



Legal Ethics: Advising a Politically Charged or “Split” Board

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Presented at the 2017 School Law Practice Seminar, October 19-21, Chicago, IL

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Ethical Challenges of Representing “Split” and Politically Charged Boards¹

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When President George W. Bush’s Defense Secretary Donald Rumsfeld famously observed that “democracy is messy” and “stuff happens,” he was referring to the looting of the Iraqi National Museum, not the internal battles of our local school boards. But when it comes to “split boards,” with sharply divided factions continuously vying for control, all too often the same holds true. Recent headlines from coast² to coast³ evidence the tension and turmoil plaguing many of our school boards. This article will address the ethical challenges we face representing them as board counsel.

The Split Board

No one can seriously dispute that the public interest is well served when a board conducts itself as a cohesive team in an atmosphere of mutual trust. Unfortunately, that ideal is not always attainable, and the law certainly does not require it. To begin with, we must be mindful that the problem is not that a board is “split” *per se* or infused with politics. After all, no one complains about a “split Congress,” or a “split town council” because, in government circles, that is the norm – so much so that overwhelming domination by one political group is often viewed as unhealthy.

¹ This is an updated version of a presentation paper from the 2010 COSA School Law Seminar.

² “Turmoil Continues at Sonoma School Board,” Sonoma Index-Tribune, June 9, 2017, <http://www.sonomanews.com/news/7079883-181/turmoil-continues-at-sonoma-school?artslide=0>; “Herhold: Insulting Emails Exacerbate Morgan Hill School Board Turmoil,” The Mercury News, December 16, 2015, <http://www.mercurynews.com/2015/12/16/herhold-insulting-emails-exacerbate-morgan-hill-school-board-turmoil/>.

³ “Bridgeport School Board In Turmoil,” Connecticut Post, October 9, 2016, <http://www.ctpost.com/local/article/Bridgeport-school-board-in-turmoil-9956900.php>.

Since school boards are considered non-partisan in most jurisdictions, there is a sense in some quarters that sharp disagreement between competing factions is “bad boardsmanship.” That is a value judgment beyond the scope of this article but, so far as the law is concerned, there is nothing improper about a majority control group on a school board exerting its will over the rest of the board, as long as the board members in the minority are not denied their lawful right to participate in the decision-making process.

What sort of “stuff happens” on split boards to cross the line into unlawful or unethical conduct? A common scenario is where a controlling faction privately makes decisions on important matters in advance of the meeting where they are to be voted on, based on information withheld from the rest of the board. A close second is where the majority allows one member of the group to function as a “one man board” with the rest of the coalition serving as nothing more than a rubber stamp; minority members are frozen out of the process completely. These behaviors present grave legal and ethical risks for board members who engage in them.

In many jurisdictions, there is nothing unlawful or improper about board members privately conferring with each other about board business between meetings, and it is common practice there for board members to individually discuss board matters. But the democratic system breaks down when a majority of the board communicate with each other, and make decisions, in secret to the exclusion of their colleagues. This principle is embedded in many states’ open meetings statutes, which prohibit a board majority from meeting or communicating with each other as a group except at a meeting on notice to all members and the public.

Obviously, it would be unlawful in many jurisdictions for a majority of board members to hold a private caucus down at the local diner, but other, less conspicuous, avenues of communication pose similar risks. For example, New Jersey’s Open Public Meetings Act includes in its definition of “meeting” any “gathering” of a majority of board members, whether corporeal or by means of communication equipment,”⁴ which most certainly includes the Internet, so the circulation of e-mails that amount to an

⁴ N.J.S.A. 10:4-8(b).

interactive discussion in real time, or anything close to it, is as much of an unlawful “meeting” as if the discussion occurred face-to-face.

