Chapter 18

ETHICAL ISSUES FOR GOVERNMENT LAWYERS

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Scope Note
Whistle-blowing, confidentiality, the public records statute, the work product doctrine, and the attorney-client privilege are only a few of the topics confronted by those whose client is a governmental entity. This chapter provides a guide for ethical practice for government lawyers.

§ 18.1 INTRODUCTION

The practice circumstances of the government lawyer differ in fundamental ways from those of the private sector lawyer, whose practice forms the model from and for which the ethical rules were devised. The category “government lawyers” includes a broad range of work: agency, municipal, and legislative counsel; prosecutors; public defenders; and adjudicators, to mention just a few. This chapter examines ethical concerns that may arise for all government lawyers, as well as some particular issues that affect civil and criminal practitioners.

In 2007, in Suffolk Construction Co. v. Division of Capital Asset Management, 449 Mass. 444 (2007), the Supreme Judicial Court put an end to speculation that the General Electric case extinguished the protections afforded by attorney-client privilege to government lawyers and their clients. The decision affirmed that confidential communications between public entities—such as agency officials or municipal employees—and their attorneys for the purpose of seeking or providing legal advice are privileged. Moreover, the court held that the Massachusetts public records statutes, G.L. c. 4, § 7 and G.L. c. 66, § 10, did not eliminate the common law attorney-client privilege as applied to government entities and officials. The holding in Suffolk Construction Co. v. Division of Capital Asset Management, 449 Mass. at 457, distinguishes the narrower scope of protection allowed attorney work product in the earlier General Electric decision from the essential significance of the attorney-client privilege: “In General
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Elec. Co., we declined to construe the public record law as implying a broad exemption for attorney work product where the Legislature affirmatively expressed its intent to provide a more limited immunity from production. *General Elec. Co., supra* at 802.” Indeed, calling the attorney-client privilege “a matter of common law of fundamental and longstanding importance to the administration of justice,” the court proceeds to affirm that “[t]he holding of *General Elec. Co.* does not lead to the conclusion that, in enacting the public records law, the Legislature mandated that public officials perform their duties without access to legal advice protected by the attorney-client privilege.” *Suffolk Constr. Co. v. Div. of Capital Asset Mgmt.*, 449 Mass. at 458, 459.

The preliminary “Scope” section of the rules devotes Paragraph 4 to a general discussion of the differences in ethical responsibilities that government lawyers may encounter. Paragraph 4 emphasizes the altered lawyer-client relationship encountered in government practice.

§ 18.2  IDENTIFYING THE CLIENT

Unlike private practice lawyers, the first question for many government lawyers is, “Who is my client?” Because most of a lawyer’s ethical responsibilities derive from the duty of loyalty to the client, the identity of the client is primary.

The task of identifying the government lawyer’s client is not straightforward. Is it the lawyer’s supervisor? The division head? The agency itself? The public interest? Without conclusively identifying the client, the government lawyer cannot conform his or her conduct to the preservation of client confidences required by Mass. R. Prof. C. 1.6 or the examination of possible conflicting representations required by Mass. R. Prof. C. 1.7. Thoughtful discussions of the difficulty identifying the government lawyer’s client and how that affects confidentiality are found in two classic law review articles by Robert P. Lawry: “Who Is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question,” 37 *Fed. B.J.* 61 (Fall 1978); and “Confidences and the Government Lawyer,” 57 *N.C.L. Rev.* 625 (1978–79).

Rule 1.13 of the Massachusetts Rules of Professional Conduct, entitled Organization as Client, addresses some of these issues without resolving them. Comment [6] to Mass. R. Prof. C. 1.13, entitled Government Agency, recognizes that defining the client may be tricky for a government lawyer. But the rule also requires a lawyer to clarify the identity of the client in dealing with the organization’s “constituents” when the organization’s interests are adverse to those of the constituents. Mass. R. Prof. C. 1.13(d), cmt. [7].

