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To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?

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INTRODUCTION

Government lawyers, like private lawyers, face conflicts of interests. This article will examine one kind of conflict which appears to occur frequently but has received little scholarly attention. What is the government lawyer's duty when there are conflicts between his public officer or public agency clients?

A recent and illustrative example of such a conflict occurred during New York City's 1975 fiscal crisis. The City of New York was on the brink of bankruptcy. The New York State and City employee pension funds were the only remaining potential source of financing over which the State or City governments had any control. Legis-
tion mandating State and City pension systems to purchase City and Municipal Assistance Corporation obligations had been held contrary to the State Constitution. During the ensuing negotiations between the City and its employee pension funds concerning their purchase of City and Municipal Assistance Corporation obligations, representatives of the City's Law Department maintained that they were the proper and sole legal counsel of both the pension funds and the City.

Under the current ethical codes a private lawyer cannot, without disclosure and consent, represent both the seller and the buyer in most transactions, especially not in a sale of securities, a purchase where issues of disclosure and due diligence abound. Why then would the representative of the largest municipal law office in the country take a contrary view?

This situation is not unusual. As the Committee on the Office of the Attorney General of the National Association of Attorneys General offered:

When legal services are consolidated under the Attorney General, conflicts in representation may develop. One type of conflict occurs when two agencies which the Attorney General represents are on opposite sides of a legal argument. Another type of conflict occurs when the Attorney General represents both a state board and an agency appearing before it. An example would be a state agency charged with violation of a civil service regulation appearing before a civil service board. A third type of potential conflict would be when the Attorney General intervenes in an action before a board or commission for which he also serves as counsel. An example would be an Attorney General intervening on behalf of the public in a rate hearing before a public service commission. A conflict could also develop if an Attorney General appears before a board of which he is a member. Finally, the Attorney General could be the defendant in an action brought before a board for which he provides legal representation. For example, the Attorney General could be the object of an employee complaint brought before a civil service

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commission which he represents.6

When confronted by conflicting governmental authorities,7 government lawyers have adopted one of two approaches. Government lawyers may follow the traditional legal ethics rules that a lawyer should avoid conflicts. On the other hand, government lawyers may assert that, sometimes on the basis of statutory authority or their representation of the people or both, they must act without regard to the conflict.8

This article examines the bases for these two approaches, the first of which we call the ethical approach and the other the public interest approach. We argue that government lawyers are subject to the same ethical rules on conflicts of interest as are private lawyers. Indeed, not only as an ethical matter but also as a policy matter, we conclude that only this result is consistent with our republican and pluralistic system of independent sources of government authority and our adversarial system of dispute resolution.

I. The Ethical Approach to Conflicts Between Government Authorities

That a lawyer cannot represent conflicting interests has long been a basic ethical principle of the American legal profession.9 The comment to the most recently promulgated code of legal ethics states, "Loyalty is an essential element in the lawyer's relationship to a


7. Much has been written about other conflicts government lawyers may face. See, e.g., Developments in the Law: Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1244, 1413-46 (1981) [hereinafter Developments]. This article will not examine conflicts in representing both private individuals and governments, between the attorney's public and personal interests, id. at 1422-26, or conflicts faced by a former government attorney, e.g., Civiletti, Disqualifying Former Government Lawyers, 7Lit. 8 (1981); Kaufman, The Former Government Attorney and the Canons of Professional Ethics, 70 Harv. L. Rev. 657 (1957).

8. But see Weinstein & Crosthwait, Some Reflections on Conflicts Between Government Attorneys and Clients, 1 Touro L. Rev. 1, 9 n.31 (1985), where the authors criticize the dichotomy between the ethical and public interest approaches based on an earlier draft of this article. The authors, in a context which is different than that explored in depth here, suggest that no dichotomy exists. The numerous cases and commentators cited herein amply demonstrate the existence of at least two quite different approaches to conflicts facing a government lawyer.

client."

This principle, as embodied in Canon 5 of the Code of Professional Responsibility, is in effect, with minor modification, in 45 states and the District of Columbia to govern the conduct of attorneys. Canon 5 states that "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." To enforce this proscription, the Code provides disciplinary rules which require a lawyer to decline or refuse to continue employment "if it would be likely to involve him in representing differing interests" unless "It is obvious that he can adequately represent the interest of each [client] and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." Only when both conditions—that the representation obviously can be adequate and the clients give consent—are satisfied is a lawyer permitted to represent clients with differing interests.

Nothing in the Code indicates that its rules do not apply with full force to lawyers who are public officers. Indeed, that Ethical Consideration 7-14 of the Code discusses the duties of government lawyers in litigation implies that the Code applies to government lawyers. The Model Rules of Professional Conduct, which were adopted by the American Bar Association in 1983, explicitly apply to government

10. ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983).
14. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY D.R. 5-105(C) (1979). The ABA MODEL RULES OF PROFESSIONAL CONDUCT adopt, in essence, these requirements, Rule 1.7, and make clear that, even where the clients consent, the lawyer must determine that the representation cannot reasonably be viewed to affect any of the differing interests.
DUTY OF LOYALTY

The Preamble to the Rules supports this conclusion. It states that the Rules do not abrogate constitutional, statutory or common-law authority for a government lawyer "to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer cannot represent multiple private clients." The implication is that absent such specific authority, the conflicts provisions of the Rules, which are substantially similar to those of the Code, make no exception for government lawyers. Indeed, the New Jersey Supreme Court, in adopting the Model Rules, amended the ABA rules regarding conflicts to state that a government agency, unlike a private litigant, could never consent to representation by an attorney representing differing interests.16

Courts and committees of professional ethics of bar associations have applied the form or the substance of the conflicts provisions of Canon 5 of the Code or the prior Canon 19 of the Canons of Professional Ethics to prohibit representation of differing interests in a number of situations where states or municipalities have interests separate and distinct from those of their constituent agencies. 17 In Krahmer v. McClafferty, 18 for example, members of the Wilmington, Delaware City Council sought appointment of independent counsel. They were defendants in an action where plaintiff sought mandamus to require the City Council to amend specific appropriation ordinances pursuant to an opinion of the City Solicitor, a mayoral appointee. The City Solicitor offered to represent the City Council and opposed appointment of independent counsel paid from municipal funds on the ground that the City Charter required the City Solicitor to represent "the City and every officer, department, board or commission in all

15. See, e.g., ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1983) (comment discusses application to government lawyers of provisions relating to representation of organizations). The National Association of Attorneys General attempted to exempt government lawyers from the Model Rules governing conflicts of interests. This attempt was rejected by the American Bar Association. See note 86, infra.


17. See People ex rel. Deukmejian v. Brown, 172 Cal. 478, 624 P.2d 1206 (1981). The California Supreme Court not only applied Canon 5 but explicitly rejected the Attorney General's argument that because he is the protector of the public interest he is not bound by the ethical rules that control the conduct of other attorneys in the state, specifically citing Rule 5-102. But see Comm'n on Special Revenue v. Connecticut Freedom of Information Commission, 174 Conn. 308, 387 A.2d 533 (1978), discussed infra at note 92.

The court held for the City Council. It noted that "[t]he City Solicitor not only owes a duty to the executive branch but has already taken a public position contending that appropriations involved are illegal. Neither he nor any member of his staff can represent the opposite viewpoint without a conflict of interest." The City Charter provision providing that the City Solicitor represent city entities in all litigation did not insulate the City Solicitor from his ethical obligations as an attorney. The court found that "[t]he duty and obligation of a lawyer under the Canon of Professional Ethics supersedes any requirement of a City Charter such as we have here which would seem to require that he or a member or his staff represent even though there might be a conflict of interest involved."

A number of other courts have found or suggested that a government lawyer should not represent conflicting governmental authorities, without express reference to the ethical rules. In Motor Club of

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19. Id. at 632.
20. Id. at 633.
21. Id. The same approach was adopted in Judson v. City of Niagara Falls, 140 App. Div. 62, 66, 124 N.Y.S. 282, 283 (1910). The Common Council appointed a committee of its members to investigate a conflict between the City's police department and office of police justice. The committee did not retain the City's Corporation Counsel because he had been acting as counsel to the Mayor who was also President of the Police Board. Instead, the Council retained an independent attorney. After the investigation, the City refused to pay the committee's independent counsel, and he sued for compensation. In defending the suit, the City argued that statutory provisions making the Corporation Counsel the Common Council's attorney forbade the Council from employing another attorney. The court rejected the City's argument. It noted that "[i]f the Corporation Counsel had attempted to discharge in this investigation all of the duties with which in the event he appeared as Corporation Counsel he would have been charged by the charter, he would necessarily have occupied the anomalous position of appearing as the legal adviser of each of the two antagonistic departments, whose conduct was to be investigated, and also of the committee which was making the investigation[.]" Id. at 66-67. The law could not be contemplated to require the Corporation Counsel to act "under circumstances which should in no event be required of any honest and self-respecting attorney." Id. at 66. Accordingly, the court construed the relevant statute to imply that the "Common Council had the authority to employ independent counsel where a conflict of interest disqualified the Corporation Counsel from acting." See also Manchin v. Browning, 296 S.E.2d 909, 920-923 (W. Va. 1982) (applying provisions of Code governing representation of client to require Attorney General to represent Secretary of State even where he disagrees with that official's position); Caruso v. New York City Police Dep't Pension Funds, 122 Misc.2d 576, 583, 470 N.Y.S.2d 963, 967 (Sup. Ct. N.Y. County 1983).
22. See Santa Rita Mining Co. v. Dep't of Property Valuation, 111 Ariz. 368, 530 P.2d 360 (1975) (rejecting appeal by attorney general to which state agency did not consent); Arizona State Land Dep't v. McAfee, 87 Ariz. 139, 348 P.2d 912 (Ariz. 1950) (refusing to permit attorney general to challenge agency action); Waigand v. City of Nampa, 64 Idaho 432, 133 P.2d 738 (1943) (finding authority for government entity to retain independent counsel); Fish v. City of Dearborn, 351 Mich. 169, 88 N.W.2d 450 (Mich. 1958) (same); Commco, Inc. v. Amelkin, 62
Iowa v. Department of Transportation," plaintiff Motor Club obtained a judgment declaring invalid a rule of the State Department of Transportation and the Department appealed to the Iowa Supreme Court.24 The Department then decided to abandon the appeal, but the Attorney General refused on the ground that he controlled the litigation pursuant to his general authority to represent the interests of the State.25 The Court rejected the Attorney General’s argument and dismissed the appeal. It observed that:

An attorney general should not seek to perform his duty to represent a department of state government where the goals of the department conflict with what the attorney general believes is the state interest. State officers and state departments of government deserve adequate legal representation. No representation can be adequate unless it is without conflicts on the part of counsel.26

The Court also noted a danger inherent in the Attorney General's position:

To accord the attorney general the power he claims would leave all
branches and agencies of government deprived of access to the court except by his grace and with his consent. In a most fundamental sense such departments and agencies would thereby exist and ultimately function only through him. . . . We believe and hold the attorney general possesses no such dominion or power.27

In addition, several bar association ethical committees have opined, citing Disciplinary Rule 5-105 of the Code of Professional Responsibility or its antecedents, that where the relationship between a governing body and one of its agencies has become antagonistic, counsel fully independent of the government should be retained for the agency,28 perhaps even in the absence of any statutory authorization for appointment of special counsel.29 Indeed, the American Bar Association’s Committee on Ethics and Professional Responsibility has opined that, notwithstanding a municipal charter provision establishing the office of municipal attorney as the legal representative of the municipality and all its departments and officials, when a true conflict exists there is:

no way that, consistent with the Model Code [of Professional Responsibility], these opposing positions can be properly advocated in the same litigation by members of the same law department, who work from the same office and who are responsible to and presumably subject to the supervision and direction of the same department head.30

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27. Id. But see Feeney v. Commission, 373 Mass. 359, 366 N.E.2d 1262 (1977) and other cases discussed at and following note 96, infra. A recent case takes the point made by the court in the text quoted above, a step further. In Board of Trustees v. Detroit, 143 Mich. App. 651, 655, 373 N.W.2d 173, 175, motion for leave to appeal, (Mich. Sup. Ct. 1985), the Detroit Police and Firemen Retirement System sued the City for past contributions. The Detroit Corporation Counsel contended that only he could appoint counsel to the Board of Trustees. The court rejected this argument, citing Disciplinary Rules 5-105 and 5-107, “Defendants should not be allowed to choose their own opposing counsel.” Accord Caruso v. New York City Police Department Pension Funds, 122 Misc. 2d 576, 470 N.Y.S. 2d 963 (1983).

28. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1282 (1973) (holding that no attorney in a corporation counsel’s office may undertake to represent either side in a suit which was brought by a city against its police force seeking reimbursement in regard to the settlement of a suit filed against the city); N.Y. State Bar Ass’n., Comm’n on Professional Ethics, Op. 447 (1976).

29. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1282 (1973). But cf. Powers of Attorneys General, supra note 6, at 172. Neither of the two cases cited in the latter authority appears to stand for the proposition, and one may actually support the ABA Committee position by calling for the appointment of a special attorney general. See also Secretary v. Att’y Gen., 367 Mass. 154, 165 n.8, 326 N.E.2d 334, 339 n.8 (1975) (see also dissenting opinion passim).

The Committee on Professional Ethics of the New York State Bar Association has stated that "[w]hen a governmental body is organized into a number of separate departments or agencies, such department or agency, and not the parent governmental unit, should be treated as the client for purposes of the rule which forbids the concurrent representation of one client against another." 31

The ABA Ethics Committee has even held that where the municipality's law department is privy to relevant confidences of the agency or its employees as well as the municipality, due to its statutory status as counsel for both, the law department may not represent either the municipality or the agency when their interests come into conflict. 32 Under the Rules and the Code, clients may in some circumstances consent to dual representation, but in other circumstances a lawyer may not act even if the client consents. 33 Doubt has also been cast on the efficacy of a public agency or a government consenting to dual representation. 34

Attorneys general have recognized the duty of government attorneys to obey the conflict rules. According to the Attorney General of New York State, where a conflict exists between the position in litigation of a town justice and a town, the town attorney should represent the town, and the town should provide private counsel to the town justice. The Attorney General concluded that the town attorney was "ethically bound to decline to participate" on behalf of the client other

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33. As noted above, the New Jersey rules forbid a government agency from consenting to multiple representation. See supra note 16 and accompanying text.
than the municipality.35 In such situations the duty of the law department to the "preeminent authority" of the municipality itself will preclude the department from representing the officer or agency rather than the municipality.36 The result appears to reflect the majority view of attorneys general who responded to a survey published in 1977. Most of them viewed themselves as representing the state agency most concerned, assuming it was acting within the law, regardless of the attorney general's own policy position.37 In cases of "real conflict" retention of independent counsel appeared to be the favored solution.

Surprisingly, the literature on government lawyers includes few examples of commentators directly applying the legal ethics conflicts analysis to conflicts between government authorities. For instance, The Honorable Jack B. Weinstein, Chief Judge of the United States District Court for the Eastern District of New York and former County Attorney for Nassau County, New York, delivered a speech on Some Ethical and Political Problems of a Government Attorney which was later published as an article in the Maine Law Review.38 The article includes a specific subsection on "Conflicts of interest among clients."39 Nowhere does it mention legal ethical rules. Weinstein instead relies on basic fairness to reach a result that approximates the ethical approach:

There are instances where the position of one of the departments is completely contrary to the position that the attorney feels is legally defensible. In such cases the county attorney should, I believe, represent the side he considers to be correct. Special independent counsel should be provided to represent the other side. Such an appointment was made by Chief Justice Stone when he was Attorney General of the United States; he himself argued against the special counsel.40

Weinstein also observed that "in part because I felt more comfortable
with an attorney on the other side" that he did not object when
the Republican controlled county legislature extensively used counsel
other than Weinstein, an appointee of a Democratic county executive.
The legislature's use of independent counsel, Weinstein noted, "elimi-
nated many of the possible conflicts of interest and ethical problems
that otherwise would have proven most troublesome."\(^{41}\)

Another commentator, again without citing rules of ethics, ap-
p lied the notions of loyalty and independent judgment underlying the
canons of legal ethics. The Honorable Robert L. Stern, Acting Solici-
tor General under President Truman and co-author of the leading
treatise on Supreme Court practice,\(^{42}\) considered "whether efficient
and orderly management of the Government's law business would . . .
eliminate the presentation of conflicting positions to the courts."\(^{43}\) He
acknowledged that such a result was not actually possible in many
instances because Congress has given certain agencies separate and in-
dependent authority to present their positions to the court. Stern went
on to observe that even where centralized control existed:
the most orderly course may not always be the most wise. Many of
the administrative agencies are important policy-making bodies.
Not even the President has authority to tell them how to decide
particular cases. They are not subject to the supervisory authority
of the Department of Justice. Whatever control it has over them is
derived entirely from its right to decide what position should be
taken in the courts, particularly in the Supreme Court.\(^{44}\)
Stern suggested that as a matter of general policy the Justice Depart-
ment permit agencies with which it disagrees to present their positions
in court.\(^{45}\)

One commentator who did apply legal ethics to governmental

\(^{41}\) Id. See also similar comments of a municipal attorney quoted in Note, *Indiana City
Attorneys: A Conflict of Interests*, 51 IND. L.J. 783 (1976). In "discussing a conflict between a
city board and the city administration," the municipal attorney said that "[s]hould this matter
continue, the board will have to hire its own attorney to sue the city. This staff cannot possibly
sue the administration it represents." *Id.* at 788.


\(^{43}\) Stern, "Inconsistency" in Government Litigation, 64 HARV. L. REV. 759, 768 (1951).

\(^{44}\) *Id.* at 768.

\(^{45}\) He concluded that "the Attorney General has no authority to give binding legal advice
to the independent agencies. Only the judiciary has authority to give the conclusive answer to
the question in dispute." *Id.* at 769. Stern also notes that the Justice Department's refusal to
take an agency's position, even where the agency has statutory authority to present its own posi-
tion, will often dissuade agencies from presenting their view because they feel the Supreme
conflicts examined the role of city attorneys in Indiana. She reviewed ambiguous statutes governing whether the city attorney should represent both the mayor and common council. She observed that an interpretation holding that the city attorney must represent both ran afoul of legal ethics. She suggested that "[a]ssigning [the city attorney] a role as representative of the city executive would be far more consistent with the realities of Indiana municipal government, and would free the attorney from the dilemmas posed by his present ambiguous posture."

II. THE PUBLIC INTEREST APPROACH TO CONFLICTS BETWEEN GOVERNMENTAL AUTHORITIES

Government lawyers have often disregarded both the letter and the spirit of the conflict rules. In so doing, they have relied on statu-

"Court will not look very favorably on arguments which the Government's chief law-enforcement officer is unwilling to espouse." Id.

The question of the binding effect of opinions of public officer lawyers is beyond the scope of this article. Nonetheless, it should be noted that the "binding force of opinions of the Attorney General within the administration is still a controversial question." Nealon, The Opinion Function of the Federal Attorney General, 25 N.Y.U.L. Rev. 825, 839 (1950).

Stern's view is supported by President Buchanan's Attorney General, Jeremiah Black, 9 Op. U.S. Atty' Gen. 32 (1857), and opposed by President Monroe's Attorney General, William Wirt, see Nealon, supra at 839 n. 70; see also 20 Op. U.S. Atty Gen. 722 (1884). Such Supreme Court authority as there is appears unclear and divided. Compare S & E Contractors, Inc. v. United States, 406 U.S. 1, 12-13 (1972) with Smith v. Jackson, 246 U.S. 388 (1918).

President Carter's Attorney General, Griffin Bell suggested that an Executive order on the subject was required. Bell, The Attorney General: The Federal Government's Chief Litigator or One Among Many?, 46 FORDHAM L. Rev. 1049, 1068 (1978), and President Carter, like Presidents Wilson and Roosevelt, signed one. It was applicable only to presidential appointees anticipating litigation. Exec. Order No. 12146, 3 C.F.R. 411 at § 1-402 (1979). Implicit is the position that the public officer lawyer's opinion is binding only when the highest executive authority decides it should be followed by his appointees, i.e. not binding as a matter of law but of policy.


47. Id. at 794.
tory construction or the notion that the government lawyer represents
the people or both.

A. *Statutory Construction*

A number of statutes and state constitutions authorize govern-
ment lawyers or law agencies to conduct all the law of business of the
city, state or federal government. These statutes do not expressly
displace or otherwise mention the ethical rules applicable to attorneys.
However, a number of government attorneys have asserted that such
statutes authorize government attorneys to avoid conflict rules.
They argue that the government lawyer's authority to conduct all law busi-

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48. See, e.g., 28 U.S.C. § 516 (1982) ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General"); N.Y. Executive Law § 63 ("The attorney-general shall: 1. Prosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interest of the state . . ."); OHIO REV. CODE ANN. § 109.02 (Anderson 1983) ("The attorney general is the chief law officer for the state. . . . No state officer, board, or the head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys at law. The attorney general shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested"); DEL. CODE ANN. tit. 29, § 2504 (Supp. 1986) ("the Attorney General shall . . . provide legal advice, counsel and services for administrative offices, agencies, departments, boards, commissions and officers of the state government concerning any matter arising in connection with the exercising of their official powers or duties [and shall] represent as counsel in all proceedings or actions which may be brought on behalf of or against them in their official capacity in any court, except in actions in which the State has a conflicting interest, all officers, agencies, departments, boards, commissions and instrumentalities of state government"); CONN. GEN. STAT. ANN. § 3-125 (West Supp. 1987) ("The attorney general shall have general supervision over all legal matters in which the state is an interested party, except those legal matters over which prosecuting officers have direction. He shall appear for the state, the governor, the lieutenant governor, the secretary, the treasurer and the comptroller, and for all heads of departments and state boards . . . in all suits and other civil proceedings . . . and all such suits shall be conducted by him or under his direction"); VA. Code § 2.1-121 (1950) ("All legal service in civil matters for the Commonwealth, the Governor and every State department, institution, division, commission, board, bureau, agency, entity, official, justice of the Supreme Court or judge of any circuit court or district court, including the conduct of all civil litigation in which any of them are interested, shall be rendered and performed by the Attorney General, except as hereinafter provided . . ."); N.Y. City Charter § 394 ("Except as otherwise provided in this chapter or other law, the corporation counsel shall be attorney and counsel for the city and every agency thereof and shall have charge and conduct of all the law business of the city and its agencies and in which the city is interested"). Some statutes provide for the appointment of independent counsel. 28 U.S.C. § 591(c) (1982); 2 ORE. REV. STAT. § 180.235 (1985).

49. See infra notes 51-110 and accompanying text.
ness permits her to represent differing interests and even to resolve differing agency policy views when based upon differing legal policies. An example of where a court, on statutory grounds, condoned representation of conflicting interests between a mayor and a separate governmental entity is Kay v. Board of Higher Education. The Kay controversy arose in 1940 when the Board of Higher Education of the City of New York appointed the world-renowned philosopher and mathematician, Dr. Bertrand Russell, to a chair at The City College. Church groups and fraternal organizations mounted a campaign against the appointment because of Russell’s support for heterosexual sexual freedom and tolerance of homosexuality. The Protestant Episcopal Bishop of New York, Bishop Manning, was especially vigorous in denouncing Russell, and publications such as the Jesuit America passionately condemned the philosopher. America termed Russell a “desiccated, divorced, and decadent advocate of sexual promiscuity. . . ”

On March 18, 1940, a taxpayer, Jean Kay, applied for an order revoking Dr. Russell’s appointment on the grounds that (1) Russell was not a citizen as required by the Education Law, (2) there had been no competitive examination for his position as required by the New York Constitution, and (3) Russell’s appointment violated public policy because of his immoral teachings and character.

The New York City Corporation Counsel, serving by appointment and at the discretion of the Mayor and apparently representing his views, appeared on behalf of the Board of Higher Education but challenged only the petitioner’s contention that the Education Law

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50. In the absence of a neuter case in English, we will use the female pronouns "she" and "her" as gender-neutral pronouns.

51. See, e.g., In re Mountain States Tel. and Tel. Co. v. Corporation Comm'n, 99 N.M. 1, 653 P.2d 501 (1985) (permitting Attorney General to represent two separate parties); Bullock v. Texas Skating Ass'n, 583 S.W.2d 888 (Texas Civ. App. 1979) (permitting Attorney General to appeal despite contrary instruction of state official). See also notes 92-106 and accompanying text.


55. Kay, 173 Misc. at 943-945, 18 N.Y.S.2d at 823-824.
required a teacher at an institution of higher education to be a citizen. All three of petitioner's grounds were challenged by organizations appearing *amici curiae*. Special Term ruled in favor of the taxpayer on all three issues presented. Three weeks later, Mayor Fiorello A. LaGuardia had the appropriation for Dr. Russell's position removed from the City budget.

After the Special Term decision, the Board wrote the Corporation Counsel to inform him that it wished to appeal. The Corporation Counsel advised that he thought the Board should not appeal, because, among other things, the Corporation Counsel believed that the Board's appointment of Russell was ineffective as a result of the Mayor's removal of the appropriation for the appointment from the budget. The Board insisted that it wanted to appeal, and the Corporation Counsel refused. The Board asked the Corporation Counsel's appointing officer, the Mayor, to "supersede the Corporation Counsel by designating special counsel to take an appeal." The Mayor refused on grounds that the:

Corporation Counsel made the position of the City perfectly clear and that is that he did not think it prudent or to the best interest of the City to appeal this particular case in order not to make bad law out of a hard case.

The Board, which was and is a separate body corporate considered for some purposes a City agency and for others a State agency, then retained two distinguished members of the New York bar, Emory R. Buckner, a former United States Attorney, and John M. Harlan, later a Justice of the United States Supreme Court. Harlan and Buck-

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56. *Id.* at 944, 18 N.Y.S.2d at 823.
57. *Id.* at 945, 953, 18 N.Y.S.2d at 824, 831.
59. Brief for Respondent by its Corporation Counsel in Opposition to the Appearance of Messrs. Buckner and Harlan in This Proceeding filed with the Appellate Division, First Department (dated June 3, 1940).
60. *Id.* at 5.
61. *Id.*
62. *Id.* at 6.
63. *Id.* at 7.
64. *Id.*
ner, on behalf of the Board, moved for an order substituting private attorneys for the Corporation Counsel, and, on behalf of twelve individual members of the Board, moved for an order permitting them to intervene individually. The petitioner and the Corporation Counsel opposed the motions. Special Term agreed and denied both motions. The Board, through its independent counsel, sought to appeal Special Term's rulings revoking Russell's appointment, denying appointment of independent counsel and denying intervention. The Corporation Counsel, who opposed the appeal and the appearances of Harlan and Buckner, asked the Appellate Division to dismiss the Board's appeal.

The Appellate Division noted that under the language of the City Charter providing the Corporation Counsel with the authority to conduct the law business of the City and its agencies, "the corporation counsel is the sole judge as to the conduct of litigation and other law matters. . . ." The court found, inter alia, that "the decision of the corporation counsel with respect to the advisability of appealing from the order setting aside the appointment of Russell is binding."

Obviously, the Russell case inflamed the passions of the day. Even so, the Appellate Division result is difficult if not impossible to square with its rationale. The court acknowledged that if there was any allegation of "fraud, collusion or corruption" on the part of the Corporation Counsel, or the presence of "conflicting interests" or other grounds for disqualification, the result might be different. The court, however, completely ignored the Corporation Counsel's conflict between the interests of the Board of Higher Education and those of his Mayor, who sought to prevent Russell's appointment, who had appointed the Corporate-Counsel, and at whose pleasure the Corporation Counsel served. Perhaps the result is explicable because the

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67. Id.
70. See p. 550 supra; Compare Note, The Bertrand Russell Case: The History of a Litigation, 53 Harv. L. Rev. 1192 (1940) and Hamilton, Trial By Ordeal, New Style, 50 Yale L.J. 778 (1941) with Kennedy & White, The Bertrand Russell Case Again, 10 Fordham L. Rev. 196 (1941) and Recent Decisions, 15 St. John's L. Rev. 118 (1940).
Mayor appointed the members of the Board of Education, and the City did and does appropriate all its funds. Arguably, the Mayor could as a matter of policy resolve a dispute between the Board and the Corporation Counsel.

