

Conflicts, Confidentiality and the Client of the Government Lawyer

Part I

By Kathleen Clark

Editor's Note: This is the first part of a two-part exploration of the age-old question "Who is the government lawyer's client?" Part I discusses how to discern the answer to that question. Part II, which will appear in the next issue of The Public Lawyer, focuses on government lawyers' options for reporting wrongdoing without violating the duty to their client.

In 2000, Cindy Ossias worked as a lawyer for the California Department of Insurance. She had investigated certain companies' practices in settling cases arising out of the 1994 Northridge earthquake, concluded that the companies had violated state law, and recommended that the companies be fined. Instead, California Insurance Commissioner Chuck Quackenbush, the head of the Insurance Department and an elected official, authorized secret settlements under which the companies would donate to private foundations formed by Quackenbush. When Ossias learned of these secret settlements, she believed that they were improper and disclosed them to state legislators who

were investigating the Insurance Department. When Quackenbush discovered that Ossias had disclosed this information to the legislators, he placed her on administrative leave, and state bar authorities investigated whether Ossias had violated her professional duty of confidentiality. Ossias argued that her disclosure was authorized by state whistleblower protection laws, and bar authorities ultimately decided not to discipline her. The state bar proposed a rule allowing government lawyers to disclose government misconduct, but the state supreme court rejected the proposed rule.¹ The California legislature passed legislation clarifying that a government lawyer does not violate confidentiality by disclosing government wrongdoing, but the governor vetoed the legislation.²

Who was Cindy Ossias's client? To whom did she owe a duty of confidentiality? Was it to the California Insurance Department or its head, Chuck Quackenbush? The government of California? The people of California? In order to properly assess a government lawyer's confidentiality obligations and possible conflicts of interest, it is first necessary to identify the client. This article

provides some much needed guidance for identifying the client of a government lawyer.

Client Identity: Pinpointing a Definition

Government officials, courts and commentators have identified a wide variety of possible clients that the government lawyer may represent.³ One can find some support for the following as clients:

- the "public interest"⁴
- the public at large⁵
- the entire government⁶
- the branch of government employing the lawyer⁷
- the particular agency employing the lawyer⁸
- a particular government official (such as the head of a government organization) in his official or individual capacity⁹

In some situations, a government lawyer is assigned to defend an individual government employee rather than a government entity. Such is routinely the case for Judge Advocate General military defense lawyers, who take on a traditional lawyer-client relationship with

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their individual clients.¹⁰ Justice Department lawyers representing government officials who have been sued in their individual capacity face a more complex situation, and they represent these individuals only if the attorney general has determined that it is “in the interest of the United States” to provide such representation.¹¹ Under Justice Department regulations, the government lawyer’s confidentiality duty toward

executive branch, she cannot. If a state natural resources department lawyer represents her agency, then she cannot reveal information about wrongdoing at the department to anyone outside of the department, including the state attorney general.¹⁶ If a lawyer in the California Insurance Department (such as Cindy Ossias) represents the entire government of California, then she can reveal information to state leg-

universal definition of the government lawyer’s client evades us. The next section develops an alternative approach. It identifies the government lawyer’s client by examining the specific context in which the government lawyer works, paying particular attention to the structure of government authority.

Client Identity: Context and Structure of Governmental Power

A government lawyer’s client may be determined by examining the particular context and the precise structure of governmental authority.²² This section describes that process and provides examples of the analysis.

To determine the identity of the client, it is necessary to examine the range of possible clients of the government lawyer and consider the relationships among them. Is one of those entities subordinate to another, or do they act independently? Then it is necessary to consider the relationship between the lawyer and those entities. A few concrete examples will demonstrate the complexity of the issue of client identity.²³

The issue of client identity often comes up in cases involving claims of attorney-client privilege or conflicts of interest. For example, in a case arising from a federal grand jury’s subpoena for the minutes from the Detroit City Council’s closed sessions, the federal prosecutor argued that the minutes were not privileged because Detroit’s corporation counsel — who ordinarily represents the city administration rather than the City Council — had been present at those sessions; thus, the privilege had been waived. But the Sixth Circuit noted that those closed sessions were for condemnation proceedings; and in those proceedings, the City Council actually instructs the corporation counsel whether to proceed. Since the corporation counsel’s client was the City Council in this legal context, the council was able to assert attorney-client privilege for its meetings with corporation counsel.²⁴

