Committee Draft Report on Proposed Changes to Rule 1.6(k) (Confidentiality of Information) and Corresponding Proposed Amendments to the Comments of Rule 1.13 (Organization as Client), and Rule 1.11 (Successive Government and Private or Other Employment)

The Rules of Professional Conduct Review Committee ("Rules Committee" or "Committee") of the D.C. Bar proposes the elimination of Rule 1.6(k), a rule which creates an assumption that the client of the government lawyer is the agency that employs the lawyer, as well as the comments to Rule 1.6 that reference Rule 1.6(k). In place of Rule 1.6(k), the Committee recommends the adoption of a comment to Rule 1.13 (Organization as Client), which provides an analytical framework for identifying the client of the government lawyer and is consistent with the substantive law.

Additionally, the Committee proposes a change to comment [10] to Rule 1.11 (Successive Government and Private or Other Employment). Comment [10] addresses the application of Rule 1.11 to lawyers moving between government agencies within the same the government. The proposed comment would instead subject those lawyers to Rule 1.9 (Conflict of Interest: Former Client).

I. Introduction

In early 2018, the Rules Committee, based on recurring questions about the identity of the client of the government lawyer, began an examination of D.C. Rule 1.6(k). The rule reads as follows:

> (k) The client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order.

The rule is unusual in that there is no analogous provision in the American Bar Association Model Rules of Professional Conduct or in the professional rules adopted by any other jurisdiction. Further, while purporting to identify the client of the government lawyer, Rule 1.6(k) is located within Rule 1.6 (Confidentiality of Information), a rule that defines a lawyer's obligations with respect to client confidences and secrets. In general, the identity of a client is a matter of substantive law and not a question of ethics.

During its review of Rule 1.6(k), it came to the Committee's attention that comment [10] to Rule 1.11 (Successive Government and Private Employment) is rooted in the idea that the employing agency is the client of the government lawyer. Comment [10] addresses the application of the Rule 1.11 conflict provisions to lawyers moving from one government position to another. The Committee also undertook review of this provision.

Ultimately, the Committee determined that Rule 1.6(k) as written does not provide consistently useful guidance to D.C. lawyers. Instead, the Committee recommends adopting a comment to Rule 1.13 (Organization as Client) which suggests an analytical framework for government lawyers who are struggling with the identity of their client. Additionally, the

Committee is recommending a revised comment [10] to Rule 1.11. The Committee's recommendations and analysis are set forth below.

II. Recommended Changes Related to the Identity of Government Client (Rules 1.6 & 1.13)

Rule 1.6(k), which creates a default presumption that the client of the government lawyer is the employing agency "unless expressly provided to the contrary by appropriate law, regulation, or order," has the advantage of providing a clear and simple answer[1] regarding the identity of a government lawyer's client. Unfortunately, it has the disadvantage of providing a demonstrably incorrect answer for many government lawyers, including most of those employed by the U.S. Department of Justice.[2]

Courts and commentators generally reject the notion that there is a universal definition for the government lawyer's client.[3] Federal, state and local governments have considerable variation in how they are organized and the degree to which their component parts (such as an agency) can exercise independent authority to direct a lawyer's work.[4] To identify a government lawyer's client, one must consider the structure of the governmental authority within which the lawyer works.[5] If a lawyer is retained -- rather than employed -- by the government, the retainer agreement may specify the client's identity.[6]

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[1] *See* D.C. Rule of Professional Conduct 1.6, Comment [38] ("The employing agency has been designated the client under this rule to provide a commonly understood and *easily determinable point for identifying* the government client." (emphasis added)).

[2] Since no statute, regulation or order expressly identifies the client of lawyers employed by the U.S. Department of Justice, Rule 1.6(k) would indicate that their client is the Department itself. But the Justice Department asserts that the client is "the United States as a whole, as articulated by the Executive." *The Attorney General's Role as Chief Litigator for the United States*, 6 Op. O.L.C. 47, 54 (1982).