B. *The People as Client*

Many government lawyers have suggested that the public is the true client of the government lawyer. For example, former Attorney General Griffin Bell observed that, “[a]lthough our client is the government, in the end we serve a more important constituency: the American people.” The Professional Ethics Committee of The Federal Bar Association, which was chaired by Judge and former Solicitor General Charles Fahy, and which included numerous prominent members of the bench and bar, found that:

the government lawyer assumes a public trust, for the government, over-all and in each of its parts, is responsible to the people in our democracy with its representative form of government. Each part of the government has the obligation of carrying out, in the public interest, its assigned responsibility in a manner consistent with the Constitution, and the applicable laws and regulations. In contrast, the private practitioner represents the client’s personal or private

74. N.Y. Educ. Law § 2590-i and its predecessor laws.
75. This does not appear to be the majority view. Seventeen state attorneys general responded to a 1976 questionnaire. Nine said they viewed their role primarily as representing the agencies of state government. Only four said they represented the interest of the people. Four reported that they represented some combination of these. Apparently three of the first four were elected attorney general, because the report notes that “interestingly” one of the four was an appointed attorney general. Powers of Attorneys General, supra note 6, at 33-4. At least one highly respected justice and scholar has suggested that the distinction between elected and appointed attorneys general in this context is without consequence. Secretary v. Attorney Gen., 367 Mass. 154, 167, 326 N.E.2d 334, 341 (Kaplan, J., dissenting). Nevertheless, an elected government lawyer may be more autonomous than an appointed one. A government lawyer appointed for a term may be in between. In the case of an elected government lawyer or one appointed for a term, the officer or body in whom any power to remove the government lawyer is lodged may also be relevant.
77. The Committee also included: Judge Arlin M. Adams, United States Court of Appeals for the Third Circuit; Superior Court Judge Sylvia Bacon, District of Columbia; Judge Earl Chudoff of the Court of Common Pleas, Philadelphia; Justin Dingfelder, Esq., Office of the General Counsel, Federal Trade Commission; Axel Kleiboemer, Esq., Department of Justice, Washington, D.C.; Joseph G. O’Neill, Jr., Esq., Assistant Legislative Counsel, Central Intelligence Agency; The Honorable Harold E. Stassen, Philadelphia; Major Charles A. White, Jr., Judge Advocate General’s School, U.S. Army, Charlottesville.
This special responsibility of the government lawyer can be broadly construed to permit and indeed require the government lawyer only to represent government officials who are acting in accord with what she views as the public interest. Some have accordingly analogized the government lawyer's task to the holding of the Supreme Court in Ex Parte Young. The Supreme Court there held that a citizen of another state could sue the Attorney General of Minnesota:

[i]f the act which the State Attorney-General seeks to enforce be a violation of the federal constitution, the officer, proceeding under such enactment comes into conflict with a superior authority of that Constitution, and he is in that case stripped of his official representative character and is subjected in his person to the consequences of his individual conduct.

The government lawyer following this approach must determine whether the public official is acting in accord with the law and only obey or represent public officials who are.

Such ideas almost always arise not in a conflict situation but with

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81. Young, 209 U.S. at 159-60.
82. Opinion 73-1 of the Federal Bar Association Ethics Committee also deals with this question. It states that where a government lawyer "who is designated to represent another in government service against whom proceedings are brought of a disciplinary, administrative or personnel character, including a court martial. . . , [t]he person the lawyer is designated to represent is the client." In regard to other government lawyers, the opinion notes that:

the client of the federally employed lawyer, using the term in the sense of where lies his immediate professional obligation and responsibility, is the agency where he is employed, including those charged with its administration insofar as they are engaged in the conduct of the public business.

32 FED. B.J. at 72. Thus, so long as the agency is acting in the public interest, the client is the agency and its employees. If the official behaves in a manner which is either illegal or perhaps merely inconsistent with the public interests entrusted with his agency, the government lawyer is free to disregard the lawyer-client relationship with that official. See Weinstein & Crosthwait, Some Reflections on Conflicts Between Government Attorneys and Clients, 1 TOURO L. REV. 1 (1985).
regard to wrongdoing by a public official. "Where the client is the Government itself," Judge Fahy noted, "he who represents this vague entity often becomes its conscience, bearing a heavier responsibility than usually encountered by the lawyer."83 Similarly, Chief Judge Weinstein, commenting on his service as Nassau County Attorney, noted that "[g]overnments and their attorneys have a duty to help individuals and to try to build a better society."84 He suggested that "[i]f 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."85

Even though the people-as-client notion most often arises in the context of wrongdoing, it has been applied to conflicts. A government lawyer who represents the people has only one client and need not worry about conflicts between sources of governmental authority. After all, when buyer and seller are both the people, how can there be a conflict of interests? This was apparently the viewpoint of the National Association of Attorneys General when it recently attempted unsuccessfully to persuade the American Bar Association to exempt government attorneys from conflict of interest rules generally governing attorneys.86


85. Id. at 160 (emphasis added).

86. Letter dated June 1, 1984 from Peggy Ann Ross, Esq., Assistant Ethics Counsel, American Bar Association, to Mr. William Kava, Research Assistant, Fried, Frank, Harris, Shriver & Jacobson and enclosure. During recent deliberations regarding the Model Rules, the National Association of Attorneys General sought to amend the following rules to add the phrase "THIS RULE IS INAPPLICABLE TO LAWYERS IN GOVERNMENT SERVICE, ACTING PURSUANT THERETO:"

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<td>1.2</td>
<td>SCOPE OF REPRESENTATION</td>
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<td>1.7</td>
<td>CONFLICT OF INTEREST: GENERAL RULE</td>
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<td>CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS</td>
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A leading commentator has also rejected attempts "to force government conflict-of-interest issues into a determination of which 'clients' should command the special loyalty of the government lawyer." That commentator concluded that "the priorities that a lawyer should attach to each of his responsibilities to various government entities depends, not on some vague and misleading notion about the identity of his 'real' client, but rather on how his performance of these responsibilities will affect the obligation of the government to serve the public interest."

This view has been eloquently applied to the role of the Solicitor General by former Solicitor General Erwin Griswold:

The Solicitor General's client in a particular case cannot be properly represented before the Supreme Court except from a broad point of view, taking into account all of the factors which affect sound government and the proper formulation and development of the law. In providing for the Solicitor General, subject to the direction of the Attorney General, to attend to the "interests of the United States" in litigation, the statutes have always been understood to mean the long-range interests of the United States, not simply in terms of its fisc, or its success in the particular litigation, but as a government, as a people.

This attempt was rejected by both the Committee drafting the rules and the American Bar Association as a whole. Id. at 1415 (footnote omitted; emphasis in original).

