SECRETS, INFORMERS
& OTHER CLASSIFIED ISSUES
IN PUBLIC WORKPLACE LAW

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For International Public Management Association – HR
Southern Region Conference
Oklahoma City, Oklahoma

April 28, 2010

Public sector employment matters differ in many respects from employment matters in the private sector. Thus, analyzing public employment issues presents special challenges. Government lawyers and public sector HR professionals generally must deal with the same issues as their private sector counterparts as well as numerous other regulations, requirements and concerns. Areas where these differences and special challenges are apparent include: 1) privacy issues; 2) whistleblowers; and 3) legal representation of the government client. This paper will overview each of these areas briefly and discuss recent developments in each area.

I. Can you keep a secret? (or Privacy Issues in the Public Workplace)

Actually, several issues fall under this heading. Some of the more troublesome and interesting areas are workplace searches, including electronic monitoring, and requests for information from public employees.

Workplace searches & electronic monitoring

Searches by a government employer of its employees' workspaces and surveillance of government employees' electronic communications is governed by the Fourth Amendment to the United States Constitution, although other federal and state laws also may apply. The Fourth Amendment affords protection against *unreasonable* searches and seizures by the government. Because the Fourth Amendment applies only when the government is the actor, it does not afford protection to private sector employees.

There are many reasons employers may want or need to search an employee's work space or monitor his or her electronic communications. Generally, the government employer has a need for "supervision, control, and the efficient operation of the workplace." *O'Connor v. Ortega*, 480 U.S. 709, 719-20 (1987). More specifically, an employer may need to retrieve property or information, such as a file. Or, an employer may wish to determine if an employee is misusing

resources or time. Employers also have an interest in preventing disclosure of confidential information. All employers, including government employers, are at risk of liability for conduct or communications conveyed by electronic means. Moreover, in some cases, employers have an affirmative duty to report crimes committed by electronic means, making the ability to monitor or search a must.

In the seminal workplace privacy case *O'Connor v. Ortega*, a plurality decision, the Supreme Court noted "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer," finding public employees may enjoy some privacy interest in their physical workplace, such as desks and file cabinets. 480 U.S. at 717. The Court therefore concluded it must balance the interests of the government against "the invasion of the employees' legitimate expectations of privacy." 480 U.S. at 719-20.

The case involved a search by a government employer of an employee's office while the employee was on leave. The Court set forth a framework for analyzing whether a public employer is liable under 42 U.S.C. § 1983 for the violation of an employee's Fourth Amendment right. First, one must determine whether the employee has a reasonable expectation of privacy in the area searched or the item seized. *Id.* at 717-18. If he does, then one must determine whether the search was unreasonable, *i.e.* whether it was justified at its inception and justified in its scope. *Id.* at 725-26.

The lower courts have attempted to apply the *Ortega* test to searches and monitoring of public employees' electronic communications and transmissions. Advances in technology have proved to make this challenging. Not only is it now practical and inexpensive for employers to utilize the most modern of communication methods, the means by which employers may monitor employees are also increasing. The Supreme Court recently granted *certiorari* from a

controversial Ninth Circuit decision in which the appellate court held a city had violated the Fourth Amendment by searching personal messages sent to and received by a police sergeant on his city-issued wireless text-messaging pager. *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892 (9th Cir. 2008), *cert. granted*, _ U.S. _, 130 S. Ct. 1011 (2009).

The concern and conflict about communication privacy in the modern workplace are on display in *Quon*. Quon filed suit against his employer, alleging violations of the Fourth Amendment, the California Constitution right to privacy, and the Stored Communications Act. 529 F.3d at 898. Applying the *Ortega* test, the Ninth Circuit held Quon had a reasonable privacy expectation in his pager messages even though the employer provided the pager and had a formal anti-privacy policy, which prohibited the use of employer-provided technology for personal communications and warned of the possibility of surveillance. The court found the expectation was reasonable because the employer had an informal practice of assuring Quon he could maintain privacy in the messages if he personally paid all overage fees on the pager. *Id.* at 904-08. The Ninth Circuit went on to hold the scope of the search was not reasonable in light of the administrative, non-investigatory purpose of the search. *Id.* at 908-09. The court nonetheless concluded the individual defendant, the police chief, was entitled to qualified immunity. *Id.* at 909-10.

In case that just came out, the Supreme Court of New Jersey an employee's email communication with her attorney, using her personal email account but on the company-owned computer, are protect by the attorney-client privilege. *Stengart v. Loving Care Agency, Inc.*, _ A.2d _, 2010 WL 1189458 (N.J. March 30, 2010). The employee had used her password-protected Yahoo email account to communicate with her lawyer regarding her anticipated lawsuit against the employer. She did not save her ID or password to the company computer, and

the emails from her lawyer contained a warning the emails were confidential and privileged. The company had a policy stating it reserved the right to intercept electronic communications, but, as the Court noted, related to "the company's media systems" and did not address the use of web-based email accounts. The Court reasoned the employee, under the circumstances, "could reasonably expect that e-mail communications with her lawyer . . . would remain private." While the case involves a private sector employer, it certainly has implications for the public sector.

Presumably, with its decision in *Quon*, the Supreme Court will clarify the application of the *Ortega* test, particularly as it relates to search and monitoring of electronic communications. Watch for that decision next term.

In the meantime, however, the legitimate risks and concerns of public employers remain, and such employers must be able to take action when necessary to protect the organization and its employees. An employer's best method for addressing these risks, while avoiding privacy claims related to searches and monitoring of electronic communications, still is to have a current, clearly worded, readily available policy, signed by each employee. The policy should identify what property is subject to search, (*e.g.*, property furnished by the employer, such as offices and desks, and/or employees' personal effects, such as purses). Regarding electronically-stored information, the policy should make clear the following: which systems are government property; what is acceptable use of government systems; monitoring will occur; the employee should not expect privacy and passwords do not create an expectation of privacy; and violations of the policy may result in disciplinary action. Employers should limit disclosure of information obtained through monitoring to officials who have a legitimate need to know, and should consistently enforce the policy and not have "informal" policies, as the city in *Quon* apparently had. Additionally, public employers and employees alike should be aware electronically-stored

information may be subject to an open records or FOI request, or disclosure in litigation.

Public employers also must assess policies governing monitoring and searches of computers and electronically-stored information in light of statutes and recent decisions imposing an affirmative duty on employers to report crimes using electronic means. For example, several states, including Oklahoma, Arkansas, Missouri, North Carolina and South Carolina, now require information technology workers to report the discovery of child pornography. The Oklahoma statute, 21 O.S. § 1021.4, is attached. However, the statute does not appear to place on affirmative duty to search for prohibited material if it is not part of the IT worker's duties to do so. 21 O.S. § 1021.4(C) ("Nothing in this section shall be construed to require or authorize any person to act outside the scope of such person's professional capacity or employment by searching for prohibited materials or media").

Nonetheless, at least one decision exists indicating employers may be held civilly liable for failure to report child pornography. *Doe v. XYC Corp.*, 887 A.2d 1156 (N.J. App. 2005). In *Doe*, the court held an employer on notice an employee is using a company computer to access child pornography has a duty to investigate and take prompt action to stop the activity, including reporting to law enforcement.

Privacy Issues with Respect to Other Personal Information

Investigations, both during the hiring process and post-employment, are useful and sometimes even required. But, they sometimes present legal problems for employers.

Most employers are aware by now that investigations conducted by third parties, including pre-hiring investigations and investigations of inappropriate employee conduct, are subject to the Fair Credit Reporting Act. Under the Act, employers who rely on consumer credit

reports[1] to make employment decisions (hiring, promotion, etc.) must comply with the Act's requirements before they obtain the reports and again before taking any adverse employment action based on a report. These requirements include providing the employee/applicant a copy of the report, making certain disclosures related to adverse actions, and giving notice of the right to dispute the report. The Act provides civil remedies for violations of the Act.

The U.S. Supreme Court recently granted *certiorari* in a case that may have significant consequences for government employers who conduct background investigations. The lower court ruled federal contractors are likely to succeed on their claim that alleged in-depth background investigations by NASA violated the contractors' constitutional right to "informational privacy." *Nelson v. NASA*, 530 F.3d 865 (9th Cir. 2008), *reh'g en banc denied*, 568 F.3d 1028 (2009), *cert. granted*, _ U.S. _, _ S. Ct. _, 2010 WL 757694. In 2007, NASA began requiring contractors in their Jet Propulsion Laboratory to undergo the same background check as that for federal employees. In its Petition for Writ of *Certiorari* (p. 16), the government states: "The decision prevents the routine background checks of many government contract employees and it casts a constitutional cloud over the background-check process the government has used for federal civil service employees for over 50 years." We shall see.

In 2009, the Oklahoma legislature passed a law prohibiting firearms inquiries by public employers. Under 21 O.S. § 1289.27:

> All public employers and public officials within this state shall be prohibited from asking any applicant for employment information about whether the applicant owns or possesses a firearm. Any public employer or public official who violates the provisions of this subsection shall be deemed to be acting outside the scope of their employment and shall be barred from seeking statutory immunity from any exemption or provision of The Governmental Tort Claims Act.

[1] A "consumer credit report" includes reports produced by a third party about an individual's general reputation or personal characteristics and has been construed to include internal investigations by third parties, such as sexual harassment investigations.

It is apparent rapid changes are occurring in the law regarding privacy issues of public employees and applicants. Thus, public sector HR professionals and lawyers representing governmental entities must stay apprised of such changes.

II. What Happens to Informers and Whistleblowers?

A public employee who blows the whistle on some illegal or improper conduct may be protected from discharge, or any adverse employment action under state law or federal law or both. The last few years have seen significant changes in the law related to "whistleblowers" both on the state and the federal level.

The First Amendment to the United States Constitution safeguards the right of a public employee to speak as a citizen on matters of public concern. *Pickering v. Board of Ed.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138, 146 (1983). A public employee subject to an adverse action, which he claims is a result of speaking on a matter of public concern, may choose to bring a claim under 42 U.S.C. § 1983 for the violation of his First Amendment rights. Individual public officers and employees as well as certain governmental entities (but not the State or its agencies) may be named as defendants in a Section 1983 suit.

In 2006, the U.S. Supreme Court issued a decision significantly impacting First Amendment employment matters. In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Court held public employees have no First Amendment protection with regard to speech or conduct made "pursuant to the official duties" of their employment.

Since the Supreme Court's decision in *Garcetti*, the Tenth Circuit now uses a five-step inquiry to analyze cases where a public employee asserts he was subject to retaliation in violation of the First Amendment. *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192, 1202 (10th Cir. 2007). The first prong is whether the employee spoke as part of his or her

official duties. *Id.* (citing *Garcetti*, 547 U.S. at ___. If not, the court moves to the second prong, which concerns whether the subject of the employee's speech is a matter of public concern. *Connick*, 461 U.S. at 146-47. The third prong requires the court to weigh the interests of the employee in commenting on matters of public concern against the government's interest, as an employer, in promoting the efficiency of public services. *Pickering*, 391 U.S. at 568. Next, if the employee's interest outweighs the government's interest, the employee must show the protected speech was a motivating factor in the adverse employment action. *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 287 (1977). Under the final prong, the burden shifts to the defendant to show it would have reached the same employment decision in the absence of the protected conduct. *Id.*

The first three prongs generally present questions of law for the court. *Brammer-Hoelter*, 492 F.3d at 1203. The last two steps concern causation and involve questions of fact ordinarily for the trier of fact. *Melton*, 879 F.2d at 713.

Determining whether speech is considered to be a part of the employee's official duties has generated a great deal of litigation. Several decisions of the U.S. Courts of Appeals attempt to establish the parameters of the now first prong of the analysis. In *Thomas v. City of Blanchard*, 548 F.3d 1317 (10th Cir. 2009), the court noted the question is not whether the speech was made during work hours or concerned the person's employment; it is whether the speech was made pursuant to the employee's job duties or was speech "commissioned" by the employer. There, a former building code inspector claimed he was terminated for reporting corruption, to the Oklahoma State Bureau of Investigation, related to the issuance of occupancy certificates. The Tenth Circuit ruled the employee's speech was constitutionally protected. In *Casey v. West Las Vegas Ind. Sch. Dist.*, 473 F.3d 1323 (10th Cir. 2007), the court found speech by a Head Start

employee regarding alleged violations of the qualifying income regulations was part of the plaintiff's duties and therefore not protected. However, it found reports by the employee to the Attorney General of alleged open meetings act violations was "sufficiently outside the scope of her office" and therefore protected. 473 F.3d at 1332-33.

Generally speaking, public employees are also protected under state law from being discharged in retaliation for blowing the whistle. An employer may not discharge an employee for refusing to act in violation of clear public policy or for performing an act consistent with clear public policy. *Burk v. K-Mart Corp.*, 1989 OK 22, ¶ 19, 770 P.2d 24, 28. In *Burk*, the Oklahoma Supreme Court explicitly recognized a public policy exception to the at-will employment doctrine, holding an "employer's termination of an at-will employee in contravention of a clear mandate of public policy is a tortious breach of contractual obligations." 1989 OK 22, ¶ 17, 770 P.2d at 28.

In Oklahoma, the Governmental Tort Claims Act ("GTCA"), 51 O.S. §§ 151, *et seq.*, governs claims made and actions filed in connection with allegedly tortious acts of employees of the state and political subdivisions. Under the GTCA, the state and political subdivisions are liable for losses resulting from their torts and the torts of their employees acting within the scope of their employment. 51 O.S. § 153(A).

Several cases have held Oklahoma public policy is violated when an employer terminates an employee for whistle blowing activities. *See, e.g., Sergent v. Central National Bank & Trust*, 1991 OK 23, 809 P.2d 1298; *see also Vannerson v. Board of Regents*, 1989 OK 125, 11, 784 P.2d 1053 (university employee discharged for going over supervisor's head to report illegal disposition of state property makes out *Burk* claim). Both internal and external whistle blowers are protected from termination by Oklahoma public policy. *Barker v. State Ins. Fund*, 2001 OK 94, 16, 40

P.3d 463. Where an employee's conduct, like whistleblowing, is alleged to have triggered a discharge in violation of Oklahoma public policy, a court must determine whether available remedies are sufficient to protect Oklahoma's public policy goals. *Kruchowski v. The Weyerhaeuser Co.*, 2008 OK 105, ¶ 25, 202 P.3d 144, 152.

Last year, in *Shephard v. Compsource Okla.*, 2009 OK 25, 209 P.3d 288, the Oklahoma Supreme Court held a state employee covered by the Whistleblower Act, 74 O.S. § 840-2.5, cannot maintain a wrongful discharge tort claim against the state premised on a violation of the Act because the Act "provides adequate remedies to redress violations of the Act and 'sufficient to protect Oklahoma's public policy goals' expressed in the Act." 2009 OK 23, ¶ 22. The remedies provided by the Act are an appeal to the Merit Protection Commission and corrective action against any employee found to have violated the Act. 74 O.S. § 840-2.5(G) and (H). The available relief provided to whistleblower on an MPC appeal includes: 1) reinstatement; 2) back pay and other benefits in appropriate cases; and 3) expungement of the adverse action from the employee's personnel records. OAC 455:10-9-2(f)(1)(B).

The Court's holding in *Shephard* was somewhat unexpected given its decision the prior year in *Darrow v. Integris Health, Inc.*, 2008 OK 1, ¶ 19, 176 P.3d 1204, 1216. There, the Court stated in *dicta*: "Although not applicable to today's case, the state's 'Whistleblower Act,' 74 O.S. Supp.2003 § 840-2.5, part of the Oklahoma Personnel Act, manifests a public policy for shielding state employees from retaliation which is in harmony with today's view that private employees should enjoy a not dissimilar quantum of protection under *Burk*." *Darrow v. Integris Health, Inc.*, 2008 OK 1, ¶ 19, 176 P.3d 1204, 1216 (finding Home Care Act and state criminal law regarding falsification of records provide sufficient public policy bases for *Burk* tort).

Nonetheless, despite its holding, the *Shepherd* Court acknowledged as valid its holding in

Vasek v. Board of Cty. Com'rs of Noble Cty., 2008 OK 35, 186 P.3d 928, that "recognized a *Burk* tort as a proper remedy because 'there is no statutory remedy sufficient to protect th[e] Oklahoma public policy goal [of protecting employees who report violations of the Oklahoma Occupational Health and Safety Standards Act.].'" *Shephard*, 2009 OK 25, ¶ 9, 209 P.3d at 292 (quoting *Vasek*, 2008 OK 35 at ¶ 18, 186 P.3d 932). The Court specifically noted "both [cases] involve statutory public policy prohibiting the termination of whistleblowers." *Id.* Accordingly, unclassified state employees presumably continue to have a *Burk* tort claim where it is premised on a statutory or constitutional provision, which has no other remedy available to protect the public policy goal of the provision.

And, of course, other public employees in Oklahoma, such as municipal and county employees, are unaffected by the *Shephard* decision. However, they still must articulate a clearly established *Oklahoma* public policy that truly impacts public interests rather than the employer's private or proprietary interests. *Darrow*, 2008 OK 1, ¶ 16, 176 P.3d 1204, 1214 ("Only a specific Oklahoma court decision, state legislative or constitutional provision, or a provision in the federal constitution that prescribes a norm of conduct for the state can serve as a source of Oklahoma's public policy.").

III. <u>Is the Secret Safe and Whose Secret is It?</u>

Legal representation of a government client substantially differs in many respects from the representation of private sector businesses and individuals. It is important for government lawyers to understand the differences and to explain them to their government client(s).

The Oklahoma Rules of Professional Conduct, the ethical code that applies to all lawyers in this State, recognizes from time to time the rules apply differently for practitioners of public law than they do for their private sector counterparts. The "Scope" section of the RPC provides:

> Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. *** Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

RPC, Scope, ¶ 18. Specific areas where differences exist and difficulties arise include attorney-client privilege and identifying the client.

Attorney-client privilege in the government context.

The attorney-client privilege is a cornerstone of our legal system. Yet, where the lawyer represents the government, the normal attorney-client privilege rules may not apply.

In Oklahoma, a statute creates and defines the evidentiary rule regarding attorney-client privilege. 12 O.S. § 2502. Additionally, lawyers have an ethical obligation to maintain confidentiality of client information. RPC 1.6. In the government context, the Comment to RPC 1.6 provides:

> The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

RPC 1.6, Comment ¶ 4A.

The problem for the government lawyer and government client is the Evidence Code restricts the privilege insofar as the government is concerned. According to subparagraph D of section 2502:

> There is no [attorney-client] privilege under this rule:
>
> (7) As to a communication between a public officer or agency and its attorney unless the communication concerns a pending investigation, claim or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim

> or conduct a pending investigation, litigation or proceeding in the public interest.

12 O.S. § 2502(D)(7). In other words, there is no privilege unless two conditions exist: (1) there is an ongoing action and (2) disclosure will seriously impair the ability of the public entity making the claim of privilege to conduct the action.

Because the scope of the attorney-client privilege in the government context is narrower, the scope of discoverable evidence is broader. Moreover, in a recent unanimous decision of the U.S. Supreme Court, the first written by Justice Sotomayor, the Court affirmed an Eleventh Circuit ruling that a discovery order implicating the attorney-client privilege is not immediately appealable and can be reviewed adequately on appeal from a final judgment. *Mohawk Industries, Inc. v. Carpenter*, _ U.S. _, 130 S. Ct. 599 (2009).

Thus, in conducting the business of the government, the lawyer must be aware that substantial portions of the discussions between attorney and government client may not be privileged. Therefore, the communication will not be protected from discovery, even though, if the client were a private person the information would clearly be outside the scope of discoverable matters. This lack of protection has several serious consequences, and the government lawyer should discuss the narrower privilege with his client.

Identifying the client when representing the "government."

That brings us to probably the stickiest ethical issue for government lawyers – identification of and duty to the client, which necessarily includes conflicts of interest.

Rule 1.13 of the RPC provides: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." RPC 1.13(a). The Rule goes on to state the lawyer owes a duty to the organization, not the individuals through whom the organization acts. It describes what a lawyer "shall" and "may" do if the individuals

are acting contrary to the organization's interest. In dealing with such individuals, the Rule requires a lawyer to explain the identity of the client. As noted in the Comment, the duty defined in the Rule "applies to governmental organizations." RPC 1.13, Comment 9.

Thus, the lawyer who represents the government does not represent any individual, but rather the entity. Unfortunately, as the Comment not so helpfully testifies, "[d]efining precisely the identity of the client and prescribing the resulting obligations of such lawyers *may be more difficult in the government context and is a matter beyond the scope of these Rules.*" RPC 1.13, Comment, ¶ 9 (emphasis added). That this is true should not be surprising.

Nonetheless, while the Comment indicates a government lawyer may have additional or broader obligations, he or she at least has the same obligations as those imposed by the Rule on other organizational lawyers. Here, the language of the Rule bears repeating:

> If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interests of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

RPC 1.13(b). Thus, in most instances, if a public official or employee is acting contrary to the interests of its employer or refuses to follow legal advice and such actions are likely to cause injury to the lawyer's client – the governmental entity – the lawyer must report the matter to a higher authority within the organization. Regarding the possibly broader duty of a government lawyer, the Comment states:

> [I]n a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more

> extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for the public business is involved.

RPC 1.13, Comment 9.

Nonetheless, the Rule specifically provides a lawyer representing an organization "may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to" the general standard regarding conflicts of interest set forth in RPC 1.7.

According to the Comments to RPC 1.7:

> A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question.

RPC 1.7, Comment ¶ 23. There is no single answer, applicable in all contexts, to the question of whether a conflict exists or is likely to develop. The nature of the litigation, and the applicable substantive law, may be determinative.

