for the state with little or no additional delineation of duties.<sup>17</sup> No mention is made as to which part of the state bureaucracy advice is to be given, and uncertainties arise as to the identity of the client for government attorneys.<sup>18</sup> Is the client a particular official, a particular agency,<sup>19</sup> a particular branch of government,<sup>20</sup> or the state as a whole?<sup>21</sup> Other statutes provide that the attorney general should initiate and defend those matters in the public interest,<sup>22</sup> however, no guidance is provided as to who determines what is in the "public interest." "It is not obvious, however, that the 'public interest' would always dictate one course over another."<sup>23</sup>

All of the attorneys general have some responsibility to represent state agencies and officials. Additional duties of the attorneys general are scattered throughout state constitutions and statutes. The attached table gives an overview of some of the more important functions of the attorneys general by state. An examination of the table will reveal the range of duties of

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17. See, e.g., *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865 (Ky. Ct. App. 1974).

18. Keith W. Donahoe, *The Model Rules and the Government Lawyer, A Sword or Shield? A Response to the D.C. Bar Special Committee on Government Lawyers and the Model Rules of Professional Conduct*, 2 GEO. J. LEGAL ETHICS 987 (1989).

19. The District of Columbia Bar Association issued a committee report suggesting that the employing agency should be considered the lawyer's client. *Bar Group Identifies Agency as Government Lawyer's Client*, 4 *Laws. Man. on Prof. Conduct (ABA/BNA)* No. 20 at 350 (Oct. 26, 1988).

20. *Ward v. Superior Court.*, 138 Cal. Rptr. 532 (1977) (finding that the county, not the official is client).

21. See Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987).

22. See, e.g., N.M. STAT. ANN. § 8-5-2J (1991) (attorney general shall "appear before local, state and federal courts and regulatory officers, agencies and bodies, to represent and to be heard on behalf of the state when, in his judgment, the public interest of the state requires such action or when requested to do so by the governor; . . .").

23. *FTC v. American Nat'l Cellular*, 868 F.2d 315, 319 (9th Cir. 1989).

the attorneys general as well as the lack of consistency among the states as to the expectations for their attorneys general. Although a lack of consistency exists among the states, one general observation can be made. The states' attorneys general are obligated to offer their services to several individual entities or interests pursuant to the states' constitutions or statutes.

These obligations arise by virtue of holding the office, not by choosing whether or not to accept a particular client.<sup>24</sup> This method of "obtaining clients" is foreign to private sector attorneys.<sup>25</sup> The basis for the duties imposed upon private sector attorneys by disciplinary board ethical rules implicitly rely upon the contractual agreement reached between the attorney and the client.<sup>26</sup>

No such voluntary assumption of obligations occur for the attorney general or the assistants on a case by case or client by client basis. While it could be said that the voluntary assumption of the attorney obligations occurs at the time one seeks election or accepts a job, neither the scope nor the subject matter of the representations is known at that time. The ability to withdraw from representation is an avenue not always open to an attorney general because of the statutory mandate that the attorney general represent, for example, a particular state agency.<sup>27</sup>

This disparity between the attorney-client relationships of a government attorney and those of a private sector attorney is one largely ignored by the drafters of the ethical rules applicable to attorneys.<sup>28</sup> While lip service to the distinction has been made in comments to the rules,<sup>29</sup> the failure to

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24. Ward v. Superior Court, 138 Cal. Rptr. 532 (1977).

25. Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987).

26. For example, as to whether a client-lawyer relationship exists: "Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so." MODEL RULES OF PROFESSIONAL CONDUCT Scope cmt. 3 (West 1992).

27. Cf. *People ex rel. Deukmejian v. Brown*, 172 Cal. Rptr. 478 (1981) (statute provided attorney general right to withdraw from representation of his statutory clients and to permit them to engage private counsel).

28. The fact that no government attorney was included in the group of drafters of the Model Rules of Professional Conduct may be one cause of the oversight. See Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 693-95 (1989).

29. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 cmt. 7 (West 1992).

recognize the distinction within the rules themselves is the source of many of the uncertainties regarding the behavior of government attorneys. The majority of the questions about government attorneys' behavior arise in what is generally viewed as a duty of loyalty owed by an attorney to a client. They generally arise amidst allegations that a government attorney has impermissible conflicts of interest or has violated client confidences.

### III. CONFLICT OF INTERESTS DILEMMAS OF GOVERNMENT ATTORNEYS

The conflict of interests dilemmas for attorneys general usually arise in four contexts: 1) disputes between two agencies or officials, 2) dual roles within one agency represented by an attorney general, 3) criminal investigation or prosecution of public officials, and 4) disagreement between an attorney general and another public official as to the appropriateness or legality of a particular action.<sup>30</sup>

The first situation occurs when two state agencies or officials both represented by the office of the attorney general are involved in a controversy in which they have conflicting views. The second situation occurs when a quasi-judicial body, like a public utility commission, and its staff, which advocates a position before the quasi-judicial body, are both entities of the state represented by the attorney general's office. The third situation which presents a conflict of interest question to state attorneys general occurs where a public official, represented in his official capacity by the attorney general, becomes the target of an attorney general criminal investigation or the subject of a grand jury proceeding. The fourth situation occurs when the attorney general concludes that the legal position which an agency or official wants advocated is contrary to that held by the attorney general or that a state statute is unconstitutional.<sup>31</sup>

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30. See NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, STATE ATTORNEYS GENERAL: POWERS AND DUTIES (Lynne M. Ross ed., 1988).

31. Another conflict situation may arise when an attorney general is both a member and legal counsel to a board. The problems arising in this context will not specifically be addressed in this article because they are similar to those in the private sector when an attorney sits on a board and is the legal counsel for the board. One difference, however, may exist because the attorney general may be required by statute to wear both hats without the option to remove one of them.

The courts have repeatedly addressed these questions but have not answered with one voice. In reaching their conclusions the courts have considered the inherent power of the courts to preserve the adversarial nature of the matters before them,<sup>32</sup> the constitutional, statutory, and regulatory mandates for the attorneys general and, either directly or indirectly, the relevant ethical mandates for attorneys practicing in their states.<sup>33</sup> The failure of the courts to reach consistent results in similar situations demonstrates the failure of the ethical rules to provide workable guidelines to government attorneys.

#### A. *Disputes Between Two Agencies*

The variety of the functions and the intended beneficiaries of the duties of state attorneys general which are mandated by statutes and state constitutions means that an attorney general will inevitably encounter a situation where two state agencies represented by the attorney general's office disagree in a particular matter.<sup>34</sup> The disagreement may or may not lead to litigation, but the reported cases generally focus on the representation of two agencies or officials involved in litigation. If an attorney general has two agencies or officials requesting representation, three options are available. The attorney general may represent both, neither or one.

The ethical rules state that an attorney or a legal office cannot represent two clients whose interests are adverse. Courts and ethics committees which have been presented with a question as to the appropriate course of action for government attorneys confronted with a two-agency conflict have usually been adamant that their conclusion as to appropriate behavior is the right one.<sup>35</sup> Unfortunately for government attorneys, the judicial conclusions are not consistent. Some have said represent both,<sup>36</sup> others proclaim the government attorney

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32. Public Util. Comm'n v. Cofer, 754 S.W.2d 121, 124-25 (Tex. 1988).

33. See, e.g., Polkey v. City of New Orleans, 557 So. 2d 405, 407 (La. Ct. App), cert. denied, 559 So. 2d 1375 (La. 1990).

34. State ex rel. Allain v. Mississippi Pub. Serv. Comm'n, 418 So. 2d 779 (Miss. 1982).

35. See, e.g., City of York v. Pennsylvania Pub. Util. Comm'n, 281 A.2d 261 (Commw. Ct. 1971), aff'd, 295 A.2d 825 (Pa. 1972).

36. See, e.g., State ex rel. Allain v. Mississippi Pub. Util. Comm'n, 418 So. 2d 779, 784 (Miss. 1982), Arizona State Land Dep't v. McFate, 348 P.2d 912, 915-16 (Ariz. 1960).

can represent neither;<sup>37</sup> still others conclude that the government attorney should represent one of the clients.<sup>38</sup>

The initial question sometimes addressed by the courts in these cases is whether the court is being presented with a case or controversy. Some have found that the existence of "the state" on both sides of the conflict means that two adversarial parties do not exist, so the jurisdictional requirement of case or controversy is lacking. Generally, the response has been that public officials should have the right to have their legal duties judicially determined.<sup>39</sup>

The ethical conflict when two opposing clients are involved centers on the notion, "No man can serve two masters."<sup>40</sup> The argument is that an attorney general's office cannot be loyal to two clients who are in direct conflict. Nonetheless, several courts have concluded that two masters can in fact be served.