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Perhaps one solution for the government lawyer is to be very clear about who is not the client. Members of the public often misconstrue the role of government lawyers and assume that, as a government lawyer, you represent them. It is probably safe to assume that your role needs explaining. Thus, spelling out that you do not represent, for example, everyone who has dealings with your agency may dispel such misconceptions. This practice, accompanied by the question, “Are you represented by counsel?” will help comply with the requirement of Mass. R. Prof. C. 4.3(a) that a lawyer who has reason to know that an unrepresented person misunderstands the lawyer’s role should try to correct the misconception.

§ 18.3 CONFLICTS OF INTEREST

Because government lawyers usually represent multiple clients, they often face actual or potential conflicts of interest between current or prospective clients. Comment [8A] to the conflict of interest general rule, Mass. R. Prof. C. 1.7, makes explicit the different weight of conflicts in the government context. Noting that the government lawyer’s situation is “special,” the comment affirms: “public policy considerations may permit representation of conflicting interests in some circumstances where representation would be forbidden to a private lawyer.” Such public policy considerations have always informed the analysis of conflicts in this area.

§ 18.3.1 Dispute Between Two Clients

Concerns for protecting confidentiality are at the root of most conflicts analysis. Clearly, as in the case of a private attorney, where a client has reposed confidences in a government lawyer, that lawyer cannot subsequently represent another in opposition to the first client. When two public agencies or officials whom the government lawyer has represented enter into a dispute with one another, assuming that client confidences are not an issue, the conflict rules have always been applied in a less rigorous fashion. Although confidentiality may be important in representing government officials in their individual capacity, disputes between agencies are unlikely to turn on factual issues but rather on interpretations of the law. Hence, representation of two opposing agencies normally does not present the same kind of problem.

A 1989 opinion of the MBA Committee on Professional Responsibility reflected the greater leeway given government lawyers to represent opposing clients under DR 5-105, the former rule prohibiting representation of clients with conflicting interests, before enactment of Comment [8A] to Mass. R. Prof. C. 1.7. Although a municipal planning board may be a current client of town counsel with counsel
advising that board on a regular basis, town counsel may represent the board of selectmen and oppose an appeal prosecuted by the planning board without obtaining the planning board’s consent. MBA Ethics Op. 89-2, 74 Mass. L. Rev. 301 (1989). After discussing several Supreme Judicial Court opinions on the different application of conflict rules to government counsel, the opinion acknowledged: “If municipal counsel cannot represent the municipality itself any time one of their other clients objects, . . . then municipal representation as it is practiced in this state will have to be completely restructured.” MBA Ethics Op. 89-2, 74 Mass. L. Rev. at 302.

However, if the conflict falls within Mass. R. Prof. C. 1.7(b) because the representation “may be materially limited by the lawyer’s responsibilities to another client,” a strategy often employed in Massachusetts agency disputes is the appointment of a special assistant attorney general or special municipal counsel from outside the agency.

In two other ethical opinions about simultaneous representation, the MBA Committee reaffirmed the view that government agency conflicts require a different analysis from private client conflicts. MBA Ethics Opinion 94-2, 79 Mass. L. Rev. 47 (1994) and MBA Ethics Opinion 94-9, 79 Mass. L. Rev. 203 (1994) endorse a case-by-case approach rather than treatment of two agencies of the same governmental unit as a single client. Unlike the identity of interest shared by a private corporation and its subsidiaries, the committee found that the roles of agencies as defined by statute and regulation often support independent functioning, which can lead to lawsuits between agencies nominally part of the same local or state government. MBA Ethics Op. 94-9, 79 Mass. L. Rev. 203.

In Opinion 94-2, no conflict was found where town counsel initiated litigation on behalf of the selectmen against a subordinate town agency in spite of counsel’s concurrent representation of that agency in unrelated litigation. Crucial considerations were the absence of relevant confidences or secrets of the agency reposed in counsel as well as the circumstance that both litigations involved questions of law and neither involved the credibility or performance of the agency. In Opinion 94-9, the committee advised that, absent special circumstances, serving as bond counsel to the state treasurer does not preclude a private law firm from also representing private clients in dealings with other state agencies.