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her individual client is more limited than in a traditional lawyer-client relationship. The lawyer must keep confidential only that information that is covered by the attorney-client privilege.¹² Any nonprivileged information need not be held confidential, and Justice Department attorneys have been required to disclose information adverse to their individual client when the lawyer learned it from a source other than a client communication.¹³

In most situations, the government lawyer represents a government entity rather than an individual government employee. While the professional rules provide guidance for entity representation,¹⁴ they generally leave open the key question for government lawyers: Which government entity does the lawyer represent?

If a government lawyer represents an agency, then the entity exception to confidentiality will apply,¹⁵ but if she is representing only the agency head, then it will not. If a Justice Department lawyer represents the entire government, then she can reveal information to a member of Congress, but if she represents the

islators; but if she represents only the Insurance Department, then she cannot — unless an exception to confidentiality applies.

Politicians often claim that the government lawyer’s client is “the public,” and a few commentators assert that government lawyers should pursue “the public interest.”¹⁷ But these philosophies fail to identify who can give direction to the lawyer on behalf of the client.¹⁸ Some assert that the government lawyer represents the government as a whole,¹⁹ but Geoffrey Miller persuasively rebuts that notion as it pertains to a government with separated powers.²⁰ Miller notes that lawyers in the executive branch do not generally represent Congress or the judiciary. Many assert that the client is the particular agency that employs the lawyer,²¹ but this approach is singularly inappropriate for the hundreds of Justice Department lawyers who represent other government agencies and departments in court.

There are problems with each of these viewpoints. Given the wide variety of roles that government lawyers play, it is no wonder that a

The Sixth Circuit used a similar structural/contextual approach to come to a different conclusion in a case involving Murfreesboro, Tennessee, City Council members, the city manager and a lawyer for the city.²⁵ There, City Council members investigating an executive decision had interests adverse to the city manager and thus were deemed not clients of the city attorney. The city was unsuccessful in its bid to assert attorney-client privilege regarding a meeting between its lawyer and City Council members.

In a California case, the issue was a possible conflict of interest by a county counsel who had given legal advice to the county's civil service commission.²⁶ The court ruled that ordinarily a county counsel's client is the entire county rather than a constituent agency of the county, even when the lawyer is giving specific legal advice to such an agency. But the court identified an exception to this general rule whereby the agency has the authority to act independently of the county. In this particular case, the court found that the civil service commission had independent authority because when the county opposed a commission decision, the county had to take the commission to court rather than simply overrule it. Since the county counsel had given legal advice to a commission with independent authority, the commission itself was a distinct client of the county counsel.

In another conflicts of interest case, employees of the Rhode Island Department of Children, Youth and Families sued the department for alleged civil rights violations.²⁷ The employees' lawyer also did legal work for two Rhode Island state boards, so the state's attorney general argued that representation of the employees constituted an improper conflict of interest. The issue was whether the lawyer represented just the two specific state boards or instead represented the entire state government. The court noted that governmental agencies sometimes

oppose each other in litigation; and thus the agency, rather than the government as a whole, is the client. It examined Rhode Island's restrictions on its employees and found that state employees are prohibited from serving as lawyers for a party suing the particular agency where they are employed. Similarly, federal law prohibits executive branch employees from serving as lawyers for a party suing the executive branch.²⁸ Thus, the court found that the clients of this lawyer were the particular boards he represented rather than the entire state government.

While this kind of structural analysis is the best way to identify a government lawyer's client, not all courts have taken this approach. In a case involving the possible disqualification of a private law firm that arguably represented the state of New York but was now representing a tobacco company being sued by the state, the court concluded that the firm represented only specific agencies rather than the state as a whole, analogizing in a rather strained fashion to the situation of a firm that represents an association's members but not the entire association.²⁹ Furthermore, in a case involving a county's claim of attorney-client privilege for communications between the county attorney and a county employee,

where those communications had also been shared with "the county personnel office, the county auditor's office, and the county judge's office," a Texas state court found that those other offices constituted third parties outside the lawyer-client relationship, thus waiving the attorney-client privilege.³⁰ However, the court failed to consider whether those offices were all part of the county attorney's client.

