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CLEAR THINKERS AND INTERLOPERS

Should Those Who Sue Our Clients Also Represent Our Clients?

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Presented by:
Michael Kenyon

Mike Kenyon is a recovering "skyscraper lawyer" who, in that past life, worked for two large firms, both of which represented cities and sued cities. In order to remove all doubt about where his loyalty lies, Mike founded the municipal law firm of Kenyon Disend, PLLC in 1993 solely to serve Washington cities. Although Mike knows that Kenyon Disend *can* sue cities, he just don't think that Kenyon Disend *should* sue cities.

I. INTRODUCTION

This paper is not intended to convince the reader that it is actually *impermissible* in most instances for a lawyer to maintain a practice that includes both the representation of and the assertion of positions adverse to cities.

Rather, this paper is intended first to state the obvious – there is likewise no requirement that lawyers or law firms who represent our clients must also sue or take positions adverse to our clients. Secondly, this paper is intended to urge us as city attorneys and WSAMA members to more thoughtfully and thoroughly consider the continued vitality and propriety of utilizing lawyers and law firms as outside counsel when those same lawyers and law firms are also suing our clients.

Put more plainly, the question is whether we *should* continue to utilize those lawyers and law firms, not whether we *can* continue to do so. In my view, the answer is painfully clear, and both the actual and potential harm to our clients in continuing along that path far outweighs any benefit that may accrue.

I recognize that this position puts me squarely at odds with some of our members. Even more entertaining, this position also places me squarely at odds with the largest law firms in Washington. Those large firms, of course, remain the primary participants in the dual representation that I am here first to discourage, and then to eliminate.

I likewise recognize that this position is supported by many of our members and, by all accounts, in a number increasing dramatically with each passing year. Popular support or opposition aside, however, discussion about and resolution of these questions remain important to the continued success of our organization and our clients.

Solely for the sake of convenience in this presentation, those lawyers and law firms that choose the potholed path of suing us while they also seek to represent us will be referred to as "Interlopers." Those of you who choose the path paved with gold - and again solely for the sake of convenience - will be referred to as "Clear Thinkers."

II. ISSUE TO PONDER

As attorneys primarily or exclusively representing cities and other public agencies, should we utilize Interlopers – or their law firms – when those Interlopers or other Interlopers in their firms sue or otherwise assert positions adverse to cities?

III. SOME LEGAL ANALYSIS TO CONSIDER

The Rules of Professional Conduct, obviously, offer substantial guidance toward resolution of the question at hand. The Rules now are undergoing substantial revision and are available for comment. In an ironic coincidence, the comment period ends April 29, the day that this presentation is scheduled.

The Preamble to the Rules provides:

> The Rules of Professional Conduct point the way to the aspiring and provide standards by which to judge the transgressor. *Each lawyer must find within his or her own conscience the touchstone against which to test the extent to which his or her actions should rise above minimum standards.*

By this statement, the Rules set the bare floor for our behavior, but thereafter offer a framework bounded only by individual conscience. My conscience in this regard is guided in part by empirical evidence of the damage done by Interlopers and the good done by Clear Thinkers, and by consideration of additional Rules.

A. Rule 1.7: Conflict of Interest: Current Clients.

The proposed revision to Rule 1.7 (Conflict of Interest: Current Clients) reads:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
> (1) the representation of one client will be directly adverse to another client; or
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer.
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

In other words, a conflict of interest exists if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case. Comment number 24 to the Rule identifies a specific instance of a concurrent conflict of interest:

> [F]or example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client.

The proposed amendment to the Rule is grounded in the American Bar Association's model rules. In the context of a municipal lawyer, the ABA offers:

> Whether or not the lawyer's representation of a governmental client in one matter may be "materially limited" by her responsibilities to other clients (or vice versa) depends on the extent to which either client would be adversely affected by the outcome of the other's matter and on whether the lawyer's diligence or judgment on behalf of one client would be compromised by her relationship or identification with the other. . . .

> There may be situations in which a lawyer's representation of the government on an important issue of public policy so identifies her with an official public position that she would be effectively compromised in her ability convincingly to oppose any part of the government on behalf of a private client, even in an entirely unrelated matter.

ABA Formal Opinion 97-405, Summary attached as Exhibit A.

We've all experienced instances where an adverse decision affecting one city ripples out and affects other cities. When the pebble first hits the pond, though, we never know how far the ripples will carry. In my view, ripple management is most easily and most comprehensively accomplished by use of lawyers and law firms that remain true to municipal objectives.

Gray areas of law exist. We shouldn't be in the business of teaching the Interlopers about those gray areas. If we don't teach them, they may not discover them on their own.

More fundamentally, though, there can be no benefit to Clear Thinkers if an Interloper raises that gray area to the detriment of a city during the Interloper's representation of a developer (or other adverse party) against that city. Equally problematic for the Interloper, of course, is the obvious conflict that he faces if he fails to raise the gray area on behalf of the developer. See, I'm all about looking out for the Interlopers . . .

By this point in the presentation, I'm guessing that most Interlopers have now made the Right Decision, and chosen to become Clear Thinkers from here on out. Congratulations, but what if Interlopers remain at the firm and exercise of your Second Amendment rights seems too harsh a remedy?

B. Rule 1.10: Imputation of Conflict of Interest: General Rule.

The proposed revision to Rule 1.10 (Imputation of Conflict of Interest: General Rule) states:

> (a) Except as provided in paragraph (e), *while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9* [Duties to Former Clients], unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.
>
> . . .
>
> (e) When a lawyer becomes associated with a firm, no other lawyer in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:
>
> (1) the personally disqualified lawyer is screened by effective means from participation in the matter and is apportioned no part of the fee therefrom;
>
> (2) the former client of the personally disqualified lawyer receives notice of the conflict and the screening mechanism used to prohibit dissemination of information relating to the former representation;
>
> (3) the firm is able to demonstrate by convincing evidence that no material information relating to the former representation was transmitted by the personally disqualified lawyer before implementation of the screening mechanism and notice to the former client.
>
> *Any presumption that information protected by Rules 1.6 and 1.9(c) has been or will be transmitted may be rebutted if the personally disqualified lawyer serves on his or her former law firm and former client an affidavit attesting that the personally disqualified lawyer will not participate in the matter and will not discuss the matter or the representation with any other lawyer or employee of his or her current law firm, and attesting that during the period of the lawyer's personal disqualification those lawyers or employees who do participate in the matter will be apprised that the personally disqualified lawyer is screened from participating in or discussing the matter.* Such affidavit shall describe the procedures being used effectively to screen the personally disqualified lawyer. Upon request of the former client, such affidavit shall be updated periodically to show actual compliance with the screening procedures. *The law firm, the personally disqualified lawyer, or the former client may seek judicial review in a court of general jurisdiction of the screening mechanism used, or may seek court supervision to ensure that implementation of the screening procedures has occurred and that effective actual compliance has been achieved.*

Comment number two to the proposed Rule establishes "[T]he premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, [and] the premise that each lawyer is vicariously bound by the obligation of loyalty owned by each lawyer with whom the lawyer is associated." Duh.

Given the provisions expressly authorizing "judicial review" and "court supervision," it also seems likely - - and purely editorializing here - - that not even the Bar has much confidence in this new notion of serving an affidavit attesting to one's adherence to the Rules.

Like most conflicts of interest, these too can be waived in writing after obtaining the client's informed consent. In the olden days, Professor Strait would refer to this form of waiver as a "Chinese wall," symbolically raising the specter of the Great Wall. Spirited discussion would then ensue regarding the efficacy of any wall designed to prevent the flow of information. Few were convinced that such a wall existed.

For the Clear Thinkers who decline to waive actual or potential conflicts, of course, no wall of any type is required.

C. Waiver of Conflict of Interest.

The proposed revisions to Rule 1.7(b) authorize waivers of conflicts of interest if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any require disclosures).

As always, however, the proposed Rule makes clear that waivers are discretionary, and are within the purview of the client. Requests for conflict waivers are often confusing, cumbersome, or incomplete. When presented with a waiver request, how many of us have experienced some uneasiness in making the decision, or even in making a recommendation to city management?

Want to do your part to convert an Interloper into a Clear Thinker? Pardon the plagiarizing from the DARE program, but "Just say no." If the Interloper walks away from your client, you've learned a great deal. If the Interloper walks away from his private client, you've learned a great deal more.

As an aside, the new City of Spokane Valley is hereby bestowed with the coveted Clear Thinker of the Year Award for taking this simple concept to a high level, indeed. In its RFP for City Attorney services – which serves as a useful model for us all - Spokane Valley made plain that it expects its attorneys to be "free of conflicts of interest in fact and in appearance," and that the "City does not contemplate granting" any conflict waivers. Exhibit B.

D. Rule 1.11: Special Conflicts of Interest for Former and Current Government Officers and Employees.

The proposed revisions to Rule 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees) provide:

> (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
> (1) is subject to Rule 1.9(c); and
> (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
   (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
   (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

Comment number four to the Rule is particularly instructive:

> This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. *A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service.*

Exactly. Although the Committee drafting the Comment was apparently too urbane to use the terms "fox" and "hen house," the point seems clear.

IV. SOME PARTING THOUGHTS TO CONSIDER

Much discussion, e-mail traffic, and other communication has occurred on this topic since the Spring Conference at Semiahmoo last year. The WSAMA Board

considered, but ultimately rejected, a bylaw amendment that would have limited membership in WSAMA by excluding most forms of Interlopers. A small number of Interlopers objected to the proposed bylaw amendment by e-mail. A small number of Clear Thinkers offered support for the amendment by e-mail. Under no circumstances, however, would it be fair to say that the membership has spoken on this issue.