§ 18.3.2 Joint Representation of Individual Employee and Agency, Including 42 U.S.C. § 1983 Actions

When a government lawyer anticipates representing not only the agency but an employee or officer of the agency in the same matter, the lawyer must identify conflicts and potential conflicts at the outset. Employees may assume you are
their attorney as soon as a matter arises. You must explain to the individual client that the employee’s confidences may be subject to disclosure to the employer.

Several important issues arise at the initial meeting with the employee: courts have deemed the first interview with the employee to be an initial consultation with counsel, finding that an attorney-client relationship is created. Even if this is not assumed automatically, the employee’s reasonable belief that the government lawyer represented the employee may be sufficient for the relationship to attach. If the government lawyer states that he or she represents the employer only and needs to assess the situation, this may suffice to defeat the formation of an attorney-client relationship.

In a 1986 opinion, the MBA Committee on Professional Responsibility reviewed the considerations involved in municipal counsel’s dual representation of the agency and an individual within the agency in a case alleging civil rights violation under 42 U.S.C. § 1983. MBA Ethics Op. 86-2, 71 Mass. L. Rev. 162 (1986). Another useful source of advice about dual representation in such situations is Debra & Rex Perschbacher, “Enter At Your Own Risk: The Initial Consultation & Conflicts of Interest,” 3 Geo. J. Legal Ethics 689 (1990).

The lawyer’s fitness to protect the interests of the agency employee (usually a police officer in the Section 1983 context) and the agency itself is problematic where one client’s defense may implicate the other: for example, the employer asserts that the employee was acting outside the scope of his or her employment; or the employee claims immunity for actions performed in good faith in the execution of an unconstitutional official policy.

To protect against later conflict problems, the attorney must

- disclose the potential for conflict to the employee and to the agency at the outset, anticipating as many scenarios as possible;
- give both clients the opportunity to consult independent counsel; and
- ascertain that each waives potential claims against the other.

The consent and waiver should be in writing. Even so, if conflicts arise later, the lawyer must withdraw, usually from both representations.

§ 18.3.3 Massachusetts Statutes Affecting Conflicts

General Laws c. 258, § 2 places the responsibility on the government lawyer—not the agency head or any other official—to determine whether there is a conflict
between the employee and the agency and to make provision for the employee’s independent representation. General Laws c. 258, §§ 9 and 9A provide for indemnification of public employees’ expenses arising from civil rights violations unless the employee acted in a grossly negligent, willful, or malicious manner. Only if the government lawyer has concluded, at least prima facie, that the employee will be entitled to indemnification may the same government counsel represent the employee and the employer.

The Massachusetts conflict of interest law, G.L. c. 268A, regulates the conduct of public officials and employees. General Laws c. 268B established the State Ethics Commission to interpret Chapter 268A and act as its civil enforcement agency. Chapter 268A provides additional standards that affect the analysis of certain conflict questions by lawyers. Counsel for the commission can assist government lawyers in interpreting the provisions of Chapter 268A as they touch on conflicts questions for the lawyer as well as the lawyer’s public clients. It is important to recognize that a current or former government lawyer may be in compliance with the Massachusetts Rules of Professional Conduct and yet violate the requirements of Chapter 268A or vice versa.

§ 18.3.4 Conflicts for Former Government Lawyers

Apart from considerations imposed by Chapter 268A, a former government lawyer who enters private practice encounters the express rule, Mass. R. Prof. C. 1.11, fashioned to avert conflicts of interest arising from such a move. Rule 1.11(c) also aims to forestall conflicts for private lawyers who enter government service and government lawyers negotiating for private employment.