[3] *See, e.g.*, *Gray v. Rhode Island Dept. of Children, Youth and Families*, 937 F. Supp. 153, 157-58 (D.R.I. 1996) (noting that "ascertaining who the client really is can be a complex affair when a governmental entity is involved" and identifying potential clients as the public interest, the state as a whole, the agency and the agency head); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 97 cmt. c (2000) ("No universal definition of the client of a governmental lawyer is possible."); D.C Bar Legal Ethics Comm. Op. 268 (1996) ("the identity of the City government client depends upon a number of discrete considerations and must be decided on a case-by-case basis"); *but see* Prof'l Ethics Comm., Fed. Bar Ass'n Op. 73-1 (1973), 32 Fed. B.J. 71, 72 (1973) ("The client of the federally employed lawyer ... is the agency where he is employed …").

[4] *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 97 cmt. c (2000) ("Government agencies exist in various forms, ranging from departments or governmental corporations that may sue and be sued in their own names, to divisions of government without such separate legal status, to legislatures or committees of legislatures.").

[5] *Id*. (noting that "the identity of the lawyer's governmental client depends on the circumstances" and identifying relevant factors as including the "particular regulatory arrangements relevant to the lawyer's work" and "nature of the lawyer's services"); *Conflicts in Representing Government Entities*, ABA F. Op. 97-405 (to determine the identity of a government client, relevant considerations include how the government entity "is legally defined and funded, and whether it has independent legal authority with respect to the matter for which the lawyer has been retained").

[6] *See* D.C Bar Legal Ethics Comm. Op. 268 (1996) ("The identity of the government (or corporate) client for all ethical purposes is established in the first instance between the lawyer and responsible public (or corporate) officials in accordance with the general precepts of client autonomy embodied in Rule 1.2."); *see also Conflicts in Representing Government Entities*, ABA F. Op. 97-405 ("We agree with the D.C. Bar opinion that the identity of the government client is, like that of any other organizational client, a matter to be decided between the lawyer and authorized representatives of the client under Rule 1.2.").

In the federal government, a lawyer employed by a particular agency may have that agency as her client and may pursue "a legal result that will benefit the narrow area of law administered by the agency."[7] A United States Department of Justice lawyer, on the other hand, represents "the United States as a whole, as articulated by the Executive," and must "represent the broader interests of the Executive."[8] If "a 'client' agency desires to … dissociate itself from legal or policy judgments to which the Executive subscribes," the Justice Department lawyer's "obligation to represent and advocate the 'client' agency's position must yield to a higher obligation to 'take care that the laws be executed faithfully.'"[9]

The issue of client identity arises in the context of disputes over the duty of confidentiality, the attorney-client privilege, and conflicts of interest.[10] The question is often whether the client is a specific government agency or the government as a whole.[11] In cases involving a government's outside counsel, courts consider the "traditional indicia of an attorney-client relationship," including how the client is identified in a retainer agreement or invoices.[12]

Based on the foregoing considerations, with respect to Rule 1.6(k), we recommend:

- deleting Rule 1.6 paragraph (k),
- deleting Rule 1.6 Comment [36], which refers to paragraph (k), and replacing it with a new comment that cross-references new comment [8] to Rule 1.13.
- deleting Rule 1.6 Comment [38], which refers to paragraph (k), but mentions paragraph (j), and
- adding a comment to Rule 1.13 about the client of government lawyers.