In *Connecticut Commission on Special Revenue v. Connecticut Freedom of Information Commission*,<sup>41</sup> the appellate court determined that the Attorney General may represent opposing state agencies in a dispute.<sup>42</sup> In doing so the court recognized that the attorney general had to represent the broader interests of the state, not merely two separate agencies. The court viewed the real client as the people who were entitled to have the state agencies represented by the constitutionally created legal officer of the state.<sup>43</sup> In reaching that conclusion the court rightly recognized that any other decision would lead to the "absurd conclusion that in the event of any dispute whatsoever between two state agencies, even though that dispute was not in litigation, the attorney general could not act as legal advisor and lawyer for either agency because of the conflict indicated by their dispute."<sup>44</sup> The court suggested that concerns about the appearance of impropriety could be lessened by having the Attorney General himself file an entry on behalf of the

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37. *People ex rel. Deukmejian v. Brown*, 172 Cal. Rptr. 478 (1981); ABA Comm. on Ethics and Professional Responsibility Informal Op. 1282 (1973).

38. *See State Health Planning & Coordinating Council v. Hyland*, 391 A.2d 1247, 1250-51 (N.J. Super. Ct. App. Div. 1978) (finding that the attorney general could refuse to represent one agency when already representing another).

39. *See Manchin v. Browning*, 296 S.E.2d 909 (W. Va. 1982).

40. *Matthew* 6:24.

41. 387 A.2d 533 (Conn. 1978).

42. *Id.* at 537.

43. *Id.*

44. *Id.* at 538.

state and the assistant attorneys general enter on behalf of the respective state agencies.<sup>45</sup>

Similarly, in *Commonwealth Department of Transportation v. Pennsylvania Public Utility Commission*,<sup>46</sup> the court recognized that there are situations "which simply require the Attorney General to wear two hats, as it were."<sup>47</sup> Some courts have justified the dual role by relying on the responsibility of attorneys general to the public or to the public interest.<sup>48</sup> In doing so, the courts have generally recognized that they are redefining the identity of the client of a government attorney or are condoning a violation of the ethical rules regarding conflicts of interest.

Other courts have taken a more narrow approach and have determined that the representation by an attorney general of more than one interest in a case poses an irreconcilable conflict.<sup>49</sup> The results in these cases are consistent with the language used in the Model Rules of Professional Conduct and the Code of Professional Responsibility. In reaching these decisions the courts have had to ignore the constitutional and statutory provisions which mandate representation by the attorney general for the two competing officials or entities. To avoid having to ignore these laws, at least one court determined that a conflict requiring withdrawal does not exist if the attorney general opposes an order within the appropriate proceeding when the attorney general may have to enforce the order in the future.<sup>50</sup>

A government attorney faced with two agencies in conflict will find little guidance from court decisions as to the appropriate course of action. The courts have analyzed the dilemma in a variety of ways with diverse outcomes.

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45. *Id.* at 538-39.

46. 394 A.2d 683 (Pa. Commw. Ct. 1978).

47. *Id.* (relying on *Ault v. Unemployment Compensation Bd. of Review*, 146 A.2d 729 (Super. Ct. 1958), *rev'd on other grounds*, 157 A.2d 375 (Pa. 1960)).

48. 387 A.2d 533 (Conn. 1978).

49. *Hanna v. Rewkowski*, 365 N.Y.S.2d 609 (App. Div. 1975); *City of York v. Pennsylvania Pub. Util. Comm'n*, 281 A.2d 261 (Commw. Ct. 1971), *aff'd*, 295 A.2d 825 (Pa. 1972).

50. *Commonwealth Dep't of Transp. v. Pennsylvania Pub. Util. Comm'n*, 394 A.2d 683, 686 (Pa. Commw. Ct. 1978).

### B. *Dual Roles Within One Agency*

The second type of conflict of interest involves representation by the attorney general's office of one agency where the agency or parts of it have two separate functions which, at least initially, appear to be contradictory. For example, it is not unusual for a utility commission to have its own staff appear before it in certain rate cases. The staff is usually presenting a position contrary to that taken by the regulated industry while the commission itself is usually performing an adjudicatory role. The staff may well be represented by an assistant attorney general while the commission is assisted in its quasi-judicial function by the attorney general's office. Thus the same office is representing a party and the decision-maker.

While the courts have been troubled by this arrangement, they seem to view the situation as unavoidable given the general nature of many state and federal agencies. Those agencies often have investigative and quasi-judicial functions.<sup>51</sup> The courts have been reluctant to find an inherent inappropriate conflict for the attorney general's office and have tended to analyze the situation within due process notions.<sup>52</sup>

In *North Fulton Community Hospital, Inc. v. State Health Planning & Development Agency* the court was faced with an argument that a dual role for an attorney within an administrative hearing is *per se* prejudicial.<sup>53</sup> The court declined to make such a finding and determined that a case by case analysis was necessary. The court went on to say the real question was the fairness of the hearing. It recognized that administrative hearings are not "fitted with all the trappings" of criminal procedure or civil procedure. The focus of the court's analysis was whether the other parties and their attorneys had a fair opportunity to present their case. The advice to the decision maker had to be made in an "evenhanded manner with due regard for the procedural rights of all parties."<sup>54</sup>

A similar question arose when an attorney general's office represented the public residential ratepayers in a rate hearing

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51. *North Fulton Comm. Hosp., Inc. v. State Health Planning & Dev. Agency*, 310 S.E.2d 764 (Ga. Ct. App. 1983).

52. *Id.* at 769.

53. 310 S.E.2d 764 (Ga. Ct. App. 1983). *See also* *Schaffer v. State Bd. of Medicine*, 237 S.E.2d 510 (Ga. Ct. App. 1977).

54. *North Fulton*, 310 S.E.2d at 771.

while assisting the commission hearing the case.<sup>55</sup> In that case the court recognized that the two individuals from the attorney general's office assigned to assist the commission functioned independently of the Attorney General. With no evidence of control over the commission's attorneys exercised by the Attorney General, the court concluded that a conflict of interest did not in fact exist.<sup>56</sup> At least one court has recognized that if the government attorneys representing two interests or functions do not act separately and independently of each other, the court must take appropriate action, including dismissal.<sup>57</sup>

### C. *Criminal Prosecutions of Public Officials*

The third apparent conflict occurs when the attorney general investigates or prosecutes a public official. Attorneys general of most states have duties which involve the handling of both civil and criminal cases on behalf of the state.<sup>58</sup> In pursuing criminal investigations or seeking criminal indictments an attorney general may be investigating or indicting public officials. Often these public officials are represented by the attorney general when they are acting in their official capacities. The question then arises as to whether or not the attorney general is able to prosecute or investigate public officials who are advised in their official capacities by the attorney general without having an unethical conflict of interest.

The Tenth Circuit Court of Appeals addressed the question of whether an unethical conflict of interest existed where the Attorney General of New Mexico assisted the United States Attorney in prosecuting two public officials of New Mexico who had been represented in their official capacities by the office of

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55. *In re Rates & Charges of Mountain States Tel. & Tel. Co.*, 653 P.2d 501 (N.M. 1982).

56. *Id.* at 504.

57. *In re Randy G.*, 487 N.Y.S.2d 967, 970-71 (Fam. Ct. 1985) (court dismissed juvenile proceeding because attorneys from corporation counsel's office representing two interests did not remain separate).

58. For example, most attorneys general may initiate local prosecutions in at least some instances. Only eight states reported that the attorney general may never initiate prosecutions under any circumstances. NATIONAL ASS'N OF ATT'YS GEN., COMMITTEE ON THE OFF. OF ATT'Y GEN., THE PROSECUTION FUNCTION: LOCAL PROSECUTION AND THE ATTORNEY GENERAL (1974). See also *Pietra v. State*, 530 N.Y.S.2d 510, 512 (1988) (attorney general is given no general prosecutorial authority and except where specifically permitted by statute has no power to prosecute criminal actions).

the attorney general.<sup>59</sup> In reaching its decision that no conflict of interest existed, the court relied on the district court's conclusion that an inherent conflict of interest does not arise merely because a state attorney general prosecutes a state officer whom he represented in his official capacity on matters unrelated to the offenses charged.<sup>60</sup>

Finding no inherent conflict of interest, the court proceeded to determine whether an actual conflict of interest existed. The court determined that no confidential information regarding the matters contained in the indictment had been communicated by the defendant to anyone in the attorney general's office. The district court also concluded that the New Mexico statute required the Attorney General to defend actions against a state officer only when the cause of action arises while the officer is acting in his official capacity. The indictment only alleged unlawful personal acts not encompassed by the public officer's official duties. Thus, the attorney general was not the defendant's attorney for matters related to the criminal prosecution and was not barred from participating in the prosecution.

A similar result was reached when the governor of Arizona was the target of a grand jury investigation.<sup>61</sup> The court concluded that the attorney general was not precluded from initiating grand jury proceedings concerning the governor if the attorney general and the governor had not communicated regarding the matter being investigated.<sup>62</sup> Prior to that decision the Supreme Court of Arizona had concluded that the attorney general would violate ethical principles if he presented a case to the grand jury concerning matters he and the governor had confidentially discussed.<sup>63</sup>

#### *D. Disagreements as to What is the Public Interest*

The fourth type of conflict situation an attorney general encounters occurs when the attorney general wants to take some action on behalf of the "public interest." State statutes often impose a duty upon the attorney general to represent the

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59. *United States v. Troutman*, 814 F.2d 1428 (10th Cir. 1987).