Communications with the board attorney are another area of potential abuse, since matters in dispute within the board often turn on counsel’s advice about whether a course of action favored by the majority is “legal.” As one federal judge aptly put it, “in the law, ... it is often how the question is framed that determines the answer that is received.”⁵ Sometimes, those in the controlling group will pose an overly narrow question to the attorney entirely out of context, omitting relevant information that would alert the attorney that the question itself is beside the point of the legal issues truly at hand. At other times, legal advice that is not to the majority’s liking may be inaccurately reported to the rest of the board, or suppressed altogether. As will be discussed below, experienced board attorneys know that their client is the board as an entity, not the board president or a majority faction, and will do their best to avoid being manipulated by asking for additional background information when necessary, and by taking steps to assure that their advice is accurately reported to the full board.

Abusive behavior is by no means the exclusive province of the board majority. The most common tactic by those in the minority is attempting to undermine the will of the majority by leaking confidential board information to those outside the board circle, or to the public at large. (Ironically, in our experience, those who have been the most prolific “leakers,” when in the minority, are the ones who complain the loudest about leaks when they achieve a controlling position on the board.) New Jersey’s School Ethics Act, for example, requires board members to “hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools.” When private matters are legitimately discussed in closed session, or shared with the board members in the form of confidential documents, only the board as a whole can waive that confidentiality (and perhaps not even the board, if the privacy rights of other parties are at stake), not an individual board member.

⁵ *Taxman v. Board of Education of the Township of Piscataway*, 91 F. 3d 1547, 1567 (3rd Cir. 1996)(Sloviter, C.J., diss.), *certiorari granted* 521 U.S. 1117 (1997), *appeal dismissed* 522 U.S. 1010 (1997).

A single member may attempt to hijack the board with sneaky, disingenuous or bullying behavior that threatens the board's ability to conduct business. Sometimes, these outliers can be counseled back into their lane by effective board leadership.⁶ But the First Amendment grants these "rogue" members broad license to conduct themselves obnoxiously, and boards that allow themselves to be baited into overreacting risk significant legal exposure.⁷

The bottom line is that democracy in local board governance may indeed be messy at times but, as long as all board members discharge their ethical responsibilities, and honor majority rule while respecting minority rights, the system will function as it should.

The Role of the Board Attorney

The shenanigans that typify many split boards pose ethical and personal dilemmas for the attorneys who represent them. Lawyer-client relationships often result from and, over time, usually develop into close and enduring bonds with those responsible for appointing and retaining the attorney. The problem is that those individuals' interests may at times conflict with those of the board itself, and the attorney's natural desire not to alienate them cannot be allowed to compromise his professional obligations.

Who Is The Client?

The starting point for charting a course of ethical behavior is to identify, and never forget, who the client is. "No universal definition of the client of a governmental lawyer is possible[,]"⁸ but for school board lawyers

⁶ See Michael T. Adamson, *The Rogue Member in the Boardroom*, <http://www.aasa.org/SchoolAdministratorArticle.aspx?id=5524> (AASA 2009).

⁷ See Karla Schultz, Mark Tilley, *What About My Rights? School Board Members and the First Amendment* (NSBA 2016).

⁸ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (hereinafter RESTATEMENT) § 97, comment (c), Identity of a governmental client. See also Kathleen Clark, *Conflicts, Confidentiality and the Client of the Government Lawyer Part I*, *The Public Lawyer*, Vol. 21, No. 1 (Winter 2013).

in most states, that issue is resolved by the version of the American Bar Association's Model Rule 1.13 and its accompanying comments, in effect in that jurisdiction.⁹ The cornerstone of Rule 1.13 is the concept that the school

⁹ The full text of Model Rule 1.13 is as follows:

Rule 1.13 Organization As Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if:

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

district entity is the client, and that the board members, administrators and employees with whom the board attorney comes in contact are “constituents” through whom the district acts, but whose personal interests may be or may not be in sync with those of the district. The school board functions essentially as a corporate board of directors, and oversees the operation of the district through a chain of command starting with the superintendent, who functions as the C.E.O.

At the board level, decision-making occurs by majority rule under its prevailing version of parliamentary procedure according due respect to procedural rights of board members in the minority, and the board attorney is duty bound to implement the will of the majority, subject to his right to resign or his whistle blowing obligations discussed below. The same holds true for instructions from the superintendent or other administrators acting within the framework of the established command structure. Generally speaking, any communications with the board attorney from board members or administrators are solely in their representative capacities as agents of the district. A board attorney may have attorney-client relationships with district “constituents” on personal matters unrelated to board business,

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

provided that the nature of the particular representation does not give rise to a conflict of interest.

