

Ethics: Going Beyond The Model Rules

September 13, 2009

Speakers:

Allan Gates
Partner
Mitchell, Williams, Selig, Gates & Woodyard
Little Rock, AR

Roberta L. Larson
Vice Chair, NACWA Legal Affairs Committee
Somach Simmons & Dunn
Sacramento, CA

Michael Sundermeyer
Partner
Williams & Connolly
Washington, DC

Scenario One

Metropolitan Water Utility MWU is currently prosecuting a multi-million dollar damages claim against a contractor. All parties are ordered to appear at a court supervised settlement conference. The order setting the settlement conference directs that all parties must have a representative with settlement authority attend the conference. MWU is represented at the conference by its in-house General Counsel and its outside Litigation Counsel. Prior to the settlement Conference, the CEO of MWU meets with General Counsel and Litigation Counsel to discuss the case and the settlement conference. At this meeting the CEO gives General Counsel and Litigation Counsel authority to settle the claim for any amount over \$4.25 million.

During the settlement conference the Magistrate, acting as settlement judge, meets privately with MWU's representatives, General Counsel and Litigation Counsel. The Magistrate asks what level of settlement authority they have. MWU's General Counsel responds, "We are not authorized to settle for anything less than \$6 million."

Duty of Truthfulness in Statements to Others

- Model Rule 4.1, Comment 2

Duty of Candor toward the Tribunal

- Model Rule 3.3

Duty to Maintain the Integrity of the Profession

- Model Rule 8.4(c)

ABA Formal Opinion 06-438 (2006)

Rubin, *A Causeur on Lawyers' Ethics in Negotiation*, 35 Louisiana L. Rev. 577 (1975)

White, *Machiavelli and the Bar: Ethical Limits on Lying in Negotiation*, 1980 A.B.F Research J. 926.

Scenario Two

The Metropolitan Water Utility Commission votes to retain Law Firm as MWU's General Counsel for a term of five years. Law Firm sends MWU an engagement letter which contains an "advance waiver" of conflicts for matters involving other branches of the City government. The "advance waiver" would allow Law Firm to represent clients in matters adverse to the City so long as MWU itself is not a party to the matter and Law Firm has not advised or represented MWU in connection with the matter.¹

During the term of Law Firm's contract with MWU, Law Firm represents the Proponent of a major commercial redevelopment project. The project becomes the focus of serious political controversy. The City Planning Commission denies required planning approval. The City Council upholds the denial. Law Firm files suit against City challenging the denial of Proponent's planning application. City moves to disqualify Law Firm from representing Proponent in the lawsuit based on Law Firm's representation of the City in unrelated matters, namely its representation of MWU.

¹ The advance waiver reads as follows:

"MWU recognizes that Law Firm represents a large number of clients which have business before various City boards and commissions other than MWU. MWU acknowledges that it would not be feasible for Law Firm to cease all such representation as a condition of undertaking the representation of MWU. MWU agrees that Law Firm may continue to represent existing and future clients in any matter adverse to the City so long as those matters do not involve MWU as a party and they do not involve matters on which Law Firm has advised or otherwise represented MWU (hereafter referred to as "UNRELATED MATTERS"). In consideration of Law Firm's agreement to represent MWU, MWU waives any conflict of interest relating to UNRELATED MATTERS; and MWU agrees that Law Firm's representation of MWU will not serve as the basis of any disqualification of Law Firm in UNRELATED MATTERS.

Validity of Advance Consents

- Permissible:
 - Model Rule 1.7, Comment 22
 - ABA Formal Ethics Opinion 05-436 (2005)
 - D.C. Ethics Op. 309 (2001)
 - NY City Ethics Op 2006-1 (2006)
- Law Firm Disqualified Despite Advance Waiver
 - *Worldspan, L.P. v. Sabre Group Holdings, Inc.*, 5 F. Supp. 2d 1356 (N.D. Ga. 1998)
- Advance Waiver Upheld
 - *Visa U.S.A., Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100 (N.D. Cal. 2003)
- Commentary:
 - Fox, *All's OK Between Consenting Adults: Enlightened Rule on Privacy, Obscene Rule on Ethics*, 29 Hofstra L. Rev. 701 (2001)
 - Lerner, *Honoring Choice By Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship*, 29 Hofstra L. Rev. 971 (2001)
 - Brown, *Advance Waivers of Conflicts of Interest: Are the ABA Formal Ethics Opinions Advanced Enough Themselves?*, 19 Geo J. Legal Ethics 567 (2006)

