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# The Professional Responsibility of Lawyers

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## THE PROFESSIONAL RESPONSIBILITY OF LAWYERS

by Louise L. Hill\*

### I. INTRODUCTION

The concepts of "[h]onor, duty, pride, self-satisfaction, [and] justice" should be aspirations for all lawyers engaged in the practice of law.<sup>1</sup> While Inspector General Robert J. DeSousa couched these traits in terms of the government lawyer, they are characteristics for which every lawyer should strive. In responding to the rhetorical question of whether the profession of law has been reduced to a mere trade,<sup>2</sup> the resounding response should be a negative one.

As Inspector General DeSousa noted, the origin of the practice of law as a profession can be traced to medieval times.<sup>3</sup> The ancient legal profession, like theology and the practice of medicine, was regarded as a learned one, and these professions were distinguished from craft and trade associations by the demarcations of society, economy, and education.<sup>4</sup> While the crafts and the learned professions had social, economic, and educational differences, lacking were any significant distinctions in the initial organization within these entities.<sup>5</sup> The special training that was concomitant with each craft or

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<sup>1</sup> Robert J. DeSousa, *Opening Remarks*, 9 WIDENER J. PUB. L. 207, 207 (2000).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Stephen Rubin, *The Legal Web of Professional Regulation*, in REGULATING THE PROFESSIONS 29, 32 (Roger D. Blair & Stephen Rubin eds., 1980). Members of the professions were generally men from leading families who trained in the classics rather than in elaborate apprenticeship programs. Professionals commonly had little regard for the competition and *caveat emptor* of the crafts, because they were not wholly dependent on their professions for their livelihoods. HENRY S. DRINKER, LEGAL ETHICS 5 (1953).

<sup>5</sup> Rubin, *supra* note 4, at 32.

profession, as well as the centrality of licensing, generated solidarity within the various associations' memberships.<sup>6</sup>

Significant attention has been devoted to the matter of defining what constitutes a profession. Dean Roscoe Pound described a profession as

a group of men pursuing a learned art as a common calling in the spirit of a public service—no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose. Gaining a livelihood is incidental, whereas in a business or trade it is the entire purpose.<sup>7</sup>

Perhaps when focusing on attributes that a lawyer should possess, or should strive to possess, lawyers should focus on this spirit of public service. The legal profession sets lofty goals and responsibilities for the government lawyer. These aspirations should not be reserved for only those lawyers in government service.

## II. LOBBYING

Lobbying is an attempt to influence the decisions that government officials make.<sup>8</sup> It serves as an effective way to present views and

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<sup>6</sup> Stanley J. Gross, *The Myth of Professional Licensing*, 1978 AM. PSYCHOLOGIST 1009, 1011 (citing J. GERSTLE & G. JACOBS, *PROFESSIONS FOR THE PEOPLE* 2 (1976)). While professions used licensing arrangements to establish a charter of autonomy, similar control was exercised by craft guilds. Although viewed by some as a way to restrict individuals from freely pursuing occupations, the early regulatory structures served to focus on an entity's expertise, and thereby gave the associations autonomy of control over the individual practices of the occupation. *Id.* at 1011-12. Since the time of these early regulatory structures, