



Wisconsin Counties Association  
**ANNUAL CONFERENCE**  
*& Exhibit Hall* **2023**

**9:15 – 10:15 AM**

**You Think Your Corporation Counsel Has a Conflict of Interest? What's Next?**

Speakers: Margaret Daun, Corporation Counsel, Milwaukee County;

Andy Phillips, Attorney, Attolles Law, s.c.

Moderator: Jonathan Delagrave, County Executive, Racine County

# So, You Think Your Corporation Counsel Has a Conflict of Interest. What's Next?

2023 WCA Annual Conference

Attorney Maggie Daun, Milwaukee County Corporation Counsel

Attorney Andy Phillips, Attolles Law, s.c.



# AGENDA – What do we want to accomplish?

- What is the role of corporation counsel?
- Who does corporation counsel represent?
- What is the scope of corporation counsel's duty of confidentiality?
- When do the rules prohibit corporation counsel from representing you or another part of county government?
- How are the rules different for private counsel engaged by the county?
- How are the rules applied to “real world” situations?
- What can we do to make sure the county is receiving good and valuable representation?

## First Step of Any Analysis on Conflict of Interest

- Who is the Client?
- This is not a simple exercise when dealing with county government
  - Governance is complex – executive/administrative and legislative branches
  - Operations are complex – constitutional officers, department heads and oversight boards/commissions

# Representing Local Public Officials or Subsidiary Local Government Entities

- Who is the client?
  - Corporation counsel, under Wis. Stat. § 59.42(b) has the obligation to “defend all civil actions...give advice to [clients] in all civil matters...perform all duties in connection with civil matters... [and] review and countersign all contracts”
    - This includes elected official, department, board, and commission – corporation counsel is the entire County’s attorneys
  - As a general rule, outside counsel should be used if issues arise to preclude the representation because of (a) bandwidth, (b) expertise, (c) insurer-direction, or (d) clients suing one another.

# What is corporation counsel's responsibility?



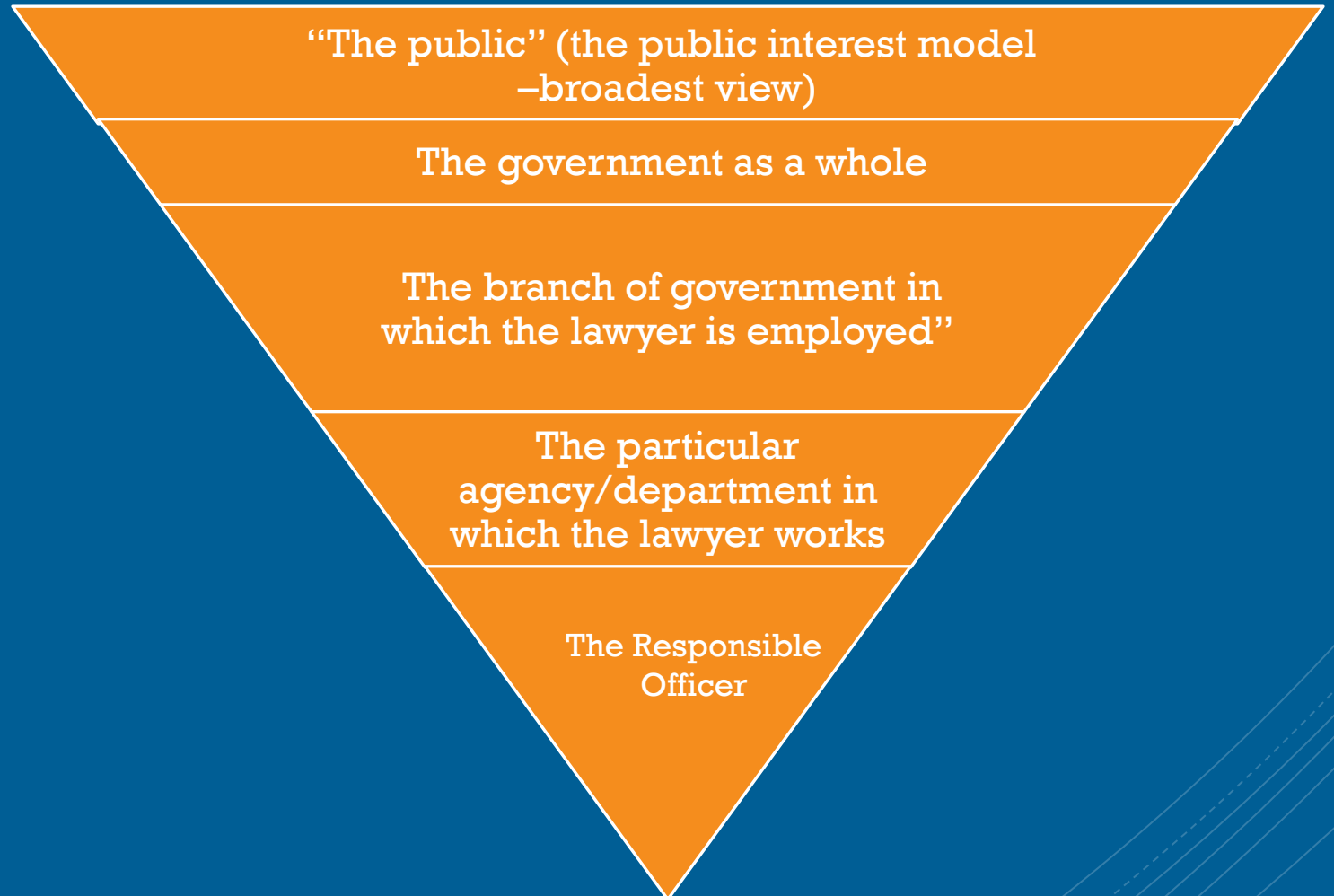
To ensure that the government entity represented by the lawyer enjoys all the benefits of competent and diligent representation.