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[7] *See The Attorney General's Role as Chief Litigator for the United States*, 6 Op. O.L.C. 47, 62 (1982).
[8] *Id.* at 54.
[9] *Id.* at 62. When this opinion refers to a federal agency as a client, it usually puts quotation marks around the word "client," meaning that the agency is not a client in the technical legal sense. *Id*. at 54, 55, 62.
[10] *See, e.g.*, *United States v. Am. Tel. & Tel. Co.*, 86 F.R.D. 603 (D.D.C. 1979) (attorney-client privilege); *Brown & Williamson Tobacco Corp. v. Pataki*, 152 F. Supp. 2d 276 (S.D.N.Y. 2001) (motion to disqualify based on alleged conflict of interest); *Gray v. Rhode Island Dept. of Children, Youth and Families*, 937 F. Supp. 153 (D.R.I. 1996) (same).
[11] *See, e.g.*, *Brown & Williamson Tobacco Corp. v. Pataki*, 152 F. Supp. 2d 276, 278, 287 (S.D.N.Y. 2001) (law firm that had "represented various New York State … interests with respect to … social welfare programs" represented the specific state agencies involved in those matters rather than "the State as a whole"); *Gray v. Rhode Island Dept. of Children, Youth and Families*, 937 F. Supp. 153, 168 (D.R.I. 1996) (noting that "the most practical answer" is either the government as a whole or the particular agency" for whom the lawyer is working).
[12] *See Brown & Williamson Tobacco Corp. v. Pataki*, 152 F. Supp. 2d 276, 282 (S.D.N.Y. 2001) ("To define the government client, the traditional indicia of an attorney-client relationship must be closely examined."); ABA Formal Op. 97-405, *Conflicts in Representing Government Entities* ("the identity of the government client is, like that of any other organizational client, a matter to be decided between the lawyer and authorized representatives of the client under Rule 1.2").

Proposed Additional Language to be Inserted at the End of Comment [8] for Rule 1.13 (italicized text reflects recommended addition):

> [8] The duty defined in this rule encompasses the representation of government organizations. See Rule 1.6 comments *[37 through 39]. When a lawyer represents a government client -- whether working as a government employee or as retained counsel – a question can arise regarding the client's identity. There is no universal answer to that question. To identify the client, one must consider how principles of substantive law external to these Rules apply to relevant circumstances regarding the nature of the lawyer's role and the government organization employing or retaining the lawyer, such as its legal definition, its funding, and whether it has independent legal authority with respect to the lawyer's work. In general, the client is the organization that has the authority to direct the lawyer's work, as articulated by an organizational constituent who is duly authorized to speak on its behalf. See Rule 1.13(a) and Comment [8]. Often, the client may be the agency that employs or retains the lawyer. But some lawyers, such as U.S. Department of Justice lawyers, usually are charged with representing the United States. See The Attorney General's Role as Chief Litigator for the United States*, 6 Op. O.L.C. 47, 54 (1982). *In the case of retained counsel, it would be prudent, at the outset of the representation, for the lawyer and government officials who are authorized to speak for the client to agree on the identity of the government client, and preferably commit that agreement to writing. See D.C. Bar Legal Ethics Committee Opinion 268.*

Recommended Changes Regarding Comment [36] to Rule 1.6:

Replace current text of comment ("Subparagraph (e)(2) was revised, and paragraph (k) was added, to address the unique circumstances raised by attorney-client relationships within the government") with cross-reference to new comment [8] to Rule 1.13: "Subparagraph (k) was deleted. For more information on the identity of the client of the government lawyer, see comment [8] to Rule 1.13."

III. Recommended Changes Regarding "Other Employment" (Rule 1.11 Comment [10])

Rule 1.11 is the rule that sets forth conflict provisions for government attorneys seeking new employment. It contains a broad prohibition on lawyers accepting other employment "which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee." It came to the attention of the Committee during its review of Rule 1.6(k) because of Rule 1.11's comment [10], which governs the application of the Rule to lawyers moving between government positions (as opposed to from a government position to the private sector). The comment reads as follows:

> *[10] "Other employment," as used in paragraph (a) of this rule, includes the representation of a governmental body other than an agency of the government by which the lawyer was employed as a public officer or employee, but in the case of a move from one government agency to another the prohibition provided in paragraph (a) may be waived by the government agency with which the lawyer was previously employed. As used in paragraph (a), it would not be other employment for a lawyer who has left the employment of a particular government agency and taken employment with another government agency (e.g., the Department of Justice) or with a private law firm to continue or accept representation of the same government agency with which the lawyer was previously employed.*

In effect, the comment allows for a waiver from the Rule 1.11(a) conflicts provision for lawyers moving between government positions. The ability of the agency that formerly employed the lawyer to "waive" the protections of Rule 1.11 appears to be based on the premise of agency-as-client.

