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ATTORNEYS' ETHICAL CONSIDERATIONS RELATED TO THE WASHINGTON PUBLIC RECORDS ACT AND OPEN PUBLIC MEETINGS ACT

AGENCIES' RESISTANCE TO DISCLOSURE CONTRAVENES THE LETTER AND SPIRIT OF THE OPEN GOVERNMENT LAWS IN WASHINGTON

Under the Washington Public Records Act, an agency is required to disclose public records unless the record is exempt from disclosure by statute. Likewise, the Washington Open Public Meetings Act furthers the goal of openness in state government by requiring that all decisions be made in public meetings, and strictly limiting the content of sessions, which are not open to the public.

Despite these statutory constructs, public agencies often resist public disclosure. There are three primary reasons why, over time, the trend has moved away from the goal of the statutes' of full disclosure.

First, there has been a marked increase in the quantity of records. For example, in *Newman v. King County*, King County asserted an administrative inconvenience argument based upon the sheer number of records kept by the County.

Second, agencies fear the potential liability of damages from persons who are identified in the records. Agencies may not realize that agencies are protected from liability for the release of records pursuant to RCW 42.56.060, and therefore cannot face repercussions for the disclosure of public records from a disgruntled third party.

Finally, agencies tend to be less receptive to public disclosure due to the general notion that "outsider interference", i.e., by the public, should be limited.

These concerns underlie the constant struggle between full disclosure to the public and adherence to the duties of agencies to withhold information exempt from disclosure per statute. Agency lawyers face particular difficulties as they counsel agency officials who may not understand the repercussions from failure to adhere to the open government laws as well as public pressure to disclose potentially damaging records.

This overview discusses these concerns as well as the ethical considerations that arise in the context of the Washington Public Records Act and the Open Public Meetings Act.

AGENCY LAWYERS SHOULD BE GUIDED BY LAWYERS' UNIQUE ADDITIONAL ROLE AS A LAWYER FOR THE PUBLIC

As noted by the Minnesota Supreme Court:

> "… the attorney-client relationship is subtly different for the government attorney. He or she has for a client the public, a client that includes the general populace even though this client assumes its immediate identity through its various governmental agencies."— *Humphrey v. McLaren, 402 N.W. 2d 535 (Minn. 1987).*

Specifically, the Attorney General, as the lead advocate for the people, is "the law officer of the people, as represented in the state government, and its only legal representative in the courts." *Gergus v. Russell, 110 N.E. 30 (Ill. 1915).*

Within each individual agency, the attorney that represents the agency "is a protector of the public interest." *People ex. rel. Deukmejian v. Brown, 624 P.2d 1206 (Cal. 1981).*

As an attorney acting on behalf of the government, the attorney must adhere to "…the goals of a governmental client necessarily include[ing the] pursuit of the public interest" (RESTATEMENT OF THE LAW GOVERNING LAWYERS § 97 (2000)). This includes the "government lawyers' challenge to identify who they represent — or, perhaps more accurately, what set of interests the lawyers serve." (ABA/BNA Lawyers Manual On Professional Conduct, No. 225, 91:4101 (Mar. 28, 2001)).

Therefore, a government lawyer must consider the public's interests as reflected in the Public Records Act and the Open Public Meetings Act:

> "The people of this state do not yield their sovereignty to the agencies, which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and informed so that they may retain control over the instruments they have created."(RCW 42.30.010 (the Open Public Meetings Act)

The Public Records Act includes the same text and adds the following:

> "[The Public Records] chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy." (RCW 42.56.030).

Ultimately, "the purpose of the Public Disclosure Act (PDA) is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions." *Kleven v. City of Des Moines, 101 Wn. App. 284 (2002).*

The Washington Rules of Professional Conduct further implicate a lawyer's responsibility to represent the public's interest as well as the agency's interest.

First, RPC 1.1 states that "a lawyer shall provide competent representation to a client, including sufficient legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Agency lawyers, as part of their public responsibility, must therefore have working knowledge of the public records and public meetings statutes and the public policy underlying those statutes. The attorney must feel free to advise public agencies of the necessity of providing access even though the desires of agency officials may be different.

Second, RPC 1.3 mandates that a lawyer act with reasonable diligence and promptness with respect to representing a client. RPC 3.2 also compels a lawyer to make "reasonable efforts to expedite litigation consistent with the interests of the client." The public has an interest in having public records requests and litigation decided expeditiously as possible, which is supported by RCW 42.56.550. Therefore, the agency lawyer may be required to work against a natural tendency on the part of agency officials to delay a decision to release or not release a record to adhere to the strict timelines of the Public Records Act. Moreover, an agency lawyer may need to consider whether the public interest is served by initiating an action seeking an injunction against the agency to prohibit the agency from releasing a public record. See *Soter v. Cowles Publishing Company, 131 Wn. App. 882, 907 (2006)*.

GENERAL ETHICAL CONSIDERATIONS

The Public Records Act includes two key exemptions that raise ethical considerations for government attorneys: the work product exemption and the "other statutes" exemption, which includes the attorney-client privilege as codified at RCW 5.60.060(2)(a). See, e.g., *Hangartner v. City of Seattle, 151 Wn.2d 439, 90 P.3d 26 (2004*).

The work product exemption is codified at RCW 42.56.290. The exemption covers two general types of information:

> (1) those records that are relevant to a controversy to which an agency is a party; and (2) records that would not be available to another party under the rules of pretrial discovery. RCW 42.56.290.