In general, under Mass. R. Prof. C. 1.11(a), former government lawyers who wish to represent a private client in a matter in which the attorney “participated personally and substantially” in public employment may do so only with the consent of the government agency. Rule 1.11(b) proscribes the use of confidential government information acquired in government service by former government lawyers. Both provisions allow screening, an escape clause intended to overcome the disadvantage of consequent disqualification for lawyers who formerly served the government. With the enactment of the Massachusetts Rules of Professional Conduct, the Commonwealth for the first time sanctioned the screening procedure devised in the ABA Model Rules to enable firms to represent a client while insulating the particular disqualified lawyers from conflicts arising from their former practice. Rule 1.10 of the Massachusetts Rules of Professional Conduct proposes a screening device for lawyers who change private practice circumstances; Mass. R. Prof. C. 1.11 is its government service counterpart.
An effective screening mechanism as to a particular matter is likely to include the following prohibitions applied to the disqualified lawyer: no participation; no discussion with any member of the firm; no access to files or documents; no share of the fees from the matter; as well as sworn testimony by the disqualified lawyer that no confidential information was imparted to the firm. The former government client is also protected by Mass. R. Prof. C. 1.9, requiring the client’s consent to any adverse representation in substantially related matters.

For an excellent discussion of the changes wrought by Mass. R. Prof. C. 1.11 and opinions interpreting its effect elsewhere, see the annotation for that rule in ABA Center for Professional Responsibility, Annotated Model Rules of Professional Conduct (3d ed. 1996).

Note that the former government lawyer must exercise care and judgment in representing clients before a former employer even if the lawyer did not participate personally or substantially in the client’s matter. In 1992, a former government lawyer received a private reprimand from the Board of Bar Overseers based on a State Ethics Commission finding that, in representing a claimant seeking benefits before his former agency, the lawyer violated G.L. c. 268A by giving the appearance that he could improperly influence other agency employees. The disciplinary proceeding found no violation of the predecessor rule, DR 9-101(B), which precluded acceptance of private employment in a matter in which the lawyer had “substantial responsibility” while a public employee. The lawyer was sanctioned, however, because his admitted breach of the conflict of interest law was deemed misconduct prejudicial to the administration of justice. PR–92–40, 8 Mass. Att’y Disc. R. 339 (1992).

§ 18.4 WHISTLE-BLOWING, CONFIDENTIAL INFORMATION, AND DIFFERENT STANDARDS FOR GOVERNMENT LAWYERS

The question of whether or when to blow the whistle on a client who commits a crime or fraud takes on extra urgency where public funds, public business, or public interests are at stake. In a real departure from the silence on this point of the former bar discipline rules, Mass. R. Prof. C. 1.13(b) and (c) provide government lawyers with a set of useful considerations and some specific measures to follow after deciding to take action. The advice is still general and rather vague, but it gives a framework, if not a road map, in this most troublesome area.

In general, the rule applies if the government lawyer has actual knowledge that someone associated with the agency will commit a legal violation likely to cause
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substantial injury to the agency. To help decide what to do, the rule sets out certain broad considerations, such as the seriousness of the violation and its consequences. The rule then proposes an ascending scale of measures the lawyer may take, from asking reconsideration to referral to the highest authority within the agency. If, despite the lawyer’s efforts, the violation will occur, Mass. R. Prof. C. 1.13(c) permits—but does not require—the lawyer to resign.

However, Mass. R. Prof. C. 1.13(c) spells out a proper resignation in these circumstances with reference to several other complex rules. The resignation must accord with Mass. R. Prof. C. 1.16 (Declining or Terminating Representation). For purposes of compliance with Mass. R. Prof. C. 1.16, withdrawal by the government lawyer in a whistle-blow situation is likely to be mandatory (as in Mass. R. Prof. C. 1.16(a)), because continued representation will result in someone’s violating a law or one of the ethical rules.

Further, according to Mass. R. Prof. C. 1.13(c), the government lawyer must examine Mass. R. Prof. C. 1.6, 3.3, and 4.1 because the lawyer is also invited to “make such disclosures as are consistent with” those rules. Rule 1.6(b)(1) requires disclosure of confidential information gained in the representation to prevent conduct that is likely to cause, among other things, “substantial injury to the financial interests or property of another.” Rule 3.3(a)(2) requires a lawyer to disclose a material fact to a tribunal to avoid assisting a client’s criminal or fraudulent act. And Mass. R. Prof. C. 4.1(b) prohibits a failure to disclose a material fact to a third person if disclosure is necessary to avoid assisting a client’s criminal or fraudulent act. Thus, under the more comprehensive scheme outlined in Mass. R. Prof. C. 1.13(c), a lawyer in the circumstances outlined in those three rules must blow the whistle.

An opinion of the MBA Committee on Professional Responsibility considered the use a government lawyer may make of confidential corporate documents provided by a nongovernment whistle-blower. MBA Ethics Op. 94-6, 79 Mass. L. Rev. 91 (1994). The opinion advised that a government lawyer violates no disciplinary rule by possessing and using documents supplied by the informant in a civil prosecution, including some documents covered by attorney-client privilege. The committee found no ethical obligation in the government lawyer to refrain from examining the materials or to return them to the corporation. The public interests protected by the regulatory and law enforcement agencies involved and the lawyer’s duty to investigate and redress violations of law brought to the lawyer’s attention were accorded particular weight in the opinion.

Several courts have held lawyers who litigate for the government to a higher ethical standard than that expected of private lawyers. See, e.g., Freeport-McMoran Oil & Gas Co. v. Fed. Energy Regulatory Comm’n, 962 F.2d 45 (D.C. Cir. 1992). The authority often cited by these cases is Ethical Consideration 7–14
of the Model Code of Professional Responsibility, which provides that government lawyers with discretionary power over the conduct of litigation have the responsibility to seek justice and should refrain from commencing or continuing unfair litigation and from using the government’s economic power to bring about unjust settlements or results.

In ABA Formal Opinion 94-387, the ABA Committee on Ethics and Professional Responsibility declared that a government lawyer has no greater duty of candor to opposing parties and to the tribunal than a private party’s lawyer. The question was whether a lawyer acts unethically if he or she negotiates with an opposing party and files a civil action on a claim as to which the statute of limitations has run. The committee cautioned the lawyer about making any affirmative misrepresentations, but found no ethical constraints to prohibit negotiating or filing suit. Despite an impassioned dissent citing the Freeport-McMoran case, the committee also found no basis in the Model Rules to impose different ethical requirements on lawyers representing a government agency, at least in the context of a noncriminal matter.

§ 18.5 THE PUBLIC RECORDS STATUTE, THE WORK PRODUCT DOCTRINE, AND ATTORNEY-CLIENT PRIVILEGE

It is important to recognize that a government lawyer’s responsibility to maintain the confidentiality of information relating to representation of a client under Mass. R. Prof. C. 1.6 and other ethical rules may be affected by developments in statutory and decisional law. In General Electric Co. v. Department of Environmental Protection, 429 Mass. 798 (1999), the Supreme Judicial Court declared that materials protected as work product under the discovery provisions of the Massachusetts Rules of Civil Procedure, Mass. R. Civ. P. 26(b)(3), are not protected from disclosure under the Massachusetts public records statute, G.L. c. 66, § 10. The court reasoned that the legislature clearly intended the public records law to require disclosure of all public records, as defined in G.L. c. 4, § 7, cl. 26, except as specifically limited by the explicit exemptions spelled out in that statute, and refused to construe any implied exceptions. Other courts, relying on the General Electric case, have mandated disclosure of documents as public records despite a government claim to protection based on attorney-client privilege, because there is no statutory exemption for that privilege either. See, e.g., Kent v. Commonwealth, No. 98-2693, 2000 WL 1473124, at *4 (Mass. Super. Ct. July 27, 2000). From all accounts, the General Electric decision has had a decided effect on the practices of many government law offices.
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In 2001, the attorney general, municipal counsel, district attorneys, and several bar associations cosponsored legislation to amend the definition of public records to exempt attorney work product and attorney-client privileged material. Mass. H.R. 2198.