87. Developments, supra note 7, at 1414 (footnote omitted).
88. Id. at 1415 (footnote omitted; emphasis in original).
89. Quoted in 46 FORDHAM L. REV. at 1060. See also former Solicitor and Attorney General Francis Biddle's description of the Office of the Solicitor General:

The work combines the best of private practice and of government service. He deter-
Alabama Attorney General, William J. Baxley, unequivocally applied the public interest approach to conflict situations. He noted that "because a governmental entity derives its legitimacy from the public, or the people, when the public's interest is in conflict with that of the governmental entity, the state's attorney is obligated to represent the public." Baxley argues that the state's attorney should be "a buffer between the citizen and his government and whose ultimate allegiance is to the people at large."

There also exists judicial support for the public interest approach to conflicts. In Connecticut Comm'n on Special Revenue v. Connecticut Freedom of Information Comm'n, the court specifically rejected the application of legal ethics rules to the Attorney General. The Attorney General’s office represented both the Commission on Special Revenue ("CSR") and the Freedom of Information Commission ("FOIC"). A private party defendant sought disqualification of the Attorney General, and the trial court agreed. On appeal, the Connecticut Supreme Court reversed. It expressly found that the conflict rules of legal ethics did not prevent the Attorney General’s office from representing opposing interests. The Court noted that "the real client of the Attorney General is the people of the state." The court accordingly concluded that, "[w]here he or she is not an actual party, the Attorney General may represent opposing State agencies in a

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91. Id. at 21.
93. Id. at 537.
94. Id. at 538 (citation omitted).
dispute."  

The notion that a government attorney is a lawyer representing a client was also rejected in *Feeney v. Commissioner.* The State of Massachusetts and a number of state agencies, represented by the Attorney General, were defendants in a case where plaintiff sought to void the preference for veterans in public employment. The plaintiff won in United States District Court, and the Governor of the State, as well as the other defendants, decided not to appeal. Notwithstanding their position, the Attorney General filed a jurisdictional statement with the United States Supreme Court. When the defendants disavowed the jurisdictional statement, the Supreme Court certified to the Massachusetts Supreme Court the question of whether the Attorney General was authorized to appeal. The Massachusetts Supreme Court found that the Attorney General could appeal based on his authority to represent the public interest.

The authority of the Attorney General, as chief law officer, to assume primary control over the conduct of litigation which involves the interests of the Commonwealth has the concommitant effect of creating a relationship with the state officers he represents that is not constrained by the parameters of the traditional attorney-client relationship.

In *Commonwealth ex rel. Hancock v. Paxton,* as well, the court applied the public interest approach to a conflict situation. In holding that the elected state attorney general, who was assigned by statute to represent the agencies and officers of the state, did not lack the authority to challenge the promulgation or enforcement of allegedly unconstitutional laws by those agencies and officers, the court observed

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95. *Id.* at 537. *State ex rel. Allain v. Mississippi Pub. Serv. Comm'n,* 418 So. 2d 779 (Miss. 1979) (permitting Attorney General to challenge action of state agency where his office also represented that agency). *See also In re Mountain States Tel. and Tel. Co. v. Corporation Comm'n,* 99 N.M. 1, ___, 653 P.2d 501, 505 (1985) (on statutory and constitutional grounds, court permits Attorney General to represent both state agencies and customers in action). *But see People ex rel. Deukmejian v. Brown,* 172 Cal. 478, 481, 624 P.2d 1206, 1209 (1981).


97. *Id.* at 360-62, 366 N.E.2d 1263-1264.

98. *Id.* at 362-67, 366 N.E.2d 1264-1265.


100. *Feeney,* 373 Mass. at 359, 366 N.E.2d at 1266.


102. *Id.*
that "in case of a conflict of duties the Attorney General's primary obligation is to the Commonwealth, the body politic, rather than to its officers, departments, commissions or agencies."\textsuperscript{103} The court did not, however, deny independent representation to the state department of transportation which was challenging the Attorney General's authority.

The insurance superintendent of Illinois was, however, denied independent representation in Fergus v. Russel,\textsuperscript{104} where the court found that:

the Attorney General is the chief law officer of the State, and the only officer empowered to represent the people in any suit or proceeding in which the State is the real party in interest except where the constitution or a constitutional statute may provide otherwise.\textsuperscript{105}

Other courts have similarly used a public interest approach to disregard conflicts for government lawyers.\textsuperscript{106} In most of these cases the court did not explicitly cite the ethical rules and discuss the ethical issues as such.

A government lawyer has mixed the people as client argument with the statutory construction argument. In a recent article, Frederick A. O. Schwarz, Jr., Corporation Counsel of The City of New York,\textsuperscript{107} asks the question, "What happens if two agencies differ in their views, or if one independently elected official disagrees with another?"\textsuperscript{108} Schwarz suggests that the government lawyer should answer this question by looking to the public interest. "While the president of a corporation is obligated to act in the interests of his shareholders, not in the interests of his competitors," Schwarz observes, "an elected or appointed government official has a duty to con-

\textsuperscript{103} Id. at 868.
\textsuperscript{104} Fergus v. Russel, 270 Ill. 304, 110 N.E. 130 (1915).
\textsuperscript{105} Id. at 145.
\textsuperscript{106} State ex rel. Morrison v. Thomas, 297 P.2d 624 (Ariz. 1956) (permitting Attorney General to prosecute appeal not authorized by agency); Environmental Protection Agency v. Pollution Control Board, 372 N.E.2d 50 (Ill. 1977) (denying Pollution Control Board private counsel and finding no impermissible conflict where Attorney General had at times represented both parties, represented the Agency, and refused to represent the Board in appellate court); State Health Planning and Coordinating Council v. Hyland, 161 N.J. Super. 468, 391 A.2d 1247 (App. Div. 1978) (permitting Attorney General to deny representation to plaintiff agency).
\textsuperscript{107} F.A.O. Schwarz, Jr., Lawyers for Government Face Unique Problems, N.Y.L.J. 1 (May 1, 1984).
\textsuperscript{108} Id. at p. 38.
sider the interests of all his constituents, not just those of the majority that elected him."\textsuperscript{109} Schwarz suggests further that the New York City Charter provisions declaring that the Corporation Counsel represents the "City" and the "people" were intended to reinforce this notion.\textsuperscript{110}

\section{III. Government Lawyers Should be Subject to the Ethical Conflict of Interest Rules}

The public interest approach should be rejected as a matter of construction and of policy. Only the ethical approach permits a public officer lawyer to function as a lawyer. Most important, only the ethical approach is consistent with our pluralistic systems of government.

\subsection{A. There is No Statutory Basis for the Public Interest Approach}

Many statutes authorize a government lawyer generally to conduct a government law business.\textsuperscript{111} But we have found no such statute which expressly displaces the rules of legal ethics. Nor have we found any evidence that any such statute was intended to displace the ethical rules in general or their conflict rules in particular. The ethical rules

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{109} \textit{Id.} (emphasis in original).
\item\textsuperscript{110} The provision that logically follows, representing both sides in a case, has drawn a judicial rebuke.