60. *Id.* at 1438-39.

61. *Mecham v. Superior Court ex rel. Corbin*, Sup. Ct. of Az. No. CV-87-0410-SA, State Grand Jury Inquiry No. 235, G.J. 73, Nov. 18, 1987.

62. *Id.*

63. *Corbin v. Broadman*, 433 P.2d 289 (Ariz. Ct. App. 1967).

public interest. The ethical conflict typically arises when a state official or the legislature has a view different from the attorney general's as to what is in the public interest. A state agency director may disagree with the attorney general as to the advisability of taking a particular appeal.<sup>64</sup> An attorney general may believe the public interest requires suing a public official or agency for a violation of the law.<sup>65</sup> The legislature may pass a statute which the attorney general believes is unconstitutional or generally against the public interest and therefore the attorney general seeks a declaratory judgment or refuses to enforce it.<sup>66</sup> Courts faced with these types of conflicts usually center their analysis on whether the attorney general has the power, or should have the power, to bring those actions or make those decisions.

One of the concerns of the courts when an attorney general rules on the duties to the public interest or public good is the separation of powers doctrine.<sup>67</sup> The separation of powers doctrine embodies the systems of checks and balances existent in government on both the federal and state levels.<sup>68</sup> The underlying rationale is the avoidance of undue accumulation of power in one person.<sup>69</sup> Courts fear that if a state attorney general is allowed to use the power of the office to control access to the judicial system in a way that tramples the authority of the executive or legislative branches, then the protection of the checks and balances will be lost.<sup>70</sup>

In addition to separation of powers concerns, the courts have addressed the propriety of an attorney general determining what is the public interest. In *Manchin v. Browning* the court stated, "The Attorney General's role in this [representative] capacity is not to make public policy in his own right on behalf of the state."<sup>71</sup> The states have complex sets of institutions to analyze and define the public interest. Should one gov-

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64. Feeney v. Commonwealth, 366 N.E.2d 1262 (Mass. 1977).

65. State Bd. v. Bowers, No. 45478 (Ga. 1988).

66. Fund Manager, Public Safety Personnel Retirement Sys. v. Corbin, 778 P.2d 1244 (Ariz. Ct. App.), *aff'd in part and dismissed in part, on other grounds*, 778 P.2d 1260 (Ariz. 1989).

67. See, e.g., Baxley v. Rutland, 409 F. Supp. 1249, 1255 (M.D. Ala. 1976).

68. See Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561.

69. *Id.*

70. Motor Club v. Department of Transp., 251 N.W.2d 510, 515-16 (Iowa 1977).

71. 296 S.E.2d 909, 920 (W. Va. 1982).

ernment attorney be able to set their view of the public interest above the views of other public officials?<sup>72</sup>

The courts have answered this question with both affirmative and negative responses. Some have said the office of the attorney general does not have the power to determine public interest at least to the extent of accessing the judicial system.<sup>73</sup> Others have said that the attorney general has a right to refuse to represent a particular position and then allow private counsel to be selected.<sup>74</sup> Courts have also split on whether attorneys general can seek a declaratory judgment that a state statute is unconstitutional.<sup>75</sup> A different analysis may be required when the attorney general is an elected official. In that event the people have elected a person so that independent judgment regarding the legal affairs of government can be had.<sup>76</sup>

#### IV. CONFIDENTIALITY DILEMMAS OF GOVERNMENT ATTORNEYS

Government attorneys have been criticized for their disclosure of what some would view as confidential information. Views certainly vary on what is confidential information when dealing with public entities.<sup>77</sup> The various state sunshine laws regarding open meetings and public records certainly provide limits as to what claims of confidentiality may be made.<sup>78</sup> Assuming that at least some information a government attorney may have is confidential, to whom can disclosure be made or,

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72. William Josephson & Russel Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict*, 29 HOW. L.J. 539, 565 (1986).

73. See, e.g., *State ex rel. Amerland v. Hagan*, 175 N.W. 372 (N.D. 1919).

74. *Superintendent of Ins. v. Attorney Gen.*, 558 A.2d 1197 (Me. 1989).

75. *Compare Hetherington v. McHale*, 311 A.2d 162, 167 (Pa. Commw. Ct. 1973) *rev'd on other grounds*, 329 A.2d 250 (Pa. 1974) with *Fund Manager, Public Safety Personnel Retirement Sys. v. Corbin*, 778 P.2d 1244 (Ariz. Ct. App.), *aff'd in part and dismissed in part, on other grounds*, 778 P.2d 1260 (Ariz. 1989); see also *State v. Burning Tree Club*, 481 A.2d 785 (Md. Ct. App. 1984); *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865 (Ky. Ct. App. 1974).

76. Eric Schnapper, *Legal Ethics and the Government Lawyer*, 32 RECORD 649 (1977).

77. For a general discussion see Jack B. Weinstein & Gary A. Crosthwait, *Some Reflections on Conflicts Between Government Attorneys and Clients*, 1 Touro L. REV. 1 (Spring 1985).

78. Ann Bradford Stevens, *Can the State Attorney General Represent Two Agencies Opposed in Litigation?* 2 GEO. J. LEGAL ETHICS 757, 776-80 (1989).

alternatively, to whom are duties of disclosure or confidentiality owed?

Courts and committees addressing the issue of disclosure have encountered problems similar to those struggling with the conflicts issues. The Federal Bar Association Ethics Committee has opined that the extent of confidentiality a government lawyer owes to those consulting him or her varies in degrees according to the subject matter.<sup>79</sup> Disclosure beyond the agency or other law enforcing or disciplinary authorities was considered to be

warranted only in the case when the lawyer, as a reasonable and prudent man, conscious of his professional obligations of care, confidentiality and responsibility concludes that these authorities have without good cause failed in the performance of their own obligation to take remedial measures required in the public interest.<sup>80</sup>

Others have concentrated on the danger of silencing government attorneys regarding wrongdoing in government. "If there is wrongdoing in government, it must be exposed. The law officer has a *special* obligation not to permit a cover-up of illegal activity on the ground that exposure may hurt his party."<sup>81</sup> The balancing of the need to keep some things confidential against the duty to expose wrongdoing by public officials is a difficult task for government attorneys within the loyalty concepts contained in the current ethical rules.

## V. THE LOYALTY ETHICAL RULES

The current ethical rules applicable to loyalty of government attorneys and courts' applications of them are unsatisfactory. A discussion of the application of them to the typical conflicts and confidentiality questions encountered by attorneys general will dramatically illustrate their inadequacies.

All fifty states have ethical mandates governing the conduct of attorneys.<sup>82</sup> Generally, loyalty to a client is required to

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79. Federal Bar Assoc., Professional Ethics Comm., Op. 73-1 (1973) (the government client and confidentiality).

80. *Id.*

81. Jack B. Weinstein, *Some Ethical v. Political Problems of a Government Attorney*, 18 ME. L. REV. 155, 160 (1966).

82. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2 (1986).

some degree.<sup>83</sup> The mandates include restrictions on attorneys' behavior regarding conflicts of interests and confidentiality. Although the restrictions vary from state to state, many incorporate the language of either the Model Code of Professional Responsibility (hereinafter Code)<sup>84</sup> or the Model Rules of Professional Conduct (hereinafter Rules).<sup>85</sup> The Rules, adopted in 1983 by the American Bar Association, will be used throughout the following discussion. Similar concerns arise in those states which use the Code when drafting their rules.

### A. *Applicability to Government Attorneys*

Traditionally, the courts and disciplinary authorities have assumed that a state's ethical rules apply to government attorneys.<sup>86</sup> Attorneys general and other government attorneys are required to be licensed to practice law and in some states are required to be members of the state bar.<sup>87</sup> Thus, adherence to the rules of the licensing entity such as the state supreme court or the state bar is a condition of holding the office. The Rules and their respective official comments specifically discuss their applicability to government attorneys.<sup>88</sup> Attempts to exempt government attorneys from certain parts of the Rules have been unsuccessful.<sup>89</sup> Arguments that the ethical mandates were not applicable to certain situations faced by government attorneys have often fallen on unsympathetic judicial ears.<sup>90</sup>

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83. *Id.* at § 4.1.

84. The Model Code of Professional Responsibility was originally adopted by the American Bar Association in 1969. Subsequently it was adopted in some form by forty-nine states and influenced California's rule. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.6 (1986). Some of those states have since adopted the Model Rules of Professional Conduct.

85. The Model Rules of Professional Conduct were originally adopted in 1983 by the American Bar Association.

86. *See, e.g., State ex rel State Bar Ass'n v. Douglas*, 416 N.W.2d 515 (Neb. 1987), *appeal dismissed and cert. denied*, 488 U.S. 802 (1988) (government attorney violated the Code in a criminal case).

87. *See, e.g., GA. CONST.* art. V, § 3.