§ 18.6 SIGNIFICANT RULES FOR PROSECUTORS AND OTHER GOVERNMENT LAWYERS

Several other rules included in the Massachusetts Rules of Professional Conduct raise questions of particular concern for government lawyers. This section focuses on Mass. R. Prof. C. 3.4, 3.8, 4.2, 5.1, 5.2, and 8.3.

§ 18.6.1 Mass. R. Prof. C. 3.4 and 3.8, Fairness to Opposing Party and Counsel and Special Responsibilities of a Prosecutor

Most of the requirements of Mass. R. Prof. C. 3.4 and 3.8 were found in various former disciplinary rules as well as former SJC Rule 3:08’s delineation of the prosecution and defense functions. One significant change for government lawyers was in Mass. R. Prof. C. 3.4(h). That provision forbids bringing or threatening to bring criminal or disciplinary charges “solely to obtain an advantage in a private civil matter.” As noted in Comment [6] to Mass. R. Prof. C. 3.4(h), the addition of the word “private” was intended to clarify the fact that government lawyers may pursue a matter in a criminal or civil context without violating this rule.

Although the stricture applies to all lawyers, prosecutors have a heightened obligation not to assert personal opinions as to credibility, culpability, and innocence, particularly because overstepping the bounds as to such matters can be deemed so prejudicial to a criminal defendant that otherwise solid prosecutions become tainted and subject to appellate reversal. See generally Kantrowitz, Connelly & Bush, “Closing Arguments: What Can and Cannot Be Said,” 81 Mass. L. Rev. 95 (1996). See also In re Robert W. Nelson, Jr., 25 Mass. Atty Disc. R. __ (2009) (After Supreme Judicial Court had overturned a conviction for first-degree murder and ordered new trial, Board of Bar Overseers publicly reprimanded assistant district attorney for improper closing argument in which he asserted personal knowledge of contested facts, vouched for the credibility of two Commonwealth witnesses, and urged the jury to avenge the codefendants’ crimes, in violation of Mass. R. Prof. C. 3.4(e), 3.8(h) and (i), and 8.4(d).).

In his closing argument, no counsel shall state any personal opinion. No “I think,” “I feel,” “I believe.” No personal opinions concerning the credibility of witnesses. No counsel shall state any personal belief that implies personal knowledge as an attorney.

Counsel shall not argue inferences from matters that are not in evidence or that have been excluded.

Counsel shall not allude to the appellate processes.

Counsel shall not address facts not in evidence.

There shall be no remarks to invoke the jury’s sympathy, and there shall be no remarks to excite the jury’s prejudice and passions.

There shall be no statement relative to the consequences of the jury verdict, and that includes any messages to society by the verdict. So there will be no argument relative to the consequences of the jury verdict, and that includes, of course, whatever the potential punishment is for the crime.

There shall be no “Golden rule” argument, the district attorney shall not ask members of the jury to place themselves or one of their relatives in the shoes of the victim, and defense counsel shall not ask any one of the jurors to place themselves or one of their loved ones in the shoes of the defendant.

§ 18.6.2 Mass. R. Prof. C. 4.2, Communication with Person Represented by Counsel

In general, under Mass. R. Prof. C. 4.2, a lawyer may not communicate with a person he or she knows to be represented by counsel in that particular matter unless either counsel has consented to the communication or it falls within the “authorized by law” exception in the rule. The former rule, DR 7-104(A)(1), limited the prohibition to represented “parties,” which confined the rule’s reach to litigation.
Rule 4.2 of the Massachusetts Rules of Professional Conduct and its Comment [4] governing communications with agents or employees of organizations, as originally drafted, created widespread concern for prosecutors and plaintiffs’ counsel. The prohibition of Comment [4] against communicating without the organization’s counsel’s consent with persons with managerial responsibility, whose act or omission may be imputed to the organization or whose statements may constitute admissions by the organization, could be read to include virtually everyone associated with an organization. Communications on the matter that is the subject of the representation with current employees or former employees, and those initiated by the represented person without counsel’s knowledge, all presented ethical problems.