In my view, however, this issue transcends by many metes and bounds the question of WSAMA membership. Government in particular, and local government in many specific instances, has become a favored new target of the plaintiffs' Bar and the media-hungry Bar. I'm tired of seeing Interlopers on the other side in those instances. I'm even more concerned that we are enabling more and better Interlopers when we also pay them to come into our houses.

I'm not so naive as to think that we'll be able to stop plaintiffs' attorneys from bringing claims, both meritless and meritorious, or the media from reporting stories, both goofy and important. I am urging, though, that we take two simple and effective steps to both "level the playing field" and reduce the population of our opposition:

1. Decline to waive any actual or potential conflict of interest when asked. There's nothing wrong with that. Granting a waiver is actually the *exception* to the Rules.

2. Decline to retain any lawyer or law firm that continues to sue or take positions adverse to cities.

Represent us. Sue us. It's certainly not too much to ask that you pick only one.

Individual Ethics Opinions 1996-Present

The following are "headnote" summaries of Formal Ethics Opinions of the American Bar Association's Standing Committee on Ethics and Professional Responsibility. The full opinions are available for purchase by clicking on the "order here" link next to each opinion or by going to the publications section of this site. Please contact Maggie Viertel at 312-988-5326 if you wish to obtain copies of Formal Ethics Opinions older than 1996. *(Updated 5/20/04)*

Formal Opinion 97-405
Conflicts in Representing Government Entities order here

A lawyer who is engaged to represent a government entity, whether on a full-time or part-time basis, may not agree simultaneously to represent a private party against her own government client, absent the informed consent of both clients. See Model Rule 1.7(a). However, the lawyer may represent a private client against another government entity in the same jurisdiction in an unrelated matter, as long as the two government entities are not considered the same client, and as long as the requirements of Model Rule 1.7(b) are satisfied.

The identity of the government client for conflict of interest purposes, like that of any other organizational client, will be established in the first instance between the lawyer and government officials who are authorized to speak for the government client, in accordance with the general precepts of client autonomy set forth in Model Rule 1.2. The lawyer may not, by agreeing to a narrow definition of the government client, seek to defeat the reasonable expectation of her other clients that they will get a conflict-free representation from their lawyer.

In the absence of an express agreement, the identity of the government client may be inferred from the reasonable understandings and expectations of the lawyer and responsible government officials, taking into account such functional considerations as how the government client presented to the lawyer is legally defined and funded, whether it has independent legal authority with respect to the matter for which the lawyer has been retained -- e.g., contracting, litigating, or settling a claim -- and the extent to which the matter involved in the proposed representation has general importance for other government components in the jurisdiction. Uncertainty in identifying the government client should be resolved in favor of disclosure -- disclosure of the government representation to any private clients the lawyer may be representing against the government, and disclosure to the government client of any arguably conflicting private representations.

Even if two representations involving government entities are not "directly adverse," because the two government entities involved are not considered the same client for conflict of interest purposes, under Rule 1.7(b) the lawyer must satisfy herself that her responsibilities to one client will not be "materially limited" by her responsibilities to the other. Whether or not the lawyer's representation of a government client in one matter may be "materially limited" by her responsibilities to other clients (or vice versa) depends on the extent to which either client would be adversely affected by the outcome of the other's matter, and on whether the lawyer's diligence or judgment on behalf of one client would be compromised by her relationship or identification with the other. This in turn may depend upon the issues at stake in a matter, the particular role the lawyer is playing in it, and the intensity and duration of her relationship with the lawyers she is opposing. There may be situations in which a lawyer's representation of the government on an important issue of public policy so identifies her with an official public position that she would be effectively compromised in her ability

EXHIBIT A

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convincingly to oppose any part of the government on behalf of a private client, even in an entirely unrelated matter.

Formal Opinion 97-409
Conflicts of Interest:
Successive Government and Private Employment order here

The conflict of interest obligations of a former government lawyer under the Model Rules of Professional Conduct are determined by Rule 1.11 and not by Rule 1.9(a) and (b). A former government lawyer is, however, subject to the provisions of Rule 1.9(c), which prohibits the use of information relating to her representation of the government to the disadvantage of her former government client where the information has not become generally known, and the disclosure of such information, except as permitted or required by Rules 1.6 and 3.3.

Under Rule 1.11, a former government lawyer is disqualified from representing private clients where she "participated personally and substantially as a public officer or employee" in the same "particular matter" at issue in the subsequent representation, whether or not she would be adverse to her former government client; she is not forbidden from representing private parties in matters in which she did not so participate, or in any matters not involving "a discrete and isolatable transaction or set of transactions between identifiable parties," except where she has obtained "confidential government information" about an adverse third party. See Rule 1.11(a) and (b); ABA Formal Opinion 342.