During its review, the Committee found that neither federal nor District of Columbia laws or regulations purport to impose special limitations on attorneys moving between government agencies. For this reason, neither federal nor D.C. government entities impose a waiver requirement in the context of such moves. The Committee also found no evidence to suggest that the prohibitions of Rule 1.11 were ever intended to impose special limitations on the movement of lawyers through successive government positions. *See Revolving Door*, 445 A.2d 615 (DCCA 1982); *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37 (D.C. 1984) (en banc); and the legislative history contained in the report of The District of Columbia Model Rules of Professional Conduct Committee (1986) ("Jordan Report") and the report of the Rules of Professional Conduct Review Committee (1994) ("Peters Report"). Rather, Rule 1.11 reflects a broad policy that lawyers should not use government service as an improper means of creating future opportunities for lucrative private employment, even if that employment is not adverse to the government.

While the Committee initially attempted to clarify the existing comment with respect to the waiver requirement, it concluded that there was no reasonable way of imposing a waiver requirement in this context. Rather, the solution was to subject lawyers moving between government positions to the conflict provisions of Rule 1.9. As always, the protections of Rule 1.6 also apply to current and former government clients. While this change to Comment [10] is a substantial departure from the prior version of comment [10] under which government lawyers currently evaluate their ability to move from one government position to another, the Committee believes that Rule 1.9 offers a common-sense approach that is also a familiar standard for attorneys evaluating potential conflicts.

One feature of Rule 1.11 that is not present in Rule 1.9 is the limitation of the rule to matters "involving a specific party or parties." Rule 1.11(g). Because of Rule 1.11(g), matters involving the development of public policy or laws/rules of general applicability usually will not create future conflicts for lawyers, although Rule 1.6 would likely prohibit (for example) a government lawyer who drafts a specific policy from moving to another government position or the private

sector and launching an attack on the constitutionality of the policy. See D.C. Bar Legal Ethics Opinions 344 and 297 for further discussion of Rule 1.11(g).

The Committee considered whether it was necessary or even possible to import the Rule 1.11(g) limitation into Rule 1.9 to limit when Rule 1.9 is applied to lawyers moving between government positions. Ultimately, the committee concluded that Rule 1.9 will not be applied in an overly broad way that will restrict lawyers' movement between government positions, in large part because the rule is already limited to those situations in which the interests of the former and current client are "materially adverse." It is difficult to imagine a hypothetical situation in which a lawyer who would have been able to accept a matter under the current Rule 1.11/comment [10] standard would be forbidden from accepting a matter under Rule 1.9, in part because Rule 1.6 operates as a separate and independent limitation on a lawyer's revelation and use of confidential information regardless of whether the lawyer is subject to Rule 1.11 or Rule 1.9.

The Committee also considered whether subjecting lawyers moving between government positions to Rule 1.9 could potentially lead to the imputation of conflicts among lawyers in accordance with Rule 1.10(a). However, the definition of "firm" contained in comment [1] to Rule 1.10 makes clear that the rule does not apply in the context of government entities.

Based on the forgoing, the Committee proposes the replacing the text of current comment [10] to Rule 1.11 with the following paragraph.

Proposed New Comment [10] to Rule 1.11:

> *The concerns and policies that underlie Rule 1.11(a), as discussed in Brown v. District of Columbia Board of Zoning Adjustment, 486 A.2d 37 (D.C. 1984) (en banc), generally are not present when a lawyer moves from one government position to another position with the same or a different government. Therefore, Rule 1.11(a) does not apply to that situation. However, a lawyer moving from one government position to another government position remains subject to Rule 1.9. A lawyer moving between government positions also is subject to Rule 1.6. As used in paragraph (a), it would not be "other employment" for a lawyer who has left government employment to continue representation of the same government entity in an ongoing matter that the newly departed lawyer had previously handled as a government lawyer. See Rule 1.13 comment [8]. For a further discussion of representations not subject to the "other employment" prohibitions of Rule 1.11(a), see D.C. Bar Legal Ethics Committee Opinion 313.*