Validity of Government Waivers of Conflicts

- Restatement of Law Governing Lawyers, § 122, comment g(ii)
- Government Cannot Consent
 - *State ex rel. Morgan Stanley & Co. v. MacQueen*, 416 S.E.2d 55 (W. Va. 1992)
 - N.J. Ethics Op. 697 (2005)
 - Tenn. Ethics Op. 2002-F-146 (2002)
- Government Can Consent
 - Ill. Ethics Op. 95-5 (1995)
 - Iowa Ethics Op. 06-03 (2006)
 - Md. Ethics Op. 99-28 (1999)
 - N.Y. State Ethics Op. 629 (1992)

Scenario Three

Metropolitan Water Utility is a defendant in a sex discrimination claim filed under Title VII and 42 USC § 1983. One of MWU's Treatment Plant Managers is also named as a defendant in the action. At MWU's request, MWU's customary outside Law Firm is defending both Treatment Plant Manager and MWU in the action. MWU's engagement letter provides that: (i) MWU will pay all legal fees, (ii) Law Firm will be free to share with each co-defendant all client confidences it receives from the other co-defendant, and (iii) if a conflict does arise between MWU and Treatment Plant Manager, Law Firm can withdraw from representing Treatment Plant Manager and continue representing MWU in the litigation. MWU and Treatment Plant Manager both execute acknowledgements consenting to the terms of the engagement letter.

One week before trial Law Firm meets with Treatment Plant Manager to prepare his testimony. At the end of the preparation session, the following exchange occurs:

Treatment Plant Manager:	"There is something really bothering me and I don't know what to do about it."
Law Firm Partner:	"Well tell me about it. That is what I am here for. I am your lawyer."
Treatment Plant Manager:	"I have been having an affair with the named plaintiff for several years. We are still seeing each other. "I cannot allow any of this to come out. It would ruin my marriage. It would ruin my career with MWU. "What should I do?"

Duty to Preserve Confidentiality of Client Information

- Model Rule of Professional Conduct 1.6

Duty to Avoid Conflicts of Interest

- Model Rule of Professional Conduct 1.7, comments [29]-[31]

Consent to Representation of Co-Parties in Litigation

- ABA Formal Ethics Opinion 08-450 (2008)
- Restatement of the Law Governing Lawyers, § 121 comment(e)
- Los Angeles County Opinion 471 (Dec. 12, 1992)
- Texas Opinion 487 (December 11, 1992)
- Maryland Opinion 2006-15 (May 5, 2006)

Scenario Four

Metropolitan Wastewater Utility's in-house General Counsel receives information which suggests that a number of MWU's monthly Discharge Monitoring Reports may have been falsified to conceal significant exceedances of permit limits. After consultation with MWU's Chief Executive Officer, the General Counsel and her Paralegal begin a formal internal investigation into the possible falsifications. The investigation includes interviews of MWU employees and outside laboratory personnel, and a detailed review of MWU documents and outside laboratory records. While the internal investigation is still ongoing, MWU is served with a civil enforcement action. Counsel for the state in the enforcement action learns of the internal investigation. He files a request for production of all notes, memoranda, correspondence and other records in MWU's possession related to the internal investigation. He also states that he intends to depose MWU regarding the investigation under the state equivalent of Fed. R. Civ. P. 30(b)(6). MWU objects to the discovery requests and proposed deposition on grounds of attorney-client privilege and work product doctrine. Counsel for the state responds that MWU's in-house General Counsel is employed by the public and cannot assert attorney-client privilege or work product doctrine to defeat disclosure to the public of information she has gathered regarding the wrongdoing of public officials or employees, particularly when that information would reveal crimes, civil law violations, or serious misconduct on the part of public officials or employees.

Attorney-Client and Work Product Is Available to Corporate Entities

- *Upjohn Co. v. United States*, 449 U.S. 383 (1981)

Can Government Agencies or Officials Assert Attorney-Client Privilege or Work Product to defeat Disclosure of Wrongdoing to the Public? Or to a Prosecutor?

- *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997)(Kenneth Starr's subpoena for notes of White House Counsel's communications with Hillary Clinton)
- *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998) (Kenneth Starr's subpoena for notes of White House Counsel's communications with President Clinton)
- *In re Witness Before Special Grand Jury 2000-2*, 288 F.3d 289 (7th Cir. 2002)(subpoena for communications between then Illinois Secretary of State George Ryan and his Chief Legal Counsel)
- *In re Grand Jury Investigation*, 399 F.3d 527 (2d Cir. 2005)(subpoena for communications between Connecticut Gov. John Rowland and his Chief Legal Counsel)
- *Pritchard v. County of Erie*, 473 F.3d 413 (2d Cir. 2007) (Communications between county attorney and county officials accused of illegal strip searches)
- *Payton v. New Jersey Turnpike Authority*, 691 A.2d 321 (N.J. 1997)

Freedom of Information Act Considerations

- *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990) (memoranda in files of private law firm representing City which analyze litigation risks in bondholders suit against City held subject to FOI disclosure despite attorney-client privilege)