



Representing School Districts: Who is the Client?

By David B. Rubin



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Representing public school districts is professionally challenging on many levels. Board attorneys must be conversant in the legal complexities any corporate entity faces in providing an important public service in a highly regulated environment.¹ Then there are the hundreds of state and federal statutes and regulations specific to public education, and the constitutional obligations government agencies must honor when interacting with private citizens. There is also much closer public scrutiny of board attorneys' legal advice these days, now that school districts have become battlefields in culture wars.

One of the most vexing challenges is complying with the ethical obligations the Rules of Professional Conduct impose on counsel for organizational clients in general, and public bodies in particular—first and foremost, knowing who the client is and, as importantly, who it isn't. A mutual understanding of this between lawyer and client, from the outset of the engagement, is critical for staking out the zone of confidentiality at the heart of the relationship, and for detecting any conflicts of interest.

RPC 1.13(a) seems to provide a straightforward answer: "A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents..."²

The duty of confidentiality is owed to a "client,"³ but school board members, superintendents and others who may be the attorney's only contact person with the district sometimes assume, wrongly, that they are entitled to individual privacy in their dealings with counsel. It is the attorney's obligation to dispel any confusion about this by "explain[ing] the identity of the client when the lawyer believes that such an explanation is necessary to avoid misunderstanding on their part."⁴ These individuals must understand that board attorneys deal with them only in their representative capacity as agents of the client—the district—not as clients in their own right.

A 1976 opinion of the Advisory Committee on Professional Ethics (ACPE) provides a textbook example of a school board attorney who lost sight of this.⁵ A board member asked the attorney to draft a resolution censuring a fellow board member, but to keep it confidential between them since he was not sure he was going to introduce it. The rest of the board got wind of it and demanded that the attorney produce the draft. The attorney, believing he was on the horns of an ethical dilemma, sought guidance

from the ACPE on whether he was obliged to honor the board member's confidentiality request. Although the opinion predated the adoption of the RPCs, the committee's response holds true today:

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 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.

The school law bar was thrown a curve last October when the Disciplinary Review Board (DRB) issued a decision casting doubt on long-held assumptions about who the client is, but a recent ACPE opinion has cleared the air and provided much-needed guidance. In *Matter of Supsie*,⁶ the DRB recommended an admonition for a school board attorney who advised the board's majority about a fellow board member's behavior that may have violated the New Jersey School Ethics Act. Citing a 1970 ACPE opinion, the DRB found that "[a]n attorney who represents a municipal body represents not only that body as a whole, but also its 'individual officials...in the performance of their official duties.'"⁷

On that premise, the DRB held that advising the board majority about potentially unethical behavior by another board member violated RPC 1.7's conflict of interest rules because he was asserting the interests of one concurrent client against the interests of another.⁸ The DRB further found that the attorney had a "material limitation" conflict because his conduct posed a significant risk that his representation of the board would be

materially limited by his decision to assist some of its members who sought to investigate a board colleague who was unaware he had been tasked with doing so.⁹

The concept that board attorneys automatically have lawyer-client relationships with individual board members was news to board attorneys around the state, and controversial even within the DRB. Three members disagreed and voted to dismiss the complaint, including the Chair at the time, usually one of the DRB's sternest disciplinarians.¹⁰ Adding to the uncertainty on the governing ground rules, the state Supreme Court summarily dismissed the complaint in a brief order with no explanation.¹¹

Since the Supreme Court's adoption of the RPCs in 1984, board attorneys have properly looked to RPC 1.13 for guidance on who their client is. Subsection (a) clearly states that the client is "the organization." For one limited purpose—contacts by other counsel subject to RPC 4.2 and 4.3—the organization's lawyer is deemed to represent those members of the organization's governing body comprising the "litigation control group." Otherwise, individual board members are not the client, at least not without a specific undertaking to represent them.

That board attorneys do not automatically represent the board's individual members is underscored by RPC 1.13(e), providing that they "*may* also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of RPC 1.7..." (Emphasis added.) "May," in that context, clearly means only if the attorney chooses to do so.

Board attorneys typically do not involve themselves in disputes between individual board members, but there may be occasions where the board's institutional interests require action against a member of its governing body. Some

examples: N.J.S.A. 18A:12-2 provides for removal of a board member who is "interested directly or indirectly in any contract with or claim against the board." N.J.S.A. 18A:12-3 allows for removal of a board member who ceases to reside in the district or fails to attend three consecutive meetings without good cause. A rogue board member's violation of the New Jersey School Ethics Act may be so disruptive that the board feels compelled to authorize the filing of a complaint with the School Ethics Commission. In all of these scenarios, the usual practice had been for boards to seek advice and representation from their general counsel whose client is the district, not the individual board member whose conduct is called into question.

To be sure, board attorneys recuse themselves, as they must, if a real or perceived relationship with the adverse board member materially limits their ability to provide vigorous representation on the issue at hand.¹² But absent a particular relationship giving rise to a material limitation, board attorneys have not understood RPC 1.13 or 1.7 to pose a conflict in representing the board's interests when they clash with those of an individual member.