In March 2002, however, the Supreme Judicial Court decided Messing, Rudavsky & Weliky, P.C. v. President of Harvard College, 436 Mass. 347 (2002), the most important Massachusetts decision to date interpreting the scope of the ban on ex parte contacts with current employees of an organization represented by counsel. The Superior Court had sanctioned the plaintiff law firm after concluding that its interviews of five current Harvard employees in connection with a client’s employment discrimination action against the university violated Mass. R. Prof. C. 4.2 and its predecessor rule, DR 7-104(A)(1). Acknowledging that the language of Rule 4.2 did not clarify which employees were off-limits, the Supreme Judicial Court interpreted the prohibition more narrowly than the lower court. The court concluded that

[This interpretation . . . would prohibit ex parte contact only with those employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation.]

Messing, Rudavsky & Weliky, P.C. v. President of Harvard Coll., 436 Mass. at 357. On June 5, 2002, the court revised Comment [4] to Rule 4.2, incorporating the precise conclusion from the Messing case excerpted above. In addition, the language of the comment was changed to refer to contacts with “agents and employees” rather than “persons.” Comment [4] now reads as follows:

In the case of an organization, [Rule 4.2] prohibits communications by a lawyer for another person or entity concerning the matter in representation only with those agents or employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the organization to
make decisions about the course of the litigation. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f).

On June 26, 2002, the MBA Committee on Professional Ethics issued an opinion stating that the prohibitions on ex parte contacts imposed by Rule 4.2 were generally inapplicable to former employees. See MBA Ethics Opinion 2002-3 (June 26, 2002), available at http://massbar.org/ethics/. The committee relied in substantial part on the revised comment’s reference to “agents and employees,” reasoning that “[f]ormer agents or employees are not ‘agents or employees’ of an organization” and that the court intended to exclude former employees.

**Practice Note**

Comment [7] to Rule 4.2 contemplates resort to a court to seek judicial authorization before communicating, which may be helpful where a represented person initiates the contact or where the organization’s counsel asserts blanket representation of all employees or that they all have managerial authority for the organization. Although the *Messing* decision should assist prosecutors in deciding whether to interview current employees without prior consent of counsel, it remains advisable for prosecutors to seek guidance from their supervisors before initiating such contact. Such recourse also conforms to the requirements of Mass. R. Prof. C. 5.1 and 5.2, discussed next.

**§ 18.6.3 Mass. R. Prof. C. 5.1 and 5.2, Responsibilities of Supervisory Lawyers and Subordinate Lawyers**

Read together, these rules confirm the expectation that supervisory and subordinate lawyers will confer about the ethical responsibilities of subordinates. The subordinate lawyer cannot simply pass the buck: Mass. R. Prof. C. 5.2(a) makes clear that each lawyer is answerable for compliance with the rules. These provisions are designed to ensure that subordinates will seek guidance from supervisors.

Moreover, legal departments of government agencies are required to have measures in place that give “reasonable assurance” that the legal staff conforms to the rules. Mass. R. Prof. C. 5.1, cmt. [1]. Such measures may include a resident ethics expert or ethics committee within the agency to whom supervisors and subordinate lawyers can refer questions or differences. The option to consult with a nonsupervising lawyer is especially critical when a subordinate lawyer believes
that a supervisor is insisting that the subordinate engage in conduct that may violate an ethical responsibility.

Some government legal departments may hire relatively inexperienced lawyers and may have high turnover among their lawyers. Comment [2] to Mass. R. Prof. C. 5.1 suggests that it is advisable to include training about ethical issues likely to be encountered in the agency’s practice in the initial orientation programs presented to new attorneys.