Duty of Loyalty

In a common “split board” scenario, the board attorney is asked to assist a board majority faction in advancing its agenda when he has reason to know that a minority faction has been excluded from the lawfully-prescribed decision-making process. Here we must draw a distinction between the majority’s right to select a board attorney with whom it feels comfortable, and that attorney’s obligation to honor majority rule on the one hand, and the use of that attorney to assist in violating the minority faction’s rights on the other.

Once appointed, the attorney cannot be a party to any course of dealing that would undermine legal “open meeting” requirements, or otherwise disenfranchise individual board members in a manner that violates the law. Wherever the attorney’s personal sympathies or loyalties may lie, she is duty bound to advise the “constituents” with whom she deals that the client’s interests require adherence to the lawfully-prescribed decision-making process.

Another precept that comes into play is Model Rule 1.7’s prohibition on conflicts of interest, which is not limited to situations where two clients’ interests are adverse, but also applies where “there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer.” Model Rule 1.7(a)(2).¹⁰ Comment 8 to the Rule provides:

¹⁰ The full text of Model Rule 1.7 is as follows:

Rule 1.7 Conflict Of Interest: Current Clients

(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

Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

When a board attorney's personal allegiance to an individual or faction on the board threatens to compromise his objectivity to the point

(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.

where “there is a significant risk” of a “material limitation,” the attorney no longer can properly discharge his duties to the client.

A New Jersey federal court addressed the potential for conflicts in a case involving a disappointed applicant for the board attorney position.¹¹ Two days before a meeting where the board was to select its legal counsel, one of the candidates sued the board on behalf of one of its members, challenging the right of some sending district representatives to vote on the board attorney appointment. The attorney failed to secure the position, and even remained counsel of record in the action against the board for some time afterward, but commenced a federal court lawsuit on his own behalf claiming that the denial of the appointment violated his constitutional rights.

The court rejected the claim, finding that the attorney had a concurrent conflict of interest that would have precluded him from serving as board attorney had he been appointed:

There is no doubt here that on one hand Plaintiff sought to advocate against the Board, and on the other he sought to represent it. Even though Plaintiff maintains that his suit was against some subset of the Board, that position is untenable. Plaintiff essentially asks the Court to believe that an attorney can sue the body of a person, but not the head. He believes that telling part of a public entity how to act is somehow different from telling the whole entity how to act. The Court does not share that belief. Plaintiff’s advocacy against the Board and subsequent attempt to join it is a prohibited concurrent conflict.¹²

At times, when control of a board shifts from one faction to another, a board attorney may find herself aligned, in reality or perception, with a minority wing of the board who may pressure the attorney to help them undermine the new majority’s political or policy agenda through the premature leaking of confidential information to the public, or similar

¹¹ *Gallagher v. Atlantic City Board of Education*, 2010 WL 572160 (D.N.J. 2010).

¹² *Id.* at *3.

tactics. The same duty of loyalty to the entity as a whole, discussed above, applies with equal force.

Ethical issues also arise when the board attorney is called upon to rein in the misbehavior of the “rogue” board member. Generally speaking, there is no *per se* conflict in representing the board against one of its members whose activities are undermining the board’s interests. That is because the school district is the client, and there is no personal attorney-client relationship with individual board members in their capacity as such. There may well be a “material limitation” conflict, however, depending on the nature of the attorney’s relationship with that board member.

Attorney-Client Privilege

A board attorney’s allegiance to a majority faction also implicates the attorney-client privilege, when the board majority pressures the attorney not to share their communications with the minority. Although the case law remains sparse, the weight of authority holds that public entities do enjoy an attorney-client privilege,¹³ which may be asserted or waived only by the entity itself through those authorized to do so on its behalf.¹⁴ Since the board attorney’s client is certainly not the majority faction but the board as a whole, there is no legal authority that would permit the attorney to deny the board minority access to this information.