In \textit{Matter of Randy G}, 127 Misc. 2d 1079, 1083-84, 487 N.Y.S. 2d 967, 971 (Family Ct. Kings County 1985), the Corporation Counsel appeared for both the presentment agency and the respondent. In dismissing the presentment agency's position the court said:

The presentment agency must therefore remain independent and objective during every stage of the proceeding. The interests of the court clinic should not be the concern of the presentment agency. As this court stated earlier in this decision, in order to more effectively cross-examine the preparer of a mental health study at the dispositional hearing, the attorney appearing on behalf of the presentment agency might have wished to be present with the Law Guardian at the evaluation interview. He might wish to disagree with the conclusions reached by the clinic at the dispositional hearing. By choosing to appear both as the attorney representing the clinic and the presentment agency the Corporation Counsel has needlessly created a conflict which undermines the performance of its primary duty in this proceeding.

Since only the Corporation Counsel may act as presentment agency (Family Ct Act § 254), the court cannot disqualify that agency and assign another attorney to appear in their place. Therefore, in view of the fact that this court considers the abdication by the presentment agency of its proper role as serious misconduct, and also takes into consideration the nature of the finding in this matter (an attempt to take money and tokens from a token booth) and the fact that at the time the finding was made this respondent was before the Supreme Court in another matter for which he was subsequently sentenced, it is ordered that this proceeding be and is hereby dismissed in furtherance of justice pursuant to Family Court Act § 315.2(1)(c). (emphasis added)

\item\textsuperscript{111} See supra note 48.
\end{enumerate}
\end{footnotesize}
generally have the force of law, and the statutes on government law business should therefore be read consistent with the rules of legal ethics. As many courts and bar association committees have found, statutes which state generally that a government lawyer will represent a set of officials and agencies do not provide authority for disregarding legal ethics. A legislature could, of course, expressly provide to the contrary, but we know of no such statute. For a legislature to make such a provision, as discussed below, would undermine the adequate legal representation of independent public officers and also the pluralistic and representative basis of our government.

B. Only the Ethical Approach is Consistent with Adequate Legal Representation

Lawyers, including government lawyers, are under an ethical obligation to follow the client's instructions when acting in a representative capacity. The comment to Rule 1.2 of the ABA Model Rules of Professional Conduct states that, "The client has the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations." Ethical Consideration 7-7 of the ABA Model Code of Professional Responsibility says that other than "[i]n certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the right of a client, . . . the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer."

The interrelationship between these ethical rules and those principles discussed above requiring separate legal representation where there are separate client interests is plain. Under the ethical approach, each type of government lawyer has a client to whom to be responsible

112. For example, the New York State citations are N.Y. Judiciary L. § 90 subd. 2 & app.; 1st Dep't App. Div. R. § 603.2, 22 N.Y.C.R.R. § 603.2; 2 Dep't App. Div. R. § 691.1, 22 N.Y.C.R.R. § 691.1; 3d Dep't App. Div. R. § 806.2, 22 N.Y.C.R.R. § 806.2; 4th Dep't App. Div. R. 1022.17, 22 N.Y.C.R.R. § 1022.17. See Lowler v. Mayor of New York, 5 Abb. Pr. 325, 337 (Sup. Ct. 1st Dist. Spec. Term), modified on other grounds, 26 Barb. 262 (N.Y. Gen. Ter 1857) ("Although subject, within certain limits to the legally authorized resolutions of the Common Council, when acting in his general character of 'counsel to the corporation'; when acting as an attorney of the court he is subject to the rules and regulations of the court").


114. See supra notes 17-37.
where a conflict exists. The appointed government lawyer serving at
the pleasure of a particular official represents that official. The govern-
ment lawyer appointed or elected for a term serves at the pleasure of
no one. If not disqualified entirely, perhaps subject only to the public
officer or agency in whom any power to remove that lawyer may be
lodged, she could choose her client in the event of a conflict.

Disregarding the ethical approach leaves the government lawyer
without a client where government authorities conflict.115 Disregard-
ing the ethical approach may also leave the government client without
a lawyer. One commentator has noted, for example, that for a govern-
ment lawyer, the "public interest or community at large . . . is a vague
and meaningless abstraction. It is impossible to represent the com-
unity which is always divided."116 The government lawyer who uses
the public interest approach when policy colleagues are in conflict
usurps the function of the client to provide her with instructions. In-
evitably, the lawyer who decides for herself which conflicting point of
view to represent decides what the public interest is. Such a lawyer is
not a lawyer representing a client but a lawyer representing herself.

The public interest approach, moreover, actually forces a lawyer
into a situation of divided loyalties. The reasons for generally avoid-
ing divided loyalties have been described above. When there are in-
dependent sources of authority within the government, a further
personal conflict of interest for the government lawyer is cre-
ated.117 It will be in the government lawyer's personal interest to favor the inter-

115. The rules of legal ethics governing representation of organizations are not to the con-
trary. The Model Code provides that an attorney for the organization represents the organi-
zation and not its officers. See Note, Indiana City Attorneys: A Conflict of Interests, 51 IND. L.J.
783, 792 (1976). Applied to government lawyers this concept might indeed suggest that the
client is the people or the government as a whole. But organizations have legal, not corporeal,
existence. It is axiomatic that they can act only through their boards, officers, or other agents.
For example, a city, state or federal agency subject to executive control is part of an organization
headed by the chief executive, and the rules for representation of an organization may well apply.
However, each independent source of governmental authority may be a separate client. Conflicts
between the chief executive and officers appointed for a term or who may be removed only for
cause may lead to an ethical requirement for separate representation. Separately and indepen-
dently elected public officials each are independent sources of authority to whom the organiza-
tional rules are not relevant. Conflicts between a board and its members, between a board and a
city or state or the federal government, conflicts between independent boards and commissions
and the chief executive are also not subject to the organizational rule.

116. Sale, The City Attorney's Relationship with Council and Staff: Determining Who is the

117. See Note, Indiana City Attorneys: A Conflict of Interests, 51 IND. L.J. 783, 790-794
(1976).
est of the government officer by whom she is appointed or from whom she may expect advancement or other benefit, even if the other public officers have independent sources of power.

Adequate legal representation will not be provided under the public interest approach. Public office or public agency clients are no less and perhaps more deserving of adequate if not full legal representation. Denying that to them, as some courts have done, serves only the personal interest of the controlling government lawyer. Providing for that government lawyer to represent both sides, as at least some courts have done, means affording less adequate representation to conflicting public points of view than that to which conflicting private points of view are entitled.