Applying structural analysis to the federal government's executive branch, client identity depends on the theory applied to the structure of executive-branch authority. Proponents of the unitary-executive view have asserted that all executive-branch lawyers have as their client the entire executive branch, with the president ultimately responsible for defining client interests.³¹ But this unitary-executive view is not universally held. Some commentators note that individual departments have some independent authority based on congressional enactments even though the president can put political pressure on a department secretary or even fire the secretary.³² These commentators would likely conclude that the client of a department lawyer is the department itself rather than the entire executive branch. For many of the lawyers

employed by independent agencies, such as the Securities and Exchange Commission (SEC) or the Federal Communications Commission, their client is the agency itself.³³ Such an agency is even more insulated from presidential control and thus can take positions that will dissatisfy the president. An SEC lawyer who disagrees with an agency decision can appeal that decision up to the commission itself, but not beyond the commission. A Justice Department lawyer who is defending a lawsuit against the Agriculture Department may in common parlance refer to

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that department as her client. But by statute the Justice Department controls the litigation and is concerned with the effect of any rulings on the rest of the executive branch.³⁴ Even if the secretary of Agriculture would prefer a particular position, the attorney general can overrule that position if he deems it in the interest of the executive branch. Thus, it would be more accurate to say that the client of the Justice Department lawyer is the entire executive branch. Federal prosecutors have as their clients the executive branch, and they have significant independence in how they go about their duties.

Most congressional lawyers have as their clients individual legislators, while a few represent entities within the legislative branch.³⁵ The former work either on the personal office staff or the committee staff of a particular member of the House of Representatives or Senate. They

owe duties of loyalty and confidentiality to the individual legislator. Similarly, lawyers in the Office of the Legislative Counsel have transitory lawyer-client relationships with the individual legislators to whom they give legal advice on the drafting of legislation.³⁶ In contrast, there are a few lawyers on Capitol Hill whose clients are legislative entities rather than individual legislators. For example, the Senate Legal Counsel represents the Senate as an institution, regularly defending the Senate in lawsuits and pursuing subpoena enforcement actions in

connection with Senate committee investigations.³⁷

Conclusion

Returning to the Ossias case, Ossias' client was arguably the California Department of Insurance, which was headed by an elected official, Charles Quackenbush. Under California law, Ossias had the option of raising the issue with Quackenbush personally, and such an approach would be consistent with the ABA Model Rule for representation of organizations.³⁸ In such a scenario, however, if the agency head denies wrongdoing, a government lawyer may be tempted to justify disclosing the alleged wrongdoing outside the agency by resorting to the idea that her client is "the public."

As discussed above, such inchoate notions of the client as "the public" are not particularly persuasive. But does that mean that the government

lawyer may never reveal wrongdoing outside of her agency? It turns out that government lawyers have options not available to private sector lawyers in dealing with alleged wrongdoing. In an article for the next issue, I will discuss how the common law principles and specific open government statutes provide government lawyers with additional options for disclosing wrongdoing without violating confidentiality rules. n

Endnotes

1. Charles S. Doskow, *The Government Attorney and the Right to Blow the Whistle: The Cindy Ossias Case and Its Aftermath (A Two-Year Journey to Nowhere)*, 25 *Whittier L. Rev.* 21, 23 (2003).

2. State Bar of Calif., Office of Governmental Affairs, *Governor Vetoes Public Attorney Whistleblower Bill*, Sacramento Scene, Oct. 4, 2002, at 1.

3. For other discussions about the range of possible clients of government lawyers, see Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 *Geo. J. Legal Ethics* 291, 296 (1991); Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 *Widener J. Pub. L.* 235, 266-69 (2000); Joshua Panas, *The Miguel Estrada Confirmation Hearings and the Client of a Government Lawyer*, 17 *Geo. J. Legal Ethics* 541 (2004).

4. *E.g.*, *Feeney v. Commonwealth*, 366 N.E.2d 1262, 1266 (Mass. 1977).