88. *See* MODEL RULES OF PROFESSIONAL CONDUCT Scope cmt. 4 (West 1992).

89. William Josephson & Russel Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?* 29 HOW. L.J. 539, 543, 557 nn.15 & 86 (1989).

90. *See, e.g., Manchin v. Browning*, 296 S.E.2d 909, 920 (W. Va. 1982) (attorney general has duty to conform conduct to that prescribed by the rules of professional conduct).

No one advocates that a government attorney should be free of any ethical mandates. In fact many would say that a government attorney ought higher standards than those imposed on others because of their special status representing the state.<sup>91</sup> "A government attorney is required to be more circumspect than a private lawyer, as improper conduct on the part of a government attorney is more likely to harm the entire system of government in terms of public trust."<sup>92</sup> The ethical standards required of government attorneys should, however, be applicable to their roles. At the very least the government attorney ought to have guidelines which assist decision-making rather than ones which cloud the issues by employing concepts foreign to the role of the government attorney.<sup>93</sup>

At times the courts have recognized a selective nonapplicability of the ethical mandates to government attorneys based on an analysis giving state statutes and constitutions superior status over ethical rules or on an analysis of the requirements of separation of powers.<sup>94</sup> In the first instance the courts have found that the ethical rules conflict to some degree with the powers and duties imposed by the state constitution or statutes and have concluded that the former must give way to the latter.<sup>95</sup> For example, state law may require the attorney general to represent state agencies when they are involved in litigation while the ethical rules may provide that no attorney may advocate a position contrary to a client's interest. If two agencies are involved as adverse parties in a lawsuit, an attorney

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91. Connecticut Comm'n on Special Revenue v. Connecticut Freedom of Info. Comm'n, 387 A.2d 533 (Conn. 1978).

92. Stephen R. Kaye, *Conflicts in Representation: An Overview of Developments During 1987 and 1988*, Practicing Law Institute (December 12, 1988).

93. Ted Schneyer, *Professionalism as Bar Politics; The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989). For a discussion of similar concerns for those lawyers representing close corporations, see Lawrence E. Mitchell, *Professional Responsibility and the Close Corporation; Toward a Realistic Ethic*, 74 CORNELL L. REV. 466 (1989).

94. For example, in *State Bd. v. Bowers*, No. 45478 (Ga. 1988) the supreme court determined that the attorney general was subject to the Code of Professional Responsibility but that the Code could not be construed to prevent him from taking a legal position adverse to the state, the agencies or public officials when the action is authorized or required by state law.

95. *Public Util. Comm'n v. Cofer*, 754 S.W.2d 121 (Tex. 1988); cf. *Krahmer v. McClafferty*, 282 A.2d 631, 633 (Del. 1971) ("Ethics super[s]edes any requirement of a City Charter such as we have here which would seem to require that he or a member of his staff represent even though there might be a conflict of interest involved.").

general's office representing either state agency would, of necessity, have to advocate a position contrary to at least one of its clients.

The separation of powers doctrine has been employed in these instances by focusing upon what could be the result of a violation by an attorney of the ethical rules. If an ethical rule is violated, disbarment or license revocation is usually an available sanction.<sup>96</sup> If bar membership or a license is a prerequisite to holding the office of attorney general, then removal from public office could result.

Generally, however, removal procedures for elected public officials such as the attorney general are set out in the provision in the law establishing the office.<sup>97</sup> It is not unusual for the procedure to call for an impeachment process in the legislature or a recall process by the voters prior to ousting a state attorney general. Neither of these methods would be employed if the licensing authority sought disbarment or de-licensing based on a violation of an ethical rule. Allowing for what amounts to a removal from office by methods distinct from the removal process mandated by law would be an incursion by the judiciary into the powers of the executive branch. Thus, a violation of the separation of powers doctrine would occur if the ethical rules were applied to the attorney general in that particular instance. Finding such an incursion unacceptable in the form of government established in this country, the courts have refused to strictly apply all the ethical conflict rules to the attorney general.<sup>98</sup> If the duty to represent the state agencies is constitutionally mandated, then the courts should find that the constitutional mandate prevails over the ethical requirements under the general notion that constitutional provisions trump conflicting statutes or judicial rules.<sup>99</sup>

The secondary status given ethical mandates is also understandable as a natural result of applying general principles of

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96. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 3.5 (1986).

97. See, e.g., *Simpson v. Alabama State Bar*, 311 So. 2d 307 (Ala. 1975).

98. The Supreme Court of Georgia, at least partly in response to the disciplinary action brought by the State Bar against the attorney general modified its rules to provide: "No provision of the Code of Professional Responsibility shall be construed to prohibit [a full time government lawyer] from taking a legal position adverse to the State, its agencies, or officials, when such action is authorized or required by the Constitution or statutes of this State." *RULES OF THE STATE BAR OF GEORGIA* Rule 4-102.

99. *Id.*

the hierarchy of law when the ethical mandates have been adopted as rules of the supreme court while the duties of the attorney general regarding representation are contained in state statutes. Generally, in the absence of unconstitutional overreaching by the legislature, the hierarchy requires statutory provisions to prevail over judicially adopted rules.<sup>100</sup> However, in some states the ethical mandates are contained in statutes.<sup>101</sup> In those states where the ethics mandates and the attorney general duties are both statutory, two statutes would necessarily conflict when an attorney general had a duty to represent two agencies in a dispute. Usually the rules of statutory construction would require that the specific statute would prevail over the general statute.<sup>102</sup> In that event the ethical statute is the more specific of the two and should prevail. Because the attorney would have to take a position adverse to a client if representation of either agency occurred, the attorney general would be precluded from representing either client even though statutorily required to represent both.

The secondary status sometimes given to the ethical mandates can probably be best understood by looking at their history. The attorney ethical rules began on a national level in 1908 as Canons of Professional Ethics.<sup>103</sup> In 1969 the American Bar Association redrafted the Canons into the Model Code of Professional Responsibility.<sup>104</sup> In 1983 the Model Rules of Professional Conduct were adopted.<sup>105</sup> The evolution into the Rules involved a transition from trade association principles of "nice behavior" into a set of rules similar to a set of laws.<sup>106</sup> The Code had limited enforceability because of the non-mandatory nature of the language used in the Ethical Considerations. The principles contained in the Ethical Considerations of the Code were aspirational in nature.<sup>107</sup> The Rules, on the other hand, employ language which clearly set the requirements attorneys

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100. See, e.g., *Ammerman v. Hubbard Broadcasting, Inc.*, 551 P.2d 1354 (NM 1976).

101. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 2.6 (1986).

102. TABEZ GRIDLEY SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 51.05 (Dallas C. Sands, 4th ed. 1984 Revision).

103. Len Biernat, *Corporate Practices from the Model Code to the Model Rules to the States*, 34 ST. LOUIS U. L.J. 27 (1989).

104. *Id.*

105. *Id.*

106. L. Ray Patterson, *An Inquiry into the Nature of Legal Ethics: The Relevance and Role of the Client*, 1 GEO. J. LEGAL ETHICS 1, 52 (1987).

107. *Id.* at 56.

must follow to avoid sanctions imposed by the appropriate governing body. These Rules have become part of the ethical rules of many states. As they become more ingrained in the minds and hearts of judges and viewed as mandates rather than aspirational goals, the judges may not be so quick to relegate them to a secondary status as they have in the past. In that event government attorneys may find themselves facing disciplinary action rather than judicial determinations in a case where the government attorney represents a party and it is alleged that the attorney has acted inappropriately.

### *B. Conflict of Interest Rules*

The Rules set out lawyers' duties to clients, the legal system and themselves. The Preamble to the Rules presents the concept that while all lawyers must act in an ethical manner, some differences may exist as to the duties of attorneys representing states and those representing private individuals.<sup>108</sup> Other differences are also acknowledged between the ethical obligations for representation of a legal organization or entity and those for representing individuals.<sup>109</sup> Three of the Model Rules address conflicts of interest specifically.<sup>110</sup> The goal of these three rules is to insure that the lawyer's loyalty lies with his client rather than with himself or another person.

#### *1. Rules dealing with conflicts of interest*

Rule 1.7 is the general conflict of interest rule.<sup>111</sup> It prohibits a lawyer from representing a client if the representation of that client will be directly adverse to another client.<sup>112</sup> The only exception to the prohibition applies if the lawyer reasonably believes the representation will not adversely affect the relationship with the other client and each client consents after consultation.<sup>113</sup> Rule 1.7 also prohibits a lawyer from representing a client if the representation may be materially limited by the lawyer's responsibilities to another client, a third person or by the lawyer's interests.<sup>114</sup> Again, the lawyer is exempted from

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108. ABA MODEL RULES OF PROFESSIONAL CONDUCT Scope cmt. 8 (West 1992).

109. *Id.* 1.13.

110. *Id.* at 1.7, 1.8 & 1.9.

111. *Id.* at 1.7.

112. *Id.* at 1.7(a).