In a Sixth Circuit case,¹⁵ a city and its former police director were defendants in a § 1983 failure-to-promote case. When the police director

¹³ “Unless applicable law otherwise provides, the attorney-client privilege extends to a communication of a governmental organization as stated in § 73 and of an individual employee or other agent of a governmental organization as a client with respect to his or her personal interest as stated in §§ 68-72.” RESTATEMENT §74 (2000). The nature and extent of the attorney-client privilege in the public sector was explored in an earlier article. See David B. Rubin, *The Attorney-Client Privilege and the School Board Attorney: Pitfalls and Pointers*, School Law in Review 2008 (NSBA) at 59.

¹⁴ “The privilege for governmental entities may be asserted or waived by the responsible public official or body.” RESTATEMENT § 74, comment e.

¹⁵ *Ross v. City of Memphis*, 423 F.3d 596 (6th Cir. 2005). See also *U.S. v. Wells Fargo Bank, N.A.*, 132 F.Supp.3d 558, 563-64 (S.D.N.Y. 2015)(citing *Ross*).

asserted qualified immunity, relying on legal advice he had received from the city's attorneys, the city objected to the attorneys' depositions on the ground that there was an attorney-client privilege that only the city could waive. The court found that the police director had no standing to waive the city's attorney-client privilege, even if revealing those communications was essential to his defense.

A Washington federal court rejected a federal agency officer's claim of attorney-client privilege, in a challenge to an indictment based on the testimony of two agency lawyers who revealed communications he had with them concerning the behavior giving rise to the charges.¹⁶ The court rejected the official's claim of privilege because he was not the "true client," even though he was communicating with the attorneys with the expectation of confidentiality. The agency was the client and, as such, the only party with standing to invoke or waive the privilege.

In another ruling involving waiver of the privilege, an Illinois federal court considered a school superintendent's attempted waiver of the attorney-client privilege so she could testify to communications between her and the board's counsel in support of an advice-of-counsel defense:¹⁷

[The Superintendent] seeks a blanket waiver of the attorney-client privileged communications between her and [the Board] attorneys in order to advance an advice of counsel defense, but the Board wishes to assert privilege. A threshold matter is whether [the Superintendent] is authorized to waive this privilege. [The Board attorney] has been employed as labor counsel to the Board at all times relevant to the defense of this matter, and a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. [The Superintendent] asserts that she is a "joint client" of [the Board attorney]. However, [she] was employed as Superintendent of the School District, and a corporate officer, such as a Superintendent, is an agent of the Board. As a

¹⁶ *U.S. v. Ferrell*, 2007 WL 2220213 (W.D. Wash. 2007).

¹⁷ *Rojicek v. River Trails School Dist. 26*, 2003 WL 1903987 (N.D. Ill. 2003).

rule, a corporate officer may only assert a personal attorney-client privilege for communications she made to her own counsel concerning personal liability unrelated to the corporation or unrelated to her role as a corporate officer. . . . However, all communications that were made to [the Board attorney] were related to the District and [her] role as Superintendent. Her communications were thus on behalf of the organization, not on her personal behalf. Accordingly, the attorney-client privilege at issue here is exclusively vested in the Board, and [she] is not authorized to waive the privilege without the Board's consent.

A Pennsylvania federal court also addressed whether a school board president had the power to waive the board's attorney-client privilege by releasing a confidential memorandum to an outside party.¹⁸ After reviewing state statutes on the powers of the board president, the court concluded that unilateral release of information covered by the board's attorney-client privilege without authority from the board was not among them. The court's analysis was consistent with the Restatement's observation that the identity of the government official or body authorized to waive the privilege "is a question of local governmental law."¹⁹

Some cases have considered whether an attorney's communications in the presence of certain employees who are not members of the governing body waives the attorney-privilege. Resolution of that issue implicates the Supreme Court's ruling in *Upjohn Co. v. United States*,²⁰ which held that a client-corporation did not necessarily waive the attorney-client privilege when one of its non-"control group" employees communicated with the corporation's attorney.²¹ The Court did not protect all such communications,

¹⁸ *Sampson v. School Dist. of Lancaster*, 262 F.R.D. 469 (E.D. Pa. 2008).