5. *E.g.*, *In re Witness Before Special Grand Jury 2000-2*, 288 F.3d 289, 294 (7th Cir. 2002).

6. Robert P. Lawry, *Who Is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question*, 37 *Fed. B.J.* 61, 66 (Fall 1978); James R. Harvey III, Note, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 *Wm. & Mary L. Rev.* 1569, 1575-76, 1594 (1996).

7. Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 *U. Chi. L. Rev.* 1293, 1298 (1987).

8. D.C. Rules of Prof'l Conduct R. 1.6(k) (2012).

9. *E.g.*, *The Attorney General's Role as Chief Litigator for the United States*, 6 *Op. Off. Legal Counsel* 47, 54 (1982) (stating that the president is the client of the attorney general).

10. *See* D.C. Rules of Prof'l Conduct R. 1.6 cmt. 39.

11. 28 C.F.R. § 50.15(a) (2012).

12. *Id.* § 50.15(a)(3).

13. Memorandum from Ralph W. Tarr, Acting Assistant Att'y Gen., Office of Legal Counsel, to Ralph K. Willard,

Acting Assistant Att’y Gen., Civil Div. 6 (Mar. 29, 1985) (on file with author).

14. Model Rules of Prof’l Conduct R. 1.13 (2012).

15. Model Rules of Prof’l Conduct R. 1.13(c).

16. *But see* Haw. Rules of Prof’l Conduct R. 1.6(c)(4)–(5) (permitting government lawyers licensed in Hawaii to make such disclosures) (2012).

17. Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. Rev. 789 (2000).

18. *See* Prof’l Ethics Comm’n., Fed. Bar Ass’n, Op. 73-1 (1973) (“The Government Client and Confidentiality”) in 32 Fed. B.J. 71, 72 (1973).

19. *See* Lawry, *supra*, note 6, at 66.

20. Miller, *supra*, note 7, at 1296.

21. *See, e.g.*, D.C. Rules of Prof’l Conduct R. 1.6(k).

22. *See* Restatement Third of the Law Governing Lawyers § 97 cmt. c (“No universal definition of the client of a governmental lawyer is possible.”) (2000).

23. *See* Gray v. R.I. Dep’t of Children, Youth and Families, 937 F. Supp. 153, 157 (D.R.I. 1996) (“Ascertaining who the client really is can be a complex affair when a governmental entity is involved.”); *United States v. Am. Tel. & Tel. Co.*, 86 F.R.D. 603, 617 (D.D.C. 1979) (adopting a contextualized approach to identifying the government lawyer’s client, indicating that the client can be more than one government agency “if the two agencies have a substantial identity of legal interest in a particular matter”).

24. *In re* Grand Jury Subpoena, 886 F.2d 135 (6th Cir. 1989).

25. *Reed v. Baxter*, 134 F.3d 351 (6th Cir. 1998).

26. *Civil Serv. Comm’n v. Superior Court*, 209 Cal. Rptr. 159, 164 (Cal. Ct. App. 1985).

27. *Gray*, 937 F. Supp. 153.

28. *Id.* (citing 18 U.S.C. § 205(a)(2)) (2012).

29. *Brown & Williamson Tobacco Corp. v. Pataki*, 152 F. Supp. 2d 276, 282–89 (S.D.N.Y. 2001).

30. *Cameron County v. Hinojosa*, 760 S.W.2d 742, 745–46 (Tex. App. 1988).

31. *See, e.g.*, Miller, *supra* note 7, at 1298.

32. *See, e.g.*, Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 Geo. Wash. L. Rev. (2007).

33. In a few cases, lawyers work for individual commissioners rather than the commission as a whole. In those cases, the client is the individual commissioner in his official capacity.

34. 28 U.S.C. § 516 (2012).

35. Kathleen Clark, *The Ethics of Representing Elected Representatives*, 61 Law & Contemp. Probs., 31, 36–37 (Spring 1998).

36. Matthew Eric Glassman, Cong. Research Serv., Office of Legislative Counsel: Senate (2007).

37. Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client*, 61 Law & Contemp. Probs., 47, 56–62 (Spring 1998).

38. Model Rules of Prof’l Conduct R. 1.13 (2012).