113. *Id.*

114. *Id.* at 1.7(b).

this prohibition if the lawyer reasonably believes the representation will not be adversely affected and the client consents after consultation.<sup>115</sup> Furthermore, if the lawyer is seeking consent from the client to represent multiple interests in a single matter, the consultation must include an explanation of the implications, advantages and risks of the common representation.<sup>116</sup>

Rule 1.8 lists transactions which are prohibited because they would form the basis for an inappropriate conflict of interest.<sup>117</sup> Many of the prohibited transactions are ones which are not particularly relevant to an inquiry regarding common conflict of interest questions unique to state attorneys general.<sup>118</sup> One of the prohibitions is, however, endemic to attorneys general conflict questions. The rule prohibits the use of information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.<sup>119</sup>

Rule 1.9 is the conflict of interest rule which applies with respect to former clients.<sup>120</sup> It prohibits a lawyer from representing a person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of a former client unless the former client consents after consultation.<sup>121</sup> Rule 1.9 also prohibits a lawyer from using information relating to the representation to the disadvantage of the former client except as Rule 1.6 regarding confidentiality allows or when the information has become generally known.<sup>122</sup>

## 2. *Conflict of interest dilemmas for government attorneys*

The ethical rules relating to conflicts of interest presuppose an ability of the attorney to decline to take on some individuals or entities as clients and to identify who the client is. The inaccuracy of these assumptions when applied to attorneys general places them in a position of choosing between failing to perform

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115. *Id.*

116. *Id.*

117. *Id.* 1.8.

118. These include, for example, prohibitions on business dealings with clients, on the lawyer being a beneficiary of a will drafted by the lawyer, on literary or media agreements and on giving financial assistance to a client. *Id.*

119. *Id.* at 1.8(b).

120. *Id.* at 1.9.

121. *Id.* at 1.9(a).

122. *Id.* at 1.9(b).

an obligation imposed by law or violating, at least in some eyes, an ethical rule which has been promulgated by the supreme court, legislature or bar association of the state. At its most extreme the choice is to be guilty of dereliction of duty or unethical behavior. In other words, lose your job or lose your license (or perhaps lose both). An examination of the four conflict situations encountered by attorneys general within the context of the ethical rules will provide background for these conclusions.

*a. Disputes between two agencies or officials.* Given the decentralization of many of the state functions it is not unusual for two state agencies or other entities represented by the attorney general to find themselves in a dispute that requires them to seek legal counsel and perhaps to sue each other.<sup>123</sup> If one takes the view that the agencies or the officials are the clients of the attorney general, representing both of them would be a violation of Rule 1.7. That rule prohibits representation of adverse clients unless the lawyer believes the representation will not adversely affect the attorney-client relationships and each client consents to the dual representation. The comments to the rule provide that it may be appropriate for a government lawyer in

some circumstances [to] represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.<sup>124</sup>

This comment seems, however, to be intended as an explanation of the rule rather than as an exception to it. It seems that a lawyer would still have to make the determination that the attorney-client relationship would not be adversely affected if the dual representation continued. Even if the lawyer believes that the adverse representation is appropriate, the lawyer must obtain the consent of both of the clients for such rep-

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123. See, e.g., *State v. Mississippi Pub. Util. Comm'n*, 418 So. 2d 779 (Miss. 1982). In those instances where the two agencies are under the control of one state official, the superior state official could command a resolution and avoid the litigation.

124. MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.7 cmt. 8 (West 1992).

resentation.<sup>125</sup> Both of these requirements are difficult to meet.<sup>126</sup>

The relationship between the attorney general or the assistants and the agencies and officials is often one instilled with trust and confidence and would be adversely affected if the attorney engaged in dual representation. Many clients, even in their official roles, would feel betrayed if "their attorney" represented another with an adverse claim even if the other were an arm of the state. Additionally, an attorney general representing both agencies which are in a dispute would certainly at times have to make statements or take positions which would be adverse to one of the clients. That action is specifically prohibited by Rule 1.7. The attorney is also prohibited from using information relating to representation of a client to the disadvantage of the client unless the client consents after consultation. If the attorney general represents either or both, the attorney general would, of necessity, be using information relating to the representation of the client to the disadvantage of a client (or former client). Few public officials or agencies would consent to that use. Thus, the attorney general may be viewed as having violated the duty of loyalty owed to the clients.

If the view is taken that the state agency or the executive branch of the state or the state itself is the client, then the attorney general must also analyze the situation in light of Rule 1.13 which gives guidelines to attorneys having an organization as a client.<sup>127</sup> That rule, which according to the comments is applicable to government entities,<sup>128</sup> provides that a lawyer employed or retained by an organization represents the organization rather than the persons involved in the organization. Of course every entity must act through its constituents or representatives. Consequently, a lawyer dealing with a person related to the entity may learn that an individual is acting or planning to act in a manner that would violate a legal obligation of the entity or which might be imputed to the organiza-

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125. *Id.* at 1.7.

126. In fact some have taken the view that a public agency cannot consent to such an arrangement. See William Josephson & Russel Pierce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients are in Conflict?*, 29 HOW. L.J. 539, 547 n.34 (1986). In fact New Jersey's conflicts rules provide that a government agency could never consent to representation by an attorney representing dual interests. *Id.* at 543 n.16.

127. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (West 1992).

128. *Id.* at 1.13 cmt. 7.

tion and which is likely to cause substantial injury to the organization. Rule 1.13 provides that the lawyer "shall proceed as is reasonably necessary in the best interest of the organization."<sup>129</sup>

While the quoted language is rather ambiguous, the Rule goes on to provide that the lawyer shall consider the seriousness of the violation, the nature of the lawyer's representation, the apparent motivation of the person involved, and organizational policies.<sup>130</sup> After considering these notions, a lawyer can take measures in a way which will minimize the disruption to the organization and the risk of revealing information outside of the organization.<sup>131</sup> Measures could include asking for reconsideration of the matter, suggesting a separate legal opinion be obtained, or referring the matter to a higher authority in the organization. The rule does not enlighten attorneys on how to analyze the hierarchy of an organization. For example, who is the highest authority in a corporation? Some would say the shareholders while others view this rule as prohibiting the lawyer from divulging the matter to the shareholders.<sup>132</sup> The extra-corporate revelation ban is absolute and thus provides special protection for corporate officials from disclosure of their wrongdoing.<sup>133</sup> Similar, and even more complex, questions arise when the organization is a government one. For example, does the highest authority analysis involve a look at the organization as the agency, the branch of government, or the state? Is the highest authority the public?

If the lawyer is unable to convince the organization to pursue a different course and the proposed action is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer is entitled to resign pursuant to Rule 1.16. In fact the lawyer may be required to resign.<sup>134</sup> Resignation is not always a viable option for government attorneys. They may have constitutionally or statutorily imposed

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129. *Id.* at 1.13.

130. *Id.*

131. L. Ray Patterson, *An Inquiry into the Nature of Legal Ethics: The Relevance and Role of the Client*, 1 GEO. J. LEGAL ETHICS 43 (1987).

132. Len Biernat, *Corporate Practice: From the Model Code to the Model Rules to the States*, 34 ST. LOUIS U. L.J. 27 (1989).

133. *Id.* at 45.

134. *Id.* at 40.

duties of representation. Resignation may be a violation of those duties.<sup>135</sup>

While Rule 1.13 does give some guidance to those having the organization as a client, it does not provide any guidance to the government attorney to decipher who the client may be. The comments to the Rule specifically state that the duty applies to governmental organizations.<sup>136</sup> The comments also provide that when the client is a governmental organization, a different balance may be appropriate between confidentiality requirements and assuring that the wrongful official act is prevented or rectified.<sup>137</sup> The justification given for the different balance is that public rather than private business is involved. The comment rather cavalierly, and unhelpfully for this analysis, further suggests that in some circumstances the client may be a specific agency but generally the client for a government attorney is the government as a whole.<sup>138</sup>

The ethical rules give no analytical framework for the attorney who is in the position of viewing the public as the client. Certainly, the attorney cannot request a vote of the citizens of the state every time a decision must be made in a legal dispute. This concern is particularly relevant to states' attorneys general who have been independently elected by the citizens.<sup>139</sup> Generally, the citizens view the elected attorney general as their lawyer with independent powers to pursue the public good.<sup>140</sup>

No matter what view is taken of the identity of the client, the attorney general runs afoul of an ethical rule when two agencies are involved in a controversy. Attorneys general could take the view that they are the ultimate decision-maker as to the correct legal view. This notion may run afoul of separation of powers notions where the attorney general, rather than the judiciary, is deciding legal controversies<sup>141</sup> or where the attorney general, who is not generally viewed as the supreme executive officer, is dictating to the executive branch what course of action must be followed in a particular transaction.<sup>142</sup> Some

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135. See *Public Utility Comm'n v. Cofer*, 754 S.W.2d 121, 123-24 (Tex. 1988).