Especially in the tort and tort-related cases in which governments so often seem enmeshed, the problem of simultaneous representation may be considerable if there is an issue of whether the employee acted within the scope of his employment. *See, e.g., Dunton v. County of Suffolk,* 729 F.2d 903 (2nd Cir. 1984), *modified on other grounds*, 748 F.2d 69 (holding simultaneous representation of county and its police officer in excessive force case created a conflict of interest so great as to deprive individual defendant of a fair trial where defense counsel provided absolute defense for entity client by subverting immunity claim of individual client); *see also Houston v. Reich*, 932 F.2d 883 (10th Cir. 1991) (city has no duty to pay

judgment against individual employee who acted outside the scope of employment).[2]

The existence of a conflict does not end the matter. Even where the government lawyer faces a conflict, disqualification may be unnecessary. This is so because of what is perhaps the most significant reform in the Rules of Professional Conduct – the ability of clients to give "informed consent."

As used in the Rules of Professional Conduct, the term "informed consent" "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." RPC 1.0(e). A further explanation of what "informed consent" might mean also appears in RPC 1.4. And, Rule 1.13(g) identifies who must give consent when the lawyer is representing an organization.

Of course, informed consent alone does not make a simultaneous representation appropriate.[3] In addition, the representation must not be prohibited by law, the representation cannot involve the assertion of claims by one client against the other, and the lawyer must "reasonably believe[] the lawyer will be able to provide competent and diligent representation to each affected client." RPC 1.7(b).

Use of the word "reasonably," implies an objective standard applies to the determination of whether the representation of a client will be adversely affected. The Comment makes clear

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[2] Keep in mind that once a governmental entity has "ratified" an employee's actions, with either pre-litigation conduct or by making an admission or allegation in a pleading, there is a presumption the employee acted within the scope of employment. *Shephard v. Compsource Okla.*, 2009 OK 25, ¶¶ 17, 22, 209 P.3d 288. Thus, the governmental entity will then be bound by that admission. *Wilson v. City of Tulsa,* 2004 OK CIV APP 44 at ¶ 16, 91 P.3d at 678.

[3] *Cf. State ex rel. Oklahoma Bar Association v. McNaughton*, 1986 OK 25, 719 P.2d 1279 (holding under Code of Professional Responsibility that simultaneous representation of criminal defendant charged with lewd molestation and of minor victim and her family in matters connected with the prosecution is improper, regardless of consent).

appropriate factors "in determining whether common representation is in the client's interests" include not only the benefits of separate representation, but the burden of additional costs. RPC 1.7, Comment ¶ 19. Additionally, the lawyer must evaluate the differing rules relating to privilege. The RPC Comment says the obvious, that "a particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege." RPC 1.7, Comment ¶¶ 18, 30. If one client is a government body and the other client is an individual employee or officer of the body, there may be a different standard as to confidentiality of client communications with counsel. "Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client." RPC 1.7, Comment ¶ 18.

Obtaining written consent, formerly a preference, is now mandatory. RPC 1.7(b)(4). The consent should be clear and succinct. The requirement the consent be "confirmed in writing" "denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent." RPC 1.0(b) (definition of "confirmed in writing"). The writing should "impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing." RPC 1.7, Comment ¶ 20.

In cases where the potential conflict matures in the course of the litigation, the Tenth Circuit has held:

> [W]e embrace the Second Circuit's procedure whereby counsel notifies the district court and the government defendant of the potential conflict, the district court determines whether the government defendant fully understands the potential conflict, and the government defendant is permitted to choose joint representation. In addition, the defendant should be told it is advisable that he or she obtain independent counsel on the individual capacity claim. We reinforce

> that, as with many issues relating to the relationship between attorney and client, the crucial element is adequate communication.

Johnson v. Bd. of Cty. Com'rs for Cty. of Fremont, 85 F.3d 489, 493 (10th Cir. 1996), *cert. den'd sub nom*, *Greer v. Kane*, 519 U.S. 1042, Although the Tenth Circuit's *dictum* arose before the amendments to the Rules of Professional Conduct, government attorneys should be careful not to ignore these statements.

Who is the government attorney's client? Which privilege rules apply to communications between the government lawyer and individuals who work for the government – the rules that apply to normal clients, or the exception that applies "to a communication between a public officer or agency and its attorney"? Where the government entity has both a board and staff, does the attorney represent management, the board or the entity? These are all difficult but necessary questions the government lawyer must answer as best he can for himself and his client.