¹⁹ RESTATEMENT § 74, comment e. See *Miles-McClellan Constr. Co. v. Westerville Bd. of Educ.*, 2006 WL 1817223 (Ohio Ct. App. 2006)(finding that even though an Ohio statute provided for school board approval of all contracts, a school district's attorney could waive the attorney-client privilege as a "properly-appointed agent").

²⁰ 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).

²¹ *Upjohn*, 449 U.S. at 395, 101 S.Ct. at 685.

but held that the privilege applied to the communication at issue in that case because: (1) the employees knew their information was needed to supply a basis for legal advice; (2) they were directed by their supervisors to provide such information; (3) their information was helpful in enabling the attorney to advise the client; and (4) the information related to matters within the scope of the employees' employment.²²

The *Upjohn* test was invoked by an Illinois federal court in an age discrimination case brought by a former school district employee,²³ who claimed that the presence of the superintendent, assistant superintendent and business manager at strategy sessions concerning her amounted to a waiver of the district's attorney-client privilege. The court found that the record before it did not adequately address the *Upjohn* factors, and remanded for development of a full record.

In a New Jersey attorney ethics opinion, a board member asked the board attorney to draft a resolution censuring a fellow board member.²⁴ He gave the attorney background information to help draft the resolution, but asked the attorney to keep it confidential, as he was not sure he was going to introduce it. The attorney did as requested but, when later directed by the board to reveal the draft resolution, sought an advisory opinion from state ethics authorities on his responsibilities. The ethics panel left no doubt about who was the "true client" in this instance:

The inquirer makes clear that the board member did not consult him as his individual attorney, but rather as the attorney for the board, to have the attorney draft a resolution for the board. The member was not, therefore, in a position to demand secrecy or confidential treatment as to matters germane to the board's

²² *Upjohn*, 449 U.S. at 394, 101 S.Ct. at 685; see also *Elgin Fed. Credit Union v. Cantor, Fitzgerald Sec.*, 91 F.R.D. 414, 418 (N.D.Ga.1981) (discussions by internal accountant and lower-level managers with employer-client's attorney at board meeting protected under *Upjohn*).

²³ *Bobkoski v. Board of Educ. of Cary Consol. School Dist.* 26, 141 F.R.D. 88 (N.D. Ill. 1992).

²⁴ *New Jersey Advisory Committee on Professional Ethics Opinion 327* (Apr.8, 1976).

business. If the attorney had understood that the member was demanding secrecy or confidential treatment as against the board, he should have made it clear that he could not accept such confidences.

As for keeping certain board members out of the information loop, split board majorities should be mindful of a New Jersey School Ethics Commission case where the chairperson of a three-member charter school board confronted the school's director with a severance agreement that he demanded she sign or face termination.²⁵ The chairperson had instructed the board attorney to prepare the agreement in advance, and had shared his intentions ahead of time with one of the other board members, but not with the third member because he did not trust her to keep the matter confidential. The Commission held, in no uncertain terms, that "under New Jersey's Code of Ethics for School Board members, one board member does not have the right to determine that another board member will be denied access to the same information as the other board members." Although the board attorney's behavior was not directly implicated in the case, he clearly placed himself in a position of peril by unwittingly aiding the board chairman in the commission of an ethics violation.