136. MODEL RULE OF PROFESSIONAL CONDUCT Rule 1.13 cmt. 7 (West 1992).

137. *Id.*

138. *Id.*

139. See *supra* notes 73 - 76 and accompanying text.

140. See Erik Schnapper, *Legal Ethics and the Government Lawyer*, 32 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK 649 (1977).

141. See *supra* notes 67 - 70 and accompanying text.

142. William Josephson & Joseph Pierce, *To Whom Does the Government Lawyer*

would even contend that the agency attorney who substitutes his or her own judgment for that of the political process, which is generally accepted as legitimate, is acting unethically.<sup>143</sup>

The second alternative is for the attorney general to represent the side taking the position consistent with the attorney general's view of the matter. The attorney general will, of necessity, have to take positions materially adverse to the client it is no longer representing. That action would be a violation of Rule 1.9.

If the second agency is to obtain private representation, decisions must be made as to who will be selected, how the choice of counsel will be made, and who will pay for the representation.<sup>144</sup> Often state law requires the selection of any special counsel to be made by the attorney general or at least with the approval of the attorney general.<sup>145</sup> In those instances the attorney general would be in the position of hiring or approving opposing counsel—a strange notion. The degree of supervision that the attorney general employs over opposing counsel may be mandated by the statutes and regulations regarding expenditures of public funds.

The use of special counsel also tends to be an inefficient method of providing services.<sup>146</sup> Even in civil cases the courts tend to recognize the desirability of having public officers representing public interests<sup>147</sup> since "to allow the numerous state agencies the liberty to employ private counsel without approval of the attorney general would invite chaos" into the legal representation of the state.<sup>148</sup>

The substantive law of governmental entities is complex. Many hours would have to be spent by special counsel to "get up to speed" at a high cost to the state. The further question of whose budget will be tapped for payment of special counsel often becomes a source of contention between the unrepresent-

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143. Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987).

144. See *City of Tukwila v. Todd*, 563 P.2d 223 (Wash. Ct. App. 1977) (approving retention of private counsel when city council has no faith in the city attorney).

145. *State v. Mississippi Pub. Serv. Comm'n*, 418 So. 2d 779, 787 (Miss. 1982).

146. NATIONAL ASS'N OF ATT'YS GEN., COMMITTEE ON THE OFFICE OF ATT'Y GEN., *THE STRUCTURE OF STATE LEGAL SERVICES* (1976).

147. *McQuesten v. Attorney Gen.*, 72 N.E. 965 (Mass. 1905).

148. *EPA v. Pollution Control Bd.*, 372 N.E.2d 50, 53 (Ill. 1977).

ed agency and the attorney general's office.<sup>149</sup> If the agency will be responsible for payment, the financial question may well result in the attorney general winning by default in times of limited state budgets.

The third alternative for the attorney general is to represent both agencies in court.<sup>150</sup> While this may seem bizarre to those practicing in the private sector, it may well be possible to establish "screens" within the attorney general's office and have separate assistant attorneys general arguing for the two agencies involved in the dispute.<sup>151</sup> The attorney general is then able to provide representation to both of his clients or client constituents. This result requires a certain amount of trust in the attorney general not to directly or indirectly intimidate the assistant attorney general taking a position contrary to that personally held by the attorney general.<sup>152</sup>

The final possibility is that the attorney general represents nobody and special private counsel is appointed for each side of the dispute by the attorney general or selected by the individual agencies. This final result still provides financial and selection questions and to some degree does not resolve the conflict problem because presumably the attorney general may well have the ultimate power to select or discharge private attorneys representing the state. The power to appoint implies the power to remove, and thus the power to control.<sup>153</sup>

In any of these scenarios the attorney general would be running afoul of an ethical rule if anyone other than the people or the state or the particular branch of government is considered to be the client. The violations occur because the attorney

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149. See *State Health Planning & Coordinating Council v. Hyland*, 391 A.2d 1247 (N.J. 1978).

150. See, e.g., *Connecticut Comm'n on Special Revenue v. Connecticut Freedom of Info. Comm'n*, 387 A.2d 533 (Conn. 1978).

151. These "screens" have been used in situations where an attorney has changed employment. Their use in those circumstances allows a firm to continue in a case even though one of its attorneys has a conflict. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(b).

152. *Public Util. Comm'n v. Cofer*, 754 S.W.2d 121, 125 (Tex. 1988) (if attorney general engages in collusive representation, then a violation of separation of powers occurs); *State v. Mississippi Pub. Serv. Comm'n*, 418 So. 2d 779 (Miss. 1982) (allow assistant attorneys general to represent separate state agencies in a dispute between them unfettered and uninfluenced by the attorney general's opinion).

153. *City of York v. Pennsylvania Pub. Util. Comm'n*, 281 A.2d 261 (Pa. 1971), *aff'd*, 295 A.2d 825 (Pa. 1972); see also Janene M. Marasville, *Removeability and the Rule of Law: The Independence of the Solicitor General*, 57 GEO. WASH. L. REV. 750 (1989).

general's office itself, or the private counsel it supervises, will be representing a client directly adverse to another client in violation of Rule 1.7. It could use information relating to representation of a client to the disadvantage of the client in violation of Rule 1.8. Or it will represent another with materially adverse interests to those of a former client in violation of Rule 1.9.

If the people, the state or the branch containing the feuding officials or agencies is considered to be the client, then the attorney general may have only one client involved and no conflict of interest would exist. In that event a court could decide no case or controversy exists<sup>154</sup> and dismiss the case, or use its inherent powers to ensure the adversarial process and prohibit the attorney general from representing both sides of the controversy.<sup>155</sup>

The attorney general may also run afoul of the powers and duties imposed upon the office by the constitution and statutes of the state. The attorney general by law often has the exclusive<sup>156</sup> ability to represent the state in court or to hire private counsel for state entities or to provide legal counsel to a particular agency.<sup>157</sup> If the attorney general fails to do so because of alleged conflict questions, the attorney general may be violating the duty so imposed.<sup>158</sup>

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154. *Cf.* *State v. Thomas*, 766 S.W.2d 217, 223 (Tex. 1989) (Hecht, J., dissenting) (The court granted writ of mandamus, in an unprecedented case where in an action by the State, represented by the Attorney General, against a state agency was also represented by the Attorney General. The result was that state sued itself, the Attorney General argued against himself, and both the state and the Attorney General both won and lost.)

155. *Public Util. Comm'n v. Cofer*, 754 S.W.2d 121 (Tex. 1988). Some courts have found that a public official possesses the implied authority to employ special counsel when the legal officer is disqualified as in the case where a dispute exists between two agencies of a government body. *See, e.g.*, *COMMCO v. Amelkin*, 465 N.E.2d 314 (N.Y. Ct. App. 1984), *Zablow v. Incorporated Village of Freeport*, 246 N.Y.S.2d 434 (App. Div. 1964).

156. *State v. Mississippi Pub. Util. Comm'n*, 418 So. 2d 779, 782 (Miss. 1982).

157. In *Hill v. Texas Water Quality Bd.*, 568 S.W.2d 738 (Tex. 1978), the court refused to allow the attorney general to sue the Water Quality Board because the attorney general had the exclusive right to represent state agencies and it would be inappropriate for the attorney general to allow the Board to have special counsel.

158. *See, e.g.*, *Connecticut Comm'n on Special Revenue v. Connecticut Freedom of Info. Comm'n*, 387 A.2d 533 (Conn. 1978).

*b. Dual roles within an agency.* The second type of conflict is that involving the representation of one agency with several functions. Representing one agency with conflicting functions is usually analyzed as involving a conflict of interest for the attorney general's office. How can it truly be a conflict of interest in the traditional sense under the ethical rules because only one client is involved? The conflict really occurs because of a conflict in roles of the agency, not because two clients of one law office have conflicting interests. Of course, this analysis only applies if one takes the view that the agency rather than certain individuals or departments within the agency is the client. A traditional conflict of interest would exist if the different individuals were viewed as the clients because attorneys from the same office would be representing parties with conflicting interests. The application of the ethical rules under that view would be the same as that used under the two agency analysis.

If, however, the view is taken that the agency is the client and the client has two functions, one of which is investigative and one of which is adjudicative, the attorney general's office is only representing one client. Under that view the only ethical concern would be the prohibition against an attorney taking a position adverse to the client. Rule 1.13 would be useful in this context. Because the entity would be considered the client, the lawyer would not be taking positions adverse to the client if the highest authority within the client determined what position should be taken ultimately. The use by the courts of due process analysis rather than conflict of interest analysis is appropriate if the agency is viewed as the client.

*c. Investigation of or prosecution of public officials.* The attorney general's prosecution of a public official brings into play both the general conflict of interest rule and the former client conflict of interest rule. The general conflict of interest rule<sup>159</sup> prohibits an attorney from representing a client if the representation will be directly adverse to another client<sup>160</sup> or if the representation of that client may be materially limited by

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159. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (West 1992).