The DRB's thinking was likely influenced by their perception, clearly spelled out in the decision, that the respondent was, for all intents and purposes, doing the personal bidding of a board president seeking retribution for losing his bid for re-election. (The board attorney involved in the case vigorously denied that charge.) However, their general formulation of board attorneys' ethical responsibilities was far broader than necessary to address that concern, since it suggested that general counsel for a public body may not advise or represent the board in any matter adverse to the interests of one of its members.

Curiously, the DRB's analysis failed to mention, much less explain away, RPC 1.13's clear, unambiguous statement of

who an organizational attorney's client is. What's more, virtually all of the authorities cited by the DRB predated the adoption of the RPCs in 1984, which was concerning in itself because, as the official comment to RPC 1.13 made clear, "[t]his rule, which has no [prior Disciplinary Rule] counterpart, sets forth guidelines for the corporate or other organizational attorney." In other words, previous precedents alone could not be relied upon as authority but must be reviewed against the backdrop of this change in the ethics rules.

The Supreme Court's summary dismissal of the complaint, without explanation, eliminated any precedential weight the DRB's opinion may have had, but also left practitioners uncertain of what the guidelines are going forward. Fortunately, in response to a request for clarification on behalf of board attorneys statewide, the ACPE issued an opinion this past July providing at least some helpful guidance.¹³

The ACPE confirmed the primacy of RPC 1.13's directive that counsel for an organization represents the organization, not the members or officers of its governing body, and that pre-RPC ethics opinions holding otherwise are no longer good law. Honoring a request to investigate wrongdoing by a board member is a "delicate affair," the ACPE observed, but there is no *per se* conflict because that board member is not the attorney's client. Still, attorneys must consider whether their relationship with the individual board member would materially limit their ability to provide competent representation in the matter and bring in special counsel if that is the case. Attorneys also should be certain they have due authority to move forward and must share their findings with the entire board.

The DRB's *Supsie* opinion and the ACPE's clarification focused on conducting investigations, performing research and rendering opinions potentially

adverse to the interests of a board member. What if the board wishes to go further and initiate litigation against that member? Or the board needs to defend litigation that board member may initiate herself?

The ACPE opinion does not squarely address these questions. On one hand, if the individual board member is not a client, as the opinion clearly confirms, there should be no ethical impediment to representing the district in that litigation. Nor would there seem to be any ethical obligation to include that member in strategy discussions with the rest of the board. On the other hand, the opinion holds that if a lawyer conducts an investigation and finds that a member has been engaged in unethical conduct, "the lawyer's recommendation must be made to the entire board and not to only select members of the board." This suggests an ongoing ethical duty of communication with that board member, as is normally required with clients.¹⁴

Whatever the lingering uncertainties about board attorneys' ethical duties when the interests of boards and their members come into conflict, the ACPE's opinion reinforces practitioners' widely held understanding of the organizational lawyer-client relationship since the adoption of RPC 1.13. Going forward, the decision whether to enlist special counsel will appropriately be driven by board attorneys' good faith assessment of any material limitations on their effectiveness and other client-relations considerations, but any without further confusion about who their client is. ■

Endnotes

1. A disclaimer: This article uses the term "Board attorney," the title informally given to attorneys for school districts which, technically, is a misnomer. As discussed below, the client is the school district itself as an entity, not merely the board of

education that functions as its governing body, and certainly not the individual members of the board. In fact, RPC 1.13 authorizes counsel to blow the whistle on boards who engage in serious misconduct that puts the entity at risk. *See* RPC 1.13(c).

2. *See also* RPC 1.13(f) ("For purposes of this rule 'organization' includes any...state or local government or political subdivision thereof[.]")
3. *See* RPC 1.6(a) (Absent certain exceptions, "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation[.]")
4. RPC 1.13(d).
5. *See* ACPE Opinion 327, 99 N.J.L.J. 298 (1976), accessible at tinyurl.com/bdep2rf5.
6. Docket No. DRB-23-091 (October 11, 2023), accessible at tinyurl.com/2afm6tdx
7. *Supsie*, at 25 (quoting ACPE Opinion 174, 93 N.J.L.J. 132 (1970), accessible at tinyurl.com/3skvuem7).
8. *See* RPC 1.7(a)(1) (prohibiting a lawyer from representing a client if "the representation of one client will be directly adverse to another client[.]")
9. *See* RPC 1.7(a)(2) (prohibiting an attorney from representing a client if "there is a significant risk that the representation...will be materially limited by the lawyer's responsibilities to another client...").
10. *See* Charles Toutant, "A Strict Disciplinary is Leaving: What Does This Mean For Lawyer Ethics?" *New Jersey Law Journal* (March 26, 2024).
11. *See* tinyurl.com/2t9z2656.
12. *See* RPC 1.7(a)(2).
13. *See* ACPE Docket No. 07-2024, issued July 9, 2024, accessible at tinyurl.com/2p8yd2c6. Published opinions of the ACPE are binding on ethics committee in disciplinary matters. *See* RPC 1:19-6. Thus far, the ACPE has declined to publish this opinion but has authorized its public dissemination, and board attorneys (including this author) will justifiably regard its guidelines as a safe harbor.
14. *See* RPC 1.4(b) ("A lawyer shall keep a client reasonably informed about the status of a matter..."), even though that board member may be conflicted from discussion or decision-making involving his own personal interests.



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