C. Only the Ethical Approach is Consistent With Pluralistic and Representative Government

The requirement inherent in the public interest approach that the government lawyer determine the public interest is counter to representative democracy. Rarely are government lawyers elected, and even then they are never the ultimate source of public authority even concerning the law. A commentator has noted that “one of the principal purposes of [our] government is to provide a set of institutions that analyze and define the public interest. No individual attorney can hope to perform this task on his own.” As Judge Bronson eloquently wrote in State ex rel. Amerland v. Hagan:

although it is perfectly obvious under the statute that the Attorney General is the general and the legal adviser of the various offices of the state government, and entitled to appear and represent them in court, this does not mean that the Attorney General, standing in the position of an attorney to a client, who happens to be an officer of the government, steps into the shoes of such client in wholly directing the defense and legal steps to be taken in opposition or contrary to the wishes and demands of his client or the officer or

118. See supra notes 51, 52, 94, 98, 106 and accompanying text.
119. See supra notes 94, 95, 97 and accompanying text.
120. Developments, supra, note 7 at 1414; see Note, Indiana City Attorneys: A Conflict of Interests, 51 IND. L.J. 783, 792 (1976) (noting that it is “unlikely that an attorney could accurately predict the ‘best interests’ of the municipality”).
department concerned.\textsuperscript{122}

Obviously, the highest elected government official should generally be the highest policy dispute resolution authority, superior even as to issues of law to the ranking government lawyer, especially if she appoints that lawyer. In the United States, the government "derives all its powers, indirectly or directly, from the great body of the people, and is administered by persons holding their office during pleasure for a limited period, or during good behavior."\textsuperscript{123} In a republic, the authority of the people is exercised by elected officials and by persons appointed by those elected officials, not specially by lawyers.

The first duty of the government lawyer, when confronted by a conflict among her government clients, is to refer the dispute to the policy superior of both her clients for resolution.\textsuperscript{124} When that government superior acts incorrectly, even when arguably acting illegally, the government lawyer’s choice should generally be between resigning or being removed rather than being insubordinate.\textsuperscript{125} The government lawyer’s choices raise more complicated issues when the public officer’s conduct arguably warrants removal from office,\textsuperscript{126} when a public officer is in conflict with an independent public officer or agency\textsuperscript{127}

\textsuperscript{122} Id. at 374.
\textsuperscript{123} \textbf{THE FEDERALIST} No. 47, at 251 (J. Madison) (J. Cooke ed. 1961).
\textsuperscript{124} Motor Club of Iowa v. Department of Transp., 251 N.W.2d 510, 516 (Iowa 1977).
\textsuperscript{125} Secretary of Admin. and Fin. v. Attorney Gen., 361, Mass. 154, 167, 326 N.E.2d 334, 341 (1975) (dissenting opinion).
\textsuperscript{126} A General Counsel of the Federal Communications Commission has noted that "if a government attorney cannot ungrudgingly adhere to the ethical imperative requiring promotion of the President’s policies through legal advocacy, then he might voluntarily consider voluntary resignation from Executive Branch." Fein, \textit{Promoting the President’s Policies through Legal Advocacy}, 30 \textit{FED. B.J.} 408 (1983). \textit{But see} Solicitor General, now Judge, Robert Bork, who agreed to discharge Special Prosecutor Archibald Cox after his superiors in the Justice Department refused to do so. Bork noted that he had decided not to resign "for the sake of 'continuity.'" \textit{Bork Asserts He’d Press White House for Evidence}, New York Times, Oct. 25, 1973, p. 1, col. 6.
\textsuperscript{127} When a public officer acts illegally so as to warrant removal, impeachment or prosecution, a government lawyer may have a duty to the public not just to resign or be removed but to report this wrongdoing. This is not inconsistent with the ethical approach. The duty to act arises because of wrongdoing and not because of conflict. \textit{See} \textbf{PUBLIC DUTIES: THE MORAL OBLIGATIONS OF GOVERNMENT OFFICIALS} 75-6 (ed. J.L. Fleishman, L. Liebman & M.H. Moore 1981). That the conflicts create difficulties for the government lawyer is manifest; \textit{Note, Conflicts of Interests in Inspector General, Justice Department, and Special Prosecutor Investigation of Agency Heads}, 35 \textit{STAN. L. REV.} 975 (1983).
\textsuperscript{127} \textit{See, e.g.}, Watson v. Caldwell, 158 Fla. 1, 27 So. 2d 524 (Fla. 1946) (rejecting attempt by attorney general to enjoin retention of independent counsel); Saint v. Allen, 172 La. 350, 134 So.
or when the government lawyer is elected or holds office for a term.128

Democracies are deliberately not monolithic. This is particularly true in the United States. On the federal level, there are the three branches of government, and their many checks and balances. This pattern is repeated with variations at the state and local levels. On each level, independently elected officials, each with independent authorization from the electorate, may and usually do have different views or goals.129 There also exist independent agencies which are not directly or even indirectly answerable to one or more elected public officers and might have different perspectives on the public interest.

Thus, in contrast to authoritarian forms of government, in a pluralistic republic differing interests flourish. Conflicts of interests are not only inevitable but desirable. The United States has adopted an adversarial approach to the resolution of disputes. The basis for the adversarial system is that independent presentation of the differing interests will enable those who judge in our society to make better decisions. When differing legal interests are concerned, that process can only adequately occur when the different interests are competently represented by independent counsel.130 The conflicts of interest rules of legal ethics are consistent with this republican and pluralistic government. The public interest approach, in a conflicts context, is not.

The ethical approach ensures that differences between independ-
ent sources of governmental authority are adequately heard and properly decided. With regard to the Bertrand Russell case discussed above, a commentator suggested that the failure of the Board to obtain adequate representation prevented full consideration of the significant legal issues raised by the case. The commentator observed that "had the litigation been conducted in the normal fashion the legal issues involved might well have been otherwise determined."131

There are other advantages. Chief Judge Weinstein, as mentioned earlier, noted that while he was County Attorney, representing a Democratic county executive, the Republican county legislature obtained independent counsel. Weinstein observed that:

The fact that the Republican Board of Supervisors had an honorable counsel, Harold Collins, one I could deal with on an adversarial basis, eliminated many of the possible conflicts of interest and ethical problems that otherwise would have proven most troublesome. Indeed, more often than not we assisted each other in moderating our clients' positions so that they could, together, move forward in the exciting and essential job of providing good local government.132

As Chief Judge Weinstein's anecdote indicates, the ethical approach is preferable not only because it is consistent with democratic governance, but also because it offers concrete practical advantages.

The ethical approach has been espoused quite eloquently by John Carlock, a 20-year veteran government lawyer. In discussing the thesis that "an agency lawyer had some inherent and compelling responsibility, superior even to that of the agency head, to determine whether various courses of action can or cannot be undertaken," he suggested that:

The theory seemed to be that the lawyer, by virtue of having taken the oath as a member of the bar, had acquired some duty—divine, sovereign, or constitutional. . . . I cannot quite agree with this philosophy, though I have found it widely and earnestly held. Certainly it is the agency lawyer's duty to make his views felt by the agency head: for without that, his counseling becomes a cipher. Certainly he must have ideals, for technique without ideals is dan-

gerous. But I do not believe that the ritual of becoming a member of the bar invests a government lawyer with a power of life and death over the agency he serves. The agency head takes his own oath of office, and he is also subject to the inscrutable forces of public opinion. In carrying out his responsibility to decide policy, the agency head looks to his lawyer's counseling as one of his strongest supports, but the lawyer's counsel can never usurp the decision which must be made by the responsible head of the agency. 133

The public interest approach, in contrast, leads to a government of lawyers, not of laws, a result as objectionable as a government of people, not of law.