A former government lawyer who is personally disqualified from representing a private client in a matter may be screened pursuant to Rule 1.11(a) to enable other lawyers in her new firm to undertake the representation, whether her disqualification arises under Rule 1.11(a) or Rule 1.9(c).

A lawyer formerly employed by a government claims administration agency is not disqualified under Rule 1.11 from representing private claimants before the agency except in connection with particular claims she personally handled while in government service. She may also represent a private party in a challenge to generally applicable agency rules, even though she was herself personally involved in the development and implementation of those rules, subject only to the constraints imposed by Rule 1.9(c) on her use or disclosure of information relating to her representation of the government that has not become generally known. In any case, if the lawyer is herself personally disqualified, members of her firm may undertake the representation if she is appropriately screened.

CITY OF SPOKANE VALLEY

REQUEST FOR PROPOSALS
CONTRACT CITY ATTORNEY SERVICES

Proposal Due Date: March 1, 2005.

The City of Spokane Valley invites proposals for contracted City Attorney services. Proposals are due to the City Clerk's Office by **4:00 p.m. March 1, 2005**. Faxed proposals should be submitted by 1:00 p.m. March 1, 2005 to ensure proper receipt and documentation. The City seeks services encompassing the traditional scope of work including legal counsel and rendering of opinions to the City Council and staff, and consultation and coordination with special counsel. Attendance at a variety of meetings will be required, including staff meetings and Council meetings as specified. This Agreement will not include criminal prosecution services, which are handled by separate contract. A more detailed statement of the services expected is provided in the Scope of Work, below at page 2.

Background information. The City of Spokane Valley is a non-charter code city organized under RCW 35A, and has a Council-Manager form of government. The City Council consists of seven members elected at-large. The Mayor is elected by his fellow Council members, and serves as the Chair of the Council. The City Manager directs all City operations. The City Manager seeks at all times to develop and implement a "best practices" approach in operating the city government.

The City of Spokane Valley incorporated March 31, 2003, is currently the 8th largest city in Washington, and encompasses approximately 38.5 square miles. Its current population is 83,950. The City is part of the larger Spokane metropolitan area of approximately 450,000 residents. The City generally considers itself to be a "contract" city, with many core services provided either by contract with private or other public entities.

The City previously utilized the services of Stanley Schwartz of the law firm Witherspoon, Kelley, Davenport & Toole, P.S. for contract City Attorney on an interim basis. The City anticipates that a replacement contract City Attorney be selected through this process and available no later than May 2, 2005.

The City's legal office is currently staffed by a Deputy City Attorney with ten years experience in land use, criminal defense and direct municipal representation. The office also currently enjoys the services of a legal intern from Gonzaga University School of Law. The office does not have any legal support staff, and the successful bidder will be required to provide any necessary staffing of this nature.

It is anticipated that more than one attorney from the successful bidder may work on some City projects, depending on work load requirements and areas of expertise. The designated City Attorney will maintain central responsibility.

EXHIBIT B

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9. Provide the Mayor and City Council with guidance as to Robert's Rules of Order and related procedural matters relating to Council meetings.

10. Performs other legal services and tasks as assigned by the City Manager.

Avoidance of Conflict of Interest. As part of the exchange of value between the City of Spokane Valley and the selected legal services provider, and in pursuit of implementing a "best practices" philosophy, the City wants its legal support to be free of conflicts of interest in fact and in appearance. As such, responders are requested to answer the following three questions so that the City may determine the degree of separation between clients the firm is willing to achieve to fulfill this City goal. In answering the three questions, please identify those steps, if any, the firm would be willing to undertake to eliminate or reduce the potential for conflict of interest. As an example, please identify how the firm would handle a situation where one attorney in the firm represents the City as the contract City Attorney, and another attorney in the same firm represents a developer seeking approval of a project in the City of Spokane Valley.

1. How would your firm handle representation of any other client doing business with or in the City?

2. How would your firm handle representation of any client engaged in development activity within Spokane County?

3. How would your firm handle representation of any client engaged in development activity within the city limits of Spokane Valley?

In responding to the foregoing questions, please be aware that the City does not contemplate granting any release that would waive restraint from participation in a conflict of interest situation.

Specifications.

1. The City Attorney attends all City Council business meetings. These are scheduled on the second and fourth Tuesday of each month beginning at 6:00 p.m. until close, which is generally before 9:00 p.m.

2. The City Attorney attends those City Council Study Sessions, which typically occur on the first and third Tuesdays of each month, at which he/she has agenda items scheduled.

3. The City Attorney may be called upon to attend occasional community meetings, and may be called upon to attend meetings related to specific projects the City is involved in.