However, as the Rules of Professional Conduct acknowledge, the duties of lawyers employed by the government may be defined by constitution, statutes, regulations and case law.

- There is not one “correct” answer, it’s nuanced.
- Moving broad to narrow...

Who/what is  
your client and  
who is the  
decision maker?



## Broad end of the spectrum: The Public Interest model

- Under this view, a counselor has a duty to formulate legal opinions based on what is best for the public, rather than on the outcome that the attorney's direct employer may desire.
- This view may result from duties derived from statutes and constitutions. This view, for example, harmonizes a prosecutor's duty to do justice
- Former Attorney General Eric Holder suggested that some government lawyers have an independent duty "to do justice" whenever the government entity is party to civil litigation.



Narrow end  
of the  
spectrum: the  
Single Client  
Model

- The attorney's duties run to "the officer who has the legitimate power to decide upon the course of action."
- The government attorney would simply owe to his or her direct supervisor the same duties that a private attorney owes to his or her client.



# Starting with the Basics

The Rules of Professional Conduct governing  
lawyers in Wisconsin

- Traditional rules of professional conduct apply equally to private and government clients alike.
- However, government clients present unique challenges:
  - They are often undelineated;
  - They commonly have conflicting interests across constituencies;
  - They require government lawyers to exercise greater discretion with respect to policy questions.
- Our advice □ Don't overlook the forest for the trees
  - Corporation counsel must, above all else, serve the county as a whole
    - Corporation counsel are “public officer[s], acting judicially, under all the solemn responsibilities of conscience and legal obligation.” 6 Op. Atty Gen. 326, 334 (1854).

# Representing Government Clients – Overview

# The main players: Supreme Court Rules 1.6, 1.7, 1.9, and 1.10



- The Wisconsin Supreme Court Rules for Professional Conduct of Attorneys (the "SCR") set forth four key rules that govern COIs; among other ancillary directives.
  - SCR 20:1.6 covers the duty of confidentiality
  - SCR 20:1.7 covers conflicts of interest between current clients;
  - SCR 20:1.9 covers duties former clients as pertains to the representation of new clients with adverse interests to such former clients; and
  - SCR 20:1.10 governs duties and procedures for mitigating circumstances where individual lawyers impute conflicts of theirs to the rest of their law firm.

## Duty of Confidentiality – the Situation

- A county board supervisor comes to corporation counsel's office and in the course of catching up on other business, let's the corp counsel know that she has secured the votes necessary to defeat a proposed budget amendment that is on the agenda for tomorrow's board meeting. The supervisor indicates that "we all know the amendment to move more funding over to human services is a terrible idea so it is critical that the measure be defeated. Don't you agree?"
- What part of this conversation is confidential?
- Can corp counsel discuss this conversation with anybody?
- What should be done?

## The Duty of Confidentiality – SCR 20:1.6:

- **Rule:** A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation.
  - But, in Wisconsin, a lawyer *shall reveal* information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.

# Confidentiality – Situation #2

- A county board supervisor visits corporation counsel's office to discuss a sticky ethics situation confronting the supervisor.
- The supervisor asks corporation counsel for a written opinion on the situation, as is contemplated in county ordinance.
- Is the request and the opinion confidential?
- May corporation counsel discuss the facts surrounding the request with anybody other than the requesting supervisor?

# Concurrent Representation – the Situation

- The sheriff approaches corporation counsel to discuss concerns surrounding the county board's proposed budget. In the sheriff's view, the proposed budget would not allow the sheriff to fulfill her constitutional obligations as sheriff. The sheriff knows there has been litigation on this issue in other counties and believes litigation might be necessary here.
  - The sheriff asks corp counsel to represent her. Can corp counsel do so?
  - The sheriff asks corp counsel to assign a certain lawyer to represent the board. What is the response?
  - Can corp counsel represent the board if the sheriff sues?
  - What if the sheriff says "please don't tell the Board Chair about my thoughts on litigation – I've not yet made up my mind on what to do." What is corp counsel's duty?