§ 18.6.4 Mass. R. Prof. C. 8.3, Reporting Professional Misconduct

The mandatory reporting of serious misconduct by another lawyer in Mass. R. Prof. C. 8.3(a) applies to all Massachusetts lawyers. Reporting is required if an attorney has actual knowledge of another lawyer’s rule violation that raises grave questions about that lawyer’s fitness in other respects. But, as Mass. R. Prof. C. 8.3(c) and Comment [2] declare, the rule does not require reporting in violation of the confidentiality rule, Mass. R. Prof. C. 1.6. Comment [6] to Mass. R. Prof. C. 1.6 makes explicit that “government lawyers who may disagree with the policy goals that their representation is designed to advance” are not excused from the requirement to maintain confidentiality of client information. If there is a disagreement with the employing agency about how to handle a situation that the government lawyer believes comes within the mandatory reporting requirements of Mass. R. Prof. C. 8.3, the lawyer’s ethical obligation to report is likely to trump the agency’s wishes.

§ 18.7 GOVERNMENT LAWYERS AS POLICY MAKERS AND THE ATTORNEY GENERAL AS CHIEF LAW OFFICER

Professor Charles W. Wolfram suggests that before examining a government lawyer’s conduct, it is important to first determine whether the lawyer was acting in the making of policy or giving legal advice. Charles Wolfram, Modern Legal Ethics 449–51 (West 1986). Wolfram and others consider policy formulation to be a unique discretionary function for lawyers in the public sector that should be outside the ethical regulations restricting attorneys. By contrast, where a government lawyer is providing legal advice or litigation support, the attorney’s conduct is sufficiently similar to that of a private lawyer that the disciplinary rules must apply.
The Supreme Judicial Court employed the same distinction to identify information protected by the attorney-client privilege in Judge Rotenberg Educational Center, Inc. v. Commissioner of the Department of Mental Retardation (No. 1), 424 Mass. 430, 457 n.26 (1997). The court would protect only lawyer-client communications “for the purpose of obtaining legal advice.” In that case, because an agency meeting at which possible litigation was discussed was deemed a “general policy meeting,” not a meeting seeking legal advice, the records of that meeting were not protected by the privilege after the policy decision was made.

In Massachusetts, a corresponding dichotomy in the role of the attorney general has been defined in several Supreme Judicial Court opinions interpreting the duties and responsibilities of that public office under the statutes and constitution of the Commonwealth. In a 1975 opinion, Chief Justice Tauro wrote that, although a traditional attorney-client relationship would permit an agency client to direct the course of litigation and determine whether to take an appeal from an adverse decision, by common law practice and under G.L. c. 12, § 3, the attorney general is “chief law officer of the Commonwealth.” As such, the attorney general “has control over the conduct of litigation involving the Commonwealth, and this includes the power to make a policy determination not to prosecute the Secretary’s appeal in this case.” Sec’y of Admin. & Fin. v. Attorney Gen., 367 Mass. 154, 159 (1975). When an agency head recommends a course of action, the attorney general must take into account the “ramifications of that action on the interests of the Commonwealth and the public generally.” Sec’y of Admin. & Fin. v. Attorney Gen., 367 Mass. at 163.

The court further extended that point in an opinion by Chief Justice Liacos that held that the attorney general’s role “includes the authority to chart a course of legal action which is opposed by the administrative officers he represents.” Feeney v. Commonwealth, 373 Mass. 359, 364 (1977); see also Alliance, AFSCME/SEIU v. Commonwealth, 425 Mass. 534, 537–38 (1997).

The author is indebted to the insights of the panelists at the MCLE conference “An Ethical Minefield: The ‘New Model Rules’ in Public Sector Practice,” held in Boston on March 27, 1998.

An excellent source to help predict and flesh out the interpretations of the Massachusetts Rules of Professional Conduct while Massachusetts develops its own common law for these rules is ABA Center for Professional Responsibility, Annotated Model Rules of Professional Conduct (4th ed. 1999).