Board Attorney as Political or Policy Advisor

Board attorneys who allow themselves to function as "consigliere," confidante or political strategist for the controlling wing of a divided board may find themselves in dangerous waters. Clients often look to their attorneys for more than just legal advice, and there is nothing *per se* unethical about an attorney offering other non-legal guidance to help clients accomplish their goals. In fact, ABA Model Rule 2.1 takes a broad view of the attorney's advisory role: "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 client's situation." The comments to the rule explain:

Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or

²⁵ *In the Matter of Paul Schaefer*, New Jersey School Ethics Commission Docket No.'s C03/C04/C06/C07/C12-03 (September 23, 2003).

effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

The Second Circuit expounded at length on the point, in overturning a discovery order requiring disclosure of e-mails and other communications between an assistant county attorney and county officials:

Fundamentally, legal advice involves the interpretation and application of legal principles to guide future conduct or to assess past conduct....It requires a lawyer to rely on legal education and experience to inform judgment....But it is broader, and is not demarcated by a bright line. What Judge Wyzanski observed long ago applies with equal force today:

The modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable. And it is in the ... public interest that the lawyer should regard himself as more than [a] predictor of legal consequences. His duty to society as well as to his client involves many relevant social, economic, political and philosophical considerations. And the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice.

. . . .

The complete lawyer may well promote and reinforce the legal advice given, weigh it, and lay out its ramifications by explaining: how the advice is feasible and can be implemented; the legal downsides, risks and costs of taking the advice or doing otherwise; what alternatives exist to present measures or the measures advised; what other persons are doing or thinking about the matter; or the collateral benefits, risks or costs in terms of expense, politics, insurance, commerce, morals, and appearances. So long as the predominant purpose of the

communication is legal advice, these considerations and caveats are not other than legal advice or separable from it. The predominant purpose of a communication cannot be ascertained by quantification or classification of one passage or another; it should be assessed dynamically and in light of the advice being sought or rendered, as well as the relationship between advice that can be rendered only by consulting the legal authorities and advice that can be given by a non-lawyer. The more careful the lawyer, the more likely it is that the legal advice will entail follow-through by facilitation, encouragement and monitoring.

It is hoped that legal considerations will play a role in governmental policymaking. When a lawyer has been asked to assess compliance with a legal obligation, the lawyer's recommendation of a policy that complies (or better complies) with the legal obligation— or that advocates and promotes compliance, or oversees implementation of compliance measures—is legal advice. Public officials who craft policies that may directly implicate the legal rights or responsibilities of the public should be encouraged to seek out and receive fully informed legal advice in the course of formulating such policies....²⁶

Lawyers serving as political or policy advisors to their boards still face significant risks. One New York federal court held that the attorney-client privilege does not extend to incidental legal advice given by an attorney acting outside the scope of his role as an attorney, where the predominant purpose of the advice is non-legal.²⁷ In such cases, it is appropriate for the court to conduct *in camera* review and order redaction as necessary.²⁸

²⁶*In re County of Erie*, 473 F.3d 413,419-22 (2nd Cir.2007)(footnotes, citations, and internal quotation marks omitted).

²⁷ *Raba v. Suozzi*, No. CV-06-119, 2007 WL 128817 (E.D.N.Y. 2007).

In fairness to board members who may not realize it, the attorney has a duty to apprise them that their communications may not necessarily be insulated from disclosure, so that they are not misled by the naturally presumed confidentiality that attends the attorney's presence in the room.²⁹ Attorney-client privilege aside, and regardless of whether advice is legal in the strict sense, the board attorney may not use his position to counsel a majority in advancing its own interests to the detriment of the minority wing of the entity she represents.

Whistle Blowing Obligations

Attorneys for split boards may at times learn of actions by the board majority or minority that are unlawful, or otherwise contrary to the interests of the board as a whole. The right or, at times, the obligation of government lawyers to blow the whistle on their clients' misconduct has received much attention in the scholarly literature,³⁰ and was dwelt on at length during the ABA's Ethics 2000 Commission's study of Model Rule 1.6 dealing with

²⁸ See also, *Cohen v. Middletown Enlarged City Sch. Dist.*, No. 05-Civ.3633, 2007 WL631298 (S.D.N.Y. 2007); *Doctor John's Inc. v. City of Sioux City, Iowa*, No. C03-4121-MWB, 2007 WL438931 (N.D. Iowa 2007).

²⁹ See *New Jersey Advisory Committee on Professional Ethics Opinion 327*, *supra* ("If the attorney had understood that the member was demanding secrecy or confidential treatment as against the board, he should have made it clear that he could not accept such confidences.").