# “Concurrent” Conflicts of Interest – SCR 20:1.7

- **Rule:** A client conflict of interest exists when:
  - (a) a lawyer’s representation of one client would be directly adverse to another current client; or
  - (b) there is a significant risk that representing one potential client would materially limit the lawyer’s representation of a current client, a former client or a third person or by a personal interest of the lawyer. 20:1.7.
- But there are Safe Harbors...
- Even if a conflict exists under SCR 20:1.7, a lawyer may still 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 a writing signed by the client.

## What happens if clients disagree?

- It depends on how and to what degree...
- Unless clients engage in active litigation against one another, corporation counsel may represent both clients, even when there is disagreement.
  - ABA's Scope 18 (Comment 9 to Supreme Court Rule 10:1.13): government "lawyers under the supervision of [elected] officers [such as a corporation counsel] may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients." (1987)
- BUT – what are some of the practical limitations on representing "both sides?"

## Rules Specifically Relating to Government Lawyers

- SCR 20 Preamble: A Lawyer's Responsibilities [18]
  - “[T]he responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships.”
- “Firm” or “law firm” denotes ... lawyers employed in a legal services organization or the legal department of a corporation or other organization, including a government entity.” SCR 20:1.0(d)]2SCR 20:1.11 (d)
- When a lawyer moves from private to public employment, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.
- SCR 20:1.13: A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
  - ABA Comment [9] imputes the 1.13 duty to governmental organizations.

## Duties to Former Clients – SCR 20:1.9

- **Rule:** A lawyer who has formerly represented a client shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in a writing signed by the client.
  - Comment 1 illustrates that “[a]fter termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule.
- **Example:**
  - A lawyer may not seek to rescind on behalf of a new client a contract drafted on behalf of the former client.

# “Imputed Disqualification n” – SCR 20:1.10

- **Rule:** Lawyers associated in a firm shall not knowingly represent a client when any one of them practicing alone would be prohibited from doing so by SCR 20:1.7 (concurrent client conflicts) or SCR 20:1.9 (former client conflicts).
- The rule does not apply if:
  - (1) 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; or
  - (2) the prohibition arises under SCR 20:1.9, and (i) the personally disqualified lawyer performed no more than minor and isolated services in the disqualifying representation and did so only at a firm with which the lawyer is no longer associated; (ii) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (iii) written notice is promptly given to any affected former client to enable the affected client to ascertain compliance with the provisions of this rule.

## Proactive Steps to avoid COIs as Corporation Counsel



Attract talented professionals; strive for low turnover



Maintain consistency with client responses across a variety of clients



Issue public opinions to all stakeholders whenever possible



Ensure advice aims to accurately estimate risk of different options



Prioritize based upon: (1) mission; (2) public trust; (3) operational impact; (4) financial impact; (5) precedential impact



Office-wide understanding and shared internal accountability to the philosophy of client service as government attorney

# Representin g Counties

Responsibility to whom/what?

Scope of Duty

Challenges

Authority to direct the  
representation

# Additional Challenges for Corporation Counsel

## Corporation Counsel:

1. Conduct and activities governed by Wis. Stat. § 59.42 in addition to rules of professional responsibility governing all lawyers.
2. Must consider policy implications associated with advice – not as simple as “aggressive defense.”
3. Cannot maintain certain information in confidence.

## Outside Counsel:

1. Conduct is governed by rules of professional responsibility and scope of engagement.
2. Policy implications are a consideration only if requested by client.
3. Generally speaking, the duty to report “up the chain” is much more limited.



# Policy Challenges – Long-term vs Short-term interests



- **Example:**
  - A county has a long-term interest in improving safety and the environment by restricting signs abutting county highways.
- **Problem Arises:**
  - What should the government lawyer do when a county board member wants to make an exception to allow for a particular sign, an exception that future would-be-sign-posters might point to as showing discriminatory treatment?
- Tension is created between short-term and long-term goals that can arise when the government lawyer is faced with deciding what course of action to take
- Lawyer must balance short term policy gain against the long term consequence to the County.

# The Takeaways

- Understand and appreciate the distinction between an appointed corporation counsel and private counsel representing the county. SOME of the same rules apply, but there are dissimilarities.
- The term “conflict of interest” means different things for different people in different contexts. Understand how to spot legal conflicts of interest for corporation counsel and appreciate the difficult situations confronting corporation counsel as it relates to conflicts of interest.
- Talk to your corporation counsel about concerns you may have surrounding conflicts of interest. It is always a good idea to have an open dialogue so as to allow you to get the representation you need and deserve.



Questions? Comments?