The exemption thus echoes the standards of the Civil Rules:

> (1) the mental impressions, conclusions, opinions or legal theories of an attorney;
> (2) other materials assembled by an agency lawyer if the agency has a reasonable expectation that litigation will be commenced; and
> (3) records may be available if the party seeking discovery has substantial need of the materials in the preparation of his case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

This exemption is only applicable to reasonably anticipated litigation and does not protect records prepared for some future, hypothetical dispute with a third party. *Limstrom v. Ladenburg, 110 Wn. App. 133, 39 P.3d 351 (2002)*; *Yakima Newspapers, Inc. v. City of Yakima, 77 Wn. App 319, 890 P.2d 544 (1995)*.

Recently, Division III of the Washington Court of Appeals addressed the scope of the work product exemption. See *Soter v. Cowles Publishing Co., 131 Wn. App. 882 (2006)*. In Soter, the court analyzed various methods in which documents, which were protected by the work product rule, could be discovered under the Public Records Act.

The Court of Appeals held, in relevant part, that:

> (1) the requested records, which consisted of all records related to the death of a child on a school field trip, constitute attorney work product, exempt from disclosure under RCW 42.17.310(1)(j); and
>
> (2) the "substantial need" exception to the work product doctrine does not apply to work product that is a public record under the Public Disclosure Act.

The protection of materials which are subject to the attorney-client privilege arises from a 2004 Supreme Court decision, *Hangartner v. City of Seattle, 151 Wn.2d 439, 90 P.3d 26 (2004)*. Within the attorney-client privilege, a record, which is prepared as communication between an attorney and a client, may not be disclosed. *Id. at 452*. When an individual agency attempts to prevent disclosure of a document by improperly alleging the attorney-client relationship, they can be held to have acted in bad faith, which will affect the amount of statutory penalties for an improper failure to disclose. *Id*.

Likewise, the Open Public Meetings Act exempts from the public those meetings that are held in executive session (RCW 42.30.110(1)(i)). This exemption is limited to discussions with legal counsel and cannot be used to inhibit public access to meetings of a governing body of an agency. Furthermore "this subsection does not permit a governing body to hold an executive session solely because an attorney representing the agency is present." (RCW 42.30.110(1)(i)).

In order to convene an executive session, the discussions must involve an agency enforcement action, litigation, or potential litigation "when public knowledge regarding the discussion is likely to result in an adverse legal or financial consequence to the agency." *Id*. In order for the litigation to be considered "potential" it must have either been specifically threatened or the agency is required to reasonably believe that an action may be commenced against the agency. Any potential adverse legal or financial consequences that may potentially arise must be viewed from an objective standard and not from the subjective belief of the agency.

THE RULES OF PROFESSIONAL CONDUCT APPLICABLE TO THE OPEN MEETINGS AND PUBLIC RECORDS CONTEXT

RPC 3.6 states that:

> A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

This rule does not provide a basis for exempting disclosure of public records. The limitation on extrajudicial statements under RPC 3.6 is only applicable to those statements that can potentially be disseminated to the public and can potentially affect an adjudicative proceeding. Generally, a statute can only provide the basis for a public records exemption, not court rules such as the Rules of Professional Conduct, however, in *O'Conner v. DSHS*, the rules of civil procedure were applied in examining the work product exemption under RCW 42.17.310(1)(j). *O'Conner v. DSHS, 143 Wn.2d 895 (2001)*.

RPC 3.7 prohibits a lawyer from acting as an advocate at a trial in which the lawyer or other lawyer in the same firm is likely to be a necessary witness, except under certain circumstances.

This Rule presents a limitation in the Open Meetings context for a lawyer who is present at a disputed executive session of an agency under RCW 42.30.110(i) or a lawyer whose work product is in dispute under RCW 42.56.230 and whether they can represent the agency in an action disputing whether those exceptions apply.

RPC 4.2 states that:

> [I]n representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. While this rule does impair a lawyer's communication with another lawyer's client, it does not preclude a lawyer representing a public agency from responding to a person making a public record request prior to the time the reporter, or other requester has contacted a lawyer to represent the requester concerning the public records request

RPC 2.1 states:

> [I]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the situation.

Given the "public interest" nature of agency lawyer's representation, such lawyers should feel free to give candid advice about Open Public Meetings and the Public Records Act implications of an agency action, including the social underpinnings and philosophy of these two statutes.

Under RPC 1.6, "a lawyer shall not reveal confidences or secrets relating to the representation of a client." An unanswered question is whether this attorney-client privilege protects general advice that an agency lawyer renders to an agency as to how it should conduct business as opposed to advice on a specific legal issue or litigation. The "public interest" nature of agency lawyers' representation suggests that the application of the attorney-client privilege in this area of general advice should be limited.

The Seventh Circuit has commented:

> First, government lawyers have responsibilities and obligations different from those facing members of the private bar. While the latter are appropriately concerned first and foremost with protecting their clients – even those engaged in wrongdoing – from criminal charges and public exposure, government lawyers have a higher competing duty to act in the public interest. *In re a Witness, 288 F.3d 289 (7th Cir. 2002).*

RPC 3.4, in pertinent part, states that a lawyer shall not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. This ethical requirement must be read in conjunction with RCW 42.56.100 in the Public Records context:

> If a public record request is made at a time when such record exists but is scheduled for destruction in the near future, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives shall retain possession of the record, and may not destroy or erase the record until the request is resolved.
> RCW 42.56.100.

This is also prevalent in the requirement under RCW 42.56.210, which states that exemptions under the Public Records Act are inapplicable to the extent that information, the disclosure of which would violate privacy or vital governmental interests, can be deleted from the specific records sought. Thus, rather than denying access to the complete record, RPC 3.4 and RCW 42.56.210 compel a lawyer representing a governmental agency to be aware that redaction of a record is a possible solution to a public records request.