³⁰ Mika C. Morse, *Honor or Betrayal? The Ethics of Government Lawyer-Whistleblowers*, 23 *Geo. J. Legal Ethics* 421 (2010); Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 *Wash.U.L. Rev.* 1033 (2007); Kathleen Clark, *Lawyer Confidentiality, Open Government Laws and Whistleblowing, Part II*, *The Public Lawyer*, Summer 2013; Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 *GEO. J. LEGAL ETHICS* 291 (1991); Charles S. Doskow, *The Government Attorney and the Right to Blow the Whistle: The Cindy Ossias Case And Its Aftermath (A Two-Year Journey To Nowhere)*, 25 *WHITTIER L. REV.* 21 (2003); James E. Moliterno, *The Federal Government Lawyer's Duty to Breach Confidentiality*, 14 *TEMP. POL. & CIV. RTS. L. REV.* 633 (2005); Jesselyn Radack, *The Government Attorney-Whistleblower and the Rule of Confidentiality: Compatible At Last*, 17 *GEO. J. LEGAL ETHICS* 125 (2003).

client confidentiality, and Model Rule 1.13 involving representation of organizational clients.

The Ethics 2000 Commission originally recommended changes in Rule 1.6 to give attorneys more discretion to disclose client confidences to prevent or remedy fraud. These recommended changes included amendments to subsection (b) of the Rule, permitting an attorney to reveal information to the extent the lawyer reasonably believes necessary to prevent or remediate substantial injury to the financial interests or property of another, in furtherance of which the client has used or is using the lawyer's services. The ABA House of Delegates initially rejected these proposals, but they were revived by the Task Force following the WorldCom, Tyco, and HealthSouth scandals, and adoption of the Sarbanes-Oxley Act. The Task Force also recommended changes to subsections (b) and (c) of Model Rule 1.13, to require "reporting up," and to allow "reporting out," in appropriate cases.

The final version of Model Rule 1.6(b) provides that an attorney "may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; [and] (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services."

There has been much discussion in the legal and academic community about whether government attorneys should be given greater leeway than their private sector colleagues to blow the whistle on unlawful or immoral conduct within the agencies they serve, even if otherwise confidential client information is disclosed.³¹ Hawaii's version of Rule 1.6 goes further than any other state in allowing government attorneys to blow the whistle on their clients. Under that state's rule:

³¹ See, e.g., *Clark I*, *supra* n. 4; Mika C. Morse, *Honor or Betrayal? The Ethics of Government Lawyer-Whistleblowers*, 23 *Geo. J. Legal Ethics* 421 (2010).

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent a public official or public agency from committing a criminal or illegal act that a government lawyer reasonably believes is likely to result in harm to the public good; [or] . . . to rectify the consequences of a public official's or a public agency's act which the government lawyer reasonably believes to have been criminal or illegal and harmful to the public good.³²

These whistle blowing obligations should not be misconstrued as a license for board attorneys to reveal client confidences whenever they believe their board's actions are not serving the public's best interests. Comment 6 to Model Rule 1.6 makes clear that “[t]he requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.” Counsel should also be mindful of Model Rule 8.4(a)'s prohibition against “violat[ing] or attempt[ing] to violate the Rules of Professional Conduct, knowingly assist[ing] or induc[ing] another to do so, or do[ing] so through the acts of another[.]” The consequences for well-meaning attorneys who violate this rule can be severe.³³

Conclusion

Split boards present legal, ethical and personal challenges for the attorneys who represent them. None of us cares to bite the hand that feeds us, but our professional responsibilities at times require that we place the interests of the board as an institution above our own, and those of the board members or administrators whom we have to thank for the engagement. By remembering at all times who our client is, and pressing the “pause button” to think a situation through if we are unsure, we cannot fail.

³² HAW. RULES OF PROF'L CONDUCT R.1.6(b)(5), (6) (2014).

³³ For an in-depth discussion of these risks, see David B. Rubin, *Confidentiality v. Transparency: The Highwire Act of the Government Lawyer* (COSA 2014).