160. An exception exists when the lawyer reasonably believes the representation will not adversely affect the relationship with the other client and each client consents after consultation. *Id.* at 1.7(a).

the lawyer's responsibilities to another.<sup>161</sup> The rule addressing the conflict of interest in regard to a former client prohibits a lawyer from representing a person in the same or a substantially related matter when that person's interests are materially adverse to the interests of a former client.<sup>162</sup> The rule also prohibits a lawyer from using information related to the representation of a former client to the disadvantage of a former client.<sup>163</sup>

These two rules of professional responsibility are implicated when a state attorney general criminally prosecutes a state official who has been or is represented in his official capacity by the attorney general's office. An argument could be made that the prosecutor in a criminal case is representing a client (the state) in a matter where the representation will be directly adverse to another client (the public official). Furthermore, in certain instances, the public official being prosecuted could claim that the prosecutor is representing the state in a matter substantially related to a matter in which the prosecutor represented the public official or is using information related to the previous representation of the public official to the disadvantage of the public official.

The argument for prohibiting the attorney general from prosecuting public officials has appeal at first blush but suffers from a lack of reality. Accepting the argument as valid would preclude attorneys general from the prosecution of any case of malfeasance of a state official who happened to be represented in his official capacity by the attorney general's office. Many attorneys general have a specific statutory duty to prosecute crimes involving public officials. To adopt a *per se* conflict rule prohibiting all prosecutions of individuals the attorney general's office represents in an official capacity would unnecessarily tie the hands of the attorney general. The approach taken by the courts in *Troutman*<sup>164</sup> and *Mecham*<sup>165</sup> makes sense.

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161. An exception is made if the lawyer reasonably believes the representation will not be adversely affected and the client consents after consultation. *Id.* at 1.7(b).

162. An exception exists if the former client consents after consultation. *Id.* at 1.9(b).

163. An exception exists if the information can be used pursuant to Rule 1.6 or if the information has become generally known. *Id.* at 1.9(c)(1).

164. *United States v. Troutman* 814 F.2d 1428 (10th Cir. 1987).

165. *Mecham v. Superior Court ex rel. Corbin*, Sup. Ct. of Az. No. CV-87-0410-SA, State Grand Jury Inquiry No. 235, G.J. 73, Nov. 18, 1987.

Those courts determined that no actual conflict existed when the attorney general prosecuted a government official previously represented in his official capacity by the attorney general's office if no confidential communications related to the criminal prosecution had occurred.

If the identity of the attorney general's client is other than the public official, then no conflict of interest concern should be raised. For purposes of Rules 1.7, 1.8 and 1.9 the public official never was a client of the attorney general, so the attorney general would not be taking a position adverse to a client or a former client by criminally prosecuting the public official. Additionally, Rule 1.13 would allow the attorney general to take steps, including disclosure within the entity client in some instances, when a person involved with the entity violates the law in a way which may be imputed to the entity.<sup>166</sup> If the client is the state or the people or the public interest, the prosecution may well fall within the bounds authorized in Rule 1.13.

*d. Disagreements as to what the public interest is.* The conflicts of interest raised by the attorney general's representation of the public interest are as problematic when analysis is attempted using the Model Rules of Professional Responsibility as is in the two agency conflicts. In fact they are very similar. On one side of the dispute the attorney general represents the public interest as the attorney general perceives it to be. On the other side of the dispute is a public official or agency with views differing from those of the attorney general. Thus, two clients, or a client and a former client, are in dispute. The attorneys general and the courts must engage in the same balancing of the constitutional, statutory and ethical mandates as discussed above regarding two agency conflicts.

One important distinction can be made, however. Often in situations where the attorney general is litigating in the public interest, the attorney general is an actual party to the litigation and is not viewed as representing a client. Most of the ethical conflict rules don't really address that issue because they focus on *representing a client* with adverse interests. Rule 1.8(b) does prohibit a lawyer from using "information relating to representation of a client to the disadvantage of the client

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166. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (West 1992).

unless the client consents after consultation."<sup>167</sup> Rule 1.9(b) prohibits a lawyer from using "information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known."<sup>168</sup> If the agency or public official who is now in a dispute with the attorney general is viewed as a client or a former client of the attorney general, then the attorney general could not generally use the information related to the representation of that client to the disadvantage of the client.

An attorney general may, however, be able to rely on Rule 1.6(b)(2) as justification for using the information to the disadvantage of the client. Rule 1.6(b)(2) allows a lawyer to divulge the information to the extent the lawyer reasonably believes necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client."<sup>169</sup> While this rule is generally seen to apply to fee disputes and legal malpractice suits, its language does not preclude a broader use. For example, suppose an attorney general of a state were obliged to enforce an open meetings law. Assume further that the attorney general's office discovered through the office's representation of an agency<sup>170</sup> that the agency violated the open meetings law. That information would be information related to the representation of the agency and release of the information would be disadvantageous to the agency. Under Rule 1.8(b) the attorney general would be unable to use the information without client consent. However, if the attorney general were to sue the agency to enforce the open meetings law, then the attorney general could use the information pursuant to Rule 1.6(b)(2) to establish a claim on behalf of the attorney general in the controversy with the agency.

The identity of the client question poses the same dilemmas to the government lawyer in the "public interest" conflict area as in the others. Analysis of each type of conflict exemplifies the unhelpful nature of the Rules regarding conflicts when they are applied to government attorneys in a wholesale fash-

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167. *Id.* at 1.8(b).

168. *Id.* at 1.9(b).

169. *Id.* at 1.6(b)(2).

170. For purposes of this example, the agency will be viewed as the client of the attorney general.

ion. Similar lack of guidelines await the government lawyer in the area of confidentiality requirements.

### C. Confidentiality Rules

The duty of confidentiality is at the core of the concept of loyalty to the client. Rule 1.6 provides that information regarding the representation of a client shall not be revealed unless the client consents.<sup>171</sup> However, the lawyer may reveal information relating to the representation if disclosure is impliedly authorized to carry out the representation.<sup>172</sup> Additionally, the lawyer may reveal information to the extent the lawyer reasonably believes necessary

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; OR

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client . . . .<sup>173</sup>

The identity of the client dilemma impacts the confidentiality duties of government lawyers as well as the avoidance of conflicts of interests obligations. If the client is viewed as the people or the public interest, then presumably all citizens would have a right to all information in the hands of a government attorney. In fact a government attorney may have a responsibility to inform the "client" of all information relevant to a particular matter. If the state is viewed as the client, then all branches of government would be entitled to the information. If the agency or public official is viewed as the client, then the lawyer's duties of confidentiality are very restrictive.

The real problem in the area of confidentiality and the government lawyer is to what extent the government lawyer can be or should be a whistle-blower.<sup>174</sup> If the information known by a lawyer involves an intent to commit a future crime

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171. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (West 1992).

172. *Id.* at 1.6(a).

173. *Id.* at 1.6(b).

174. See Roger C. Cranton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291 (1991).

which will likely result in imminent death or substantial bodily harm, then under Rule 1.6(b)(2) the lawyer may reveal it. Most information held by a government lawyer does not fall into that category. Usually the information involves behavior that will cause harm to the public interest or the financial status of the state. Rule 1.6 does not seem to allow divulging of that information. Rule 1.13 would only allow disclosure to higher authorities within the entity viewed as the client. These rules ignore federal and state statutes requiring government employees to disclose certain unlawful actions by public officials.<sup>175</sup> Even more importantly they impose an obligation of silence on the lawyer. Many believe, particularly in this post-Watergate society, that wrongdoings by public officials ought not be covered up by attorneys. The Model Rules of Professional Conduct seem to prevent a government lawyer from responding to those concerns.

## VI. PROPOSED RULES

Rules other than those promulgated by the American Bar Association have been drafted by groups attempting to devise standards more appropriate for government attorneys. Unfortunately they have never been seriously considered by the ABA in drafting its rules and have never been adopted by the state judiciary or legislatures. The ABA has had a "super-legislature" status where ethical rules are concerned.<sup>176</sup> In some instances that deference to the ABA may be appropriate, because it is the lawyer organization with the greatest membership and has employed a very involved process in developing its rules. The ABA has been traditionally lacking in government attorney membership, however. In the past it has refused to include within its rules amendments offered by various government attorneys. Its members have denounced attempts by government attorneys to obtain exceptions for themselves under the Rules.<sup>177</sup>

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175. *Id.*

176. Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 *LAW & SOC. INQUIRY* 677 (1989).

177. The ABA House of Delegates condemned the Department of Justice position that prosecutors can contact individuals represented by counsel without the permission of their attorney. While this author may disagree with the Department's position, it ought not to be dismissed outright as a clear violation of the Model Rules of Professional Conduct. The Rules fail to delineate appropriate bounds of activity when a prosecutor may be acting as an investigator. It certainly doesn't seem to

Recently the ABA has made efforts at incorporating government attorneys into its fold. Perhaps if its efforts are successful, increased sensitivity to the realities daily encountered by government attorneys would result. Working through the ABA processes may be the only way government attorneys can obtain ethical guidelines relevant for their roles. It is with the hope of beginning the needed serious dialogue that the following amendments to the existing Model Rules of Professional Conduct are made.

#### A. *Confidentiality of Information*

##### **RULE 1.6 Confidentiality of Information**

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; OR

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(3) *to prevent a public official or public agency from committing a criminal or illegal act that a government lawyer believes is likely to result in harm to the public good; or*

(4) *to remedy substantial adverse effects on the public good which the government lawyer believes was caused by a criminal or illegal act of a public official or public agency; or*

(5) *when otherwise required by law.*

The proposed changes to Rule 1.6 found in (b)(3) would allow a government lawyer to divulge information to prevent

an illegal or criminal act in the future by a public official or agency. The government lawyer would have to believe that the act is likely to result in harm to the public good before divulging the information.

The changes contained in (b)(4) would allow a government lawyer to reveal information of a past criminal or illegal act of a public official or agency in more limited circumstances. For past acts the information could only be divulged to remedy substantial adverse effects on the public good.

Section (b)(5) is intended to release the government lawyer from confidentiality restraints when the lawyer has an obligation under state or federal statutes to disclose certain information. A definition of government lawyer would need to be drafted. It could include those employed on a full time basis as well as lawyers representing a government agency or official in an official capacity on a case by case basis.

The proposed rule is not intended to include an attorney representing a public official who is a defendant in a criminal proceeding. The rule is intended to allow disclosures, not to mandate them. Thus, the government attorney can decide what is appropriate disclosure, if any, in a particular situation.

*B. Conflict of Interest Rules*

*1. The general rule*

**RULE 1.7 Conflict of Interest: General Rule**

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

*(c) A government attorney shall not be in violation of this Rule when a government attorney represents more than one client or interest in a particular matter if the government attorney believes in good faith that such dual representation is required or allowed by relevant constitutional or legislative provisions.*

The proposed addition to Rule 1.7 is intended to provide a safe harbor to government attorneys acting in a manner consistent with the applicable law regarding the attorney's powers and duties. The language suggested is a bit amorphous because of the variety of the sources and types of powers and duties of the government attorneys. If the proposed addition were made, a court faced with a claim of conflict of interest by a government attorney would analyze the relevant substantive law to determine whether the dual representation is allowed without resorting to the ethical rules. If the court finds that the law allows dual representation, then the government attorney would have an easy time showing the required good faith belief in any disciplinary proceeding. If a court determined that the relevant law did not allow dual representation, the government

attorney could still carry the burden of showing the basis of a good faith belief that dual representation was allowed and avoid disciplinary sanctions. The use of the good faith belief standard allows the government attorney to be wrong but ethical.

## 2. *Prohibited transactions*

### **RULE 1.8 Conflict of Interest: Prohibited Transactions**

...  
(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation. *This subsection shall not apply to government lawyers engaging in dual representation in a particular matter pursuant to the conflict of interest exception in Rule 1.7(c).*  
...

The additional language proposed for Rule 1.8(b) is intended to allow a government lawyer to use adverse information against a client when the government lawyer (or the office of the lawyer) is representing both parties in an adversarial situation.

## 3. *Former client*

### **RULE 1.9 Conflict of Interest: Former Client**

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) 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 consents after consultation *except as allowed in Rule 1.7(c);* or

(b) use information relating to the representation to the disadvantage of the former client except as rule 1.6 would permit with respect to a client or when the information has become generally known.

The change to Rule 1.9(a) is necessary to bring forward the exception to the conflict of interest rule for government attorneys to those situations involving former clients. No change to Rule 1.9(b) would be necessary because the proposed changes to Rule 1.6 would also apply to information regarding former clients of the government attorney.

### C. *The Government as a Client*

#### **RULE 1.13 Organization as Client**

(f) *If a government lawyer knows that an officer, employee or other person associated with the government is engaged in action, intends to act or refuses to act in a matter related to the lawyer's representation that is a violation of a legal obligation to the government or the public, or a violation of law which reasonably might be imputed to the government, the lawyer shall proceed as is reasonably necessary in the best interest of the government or the public. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, governmental policies concerning such matters, governmental chain of command, and any other relevant consideration. Any measures taken shall be designed to minimize disruption of the governmental functions. Such measures may included among others:*

- (1) *asking for reconsideration of the matter;*
- (2) *referring the matter to a higher authority in the government, including, if warranted by the seriousness of the matter, referral to the highest government official that can act in behalf of the government on the particular matter as determined by applicable law even if the highest authority is not within the agency or department the attorney generally represents; and*
- (3) *advising that a separate legal opinion on the matter be sought and considered; and*
- (4) *divulging of information to persons outside the government pursuant to the limitations provided in Rule 1.6.*

The addition of subsection (f) to Rule 1.13 is necessary to give government attorneys guidelines similar to those providing representation to other organizations. It contemplates that the attorney will act in furtherance of the governmental and public interest. It makes it clear that the attorney can go outside the agency he or she generally represents if that is where the highest authority on the matter is. The amendment avoids the problem of having to identify which organization is the client because it does not unilaterally prohibit disclosure of the intended act outside the agency which many previously viewed as the client organization. The amendment also incorporates the

confidentiality standards for government attorneys found in the proposed amendments to Rule 1.6.

## VI. CONCLUSION

It has been said of an organizational structure that if it handles most of the data better than any other theory, it will do.<sup>178</sup> The same can be said of ethical rules: if they handle most of the circumstances lawyers encounter, they will do. The current rules do not provide guidelines for the many circumstances government lawyers encounter. The proposed rules would hold government attorneys to high ethical standards and at the same time give them an opportunity to give due consideration to the responsibilities imposed upon their offices by the constitutions and statutes.

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178. Speech of Sam Deloria, Director, American Indian Law Center, on file in author's office.

Duties of Attorneys General

S T A T E officials	Opinions to city/county officials	Advice to DA's	Represent municipal- ities	Advise legis- lature re: invalid laws	Statutes for const'l validity	Criminal prosecution or appeals	Opinions & Advice to State
ALABAMA	X	X	L	X	X	X	X
ALASKA				X		X	X
ARIZONA		X	L			L	L
ARKANSAS	L	X	L	X	X	X	X
CALIFORNIA	L	X		X		X	L
COLORADO				X		X	X
CONNECTICUT				X			X
DELAWARE		X			L	X	X
DIST. OF COLUMBIA	X		X			X	
FLORIDA	X	X	L	X	L	X	X
GEORGIA		X				L	X
HAWAII	L	X		X		X	X
IDAHO		X		X		X	X
ILLINOIS		X		X	X	L	X
INDIANA		X		X	X	X	X

X = HAS DUTY      L = HAS LIMITED DUTY

## Duties of Attorneys General

S T A T E	Opinions to city/county officials	Advice to DA's	Represent municipal- ities	Advise legis- lature re: invalid laws	Statutes for const'l validity	Criminal prosecution or appeals	Opinions & Advice to State officials
IOWA		X		X		X	X
KANSAS		X		X		X	X
KENTUCKY	X			X		L	X
LOUISIANA		L		X		L	X
MAINE		X		X		X	X
MARYLAND		X		X		L	L
MASSACHUSETTS		X	L	X		X	X
MICHIGAN	L	X	L	X	X	X	X
MINNESOTA	X			X		X	X
MISSISSIPPI	X	X		X		X	X
MISSOURI		X		X		X	X
MONTANA	X	X		X		X	X
NEBRASKA		X		X	X	X	X
NEVADA	L	X			X	X	X
NEW HAMPSHIRE		X		X		X	X

X = HAS DUTY      L = HAS LIMITED DUTY

## Duties of Attorneys General

S T A T E	Opinions to city/county officials	Advice to DA's	Represent municipal- ities	Advise legis- lature re: invalid laws	Statutes for const'l validity	Criminal prosecution or appeals	Opinions & Advice to State officials
NEW JERSEY		X		X	L	X	X
NEW MEXICO		X		X		X	X
NEW YORK						X	L
NORTH CAROLINA		X		X		X	X
NORTH DAKOTA	X	X		X	L	X	X
OHIO		X		X		X	X
OKLAHOMA		X		X		X	L
OREGON		X	L	L	X	X	X
PENNSYLVANIA						X	X
PUERTO RICO		X		X		X	X
RHODE ISLAND				X		X	X
SOUTH CAROLINA		X		X		X	X
SOUTH DAKOTA		X		X		X	L
TENNESSEE				X	X	X	X
TEXAS	X	X		X		X	X

X = HAS DUTY      L = HAS LIMITED DUTY

## Duties of Attorneys General

S T A T E	Opinions to city/county officials	Advice to DA's	Represent municipal- ities	Advise legis- lature re: invalid laws	Statutes for const'l validity	Criminal prosecution or appeals	Opinions & Advice to State officials
UTAH	X	X		X		X	X
VERMONT		X		X		L	X
VIRGINIA	X	X		X		L	X
WASHINGTON		X		X	X	X	X
WEST VIRGINIA		X		X		L	X
WISCONSIN		X		X	X	L	X
WYOMING	X	X		X		L	X

X = HAS DUTY      L = HAS LIMITED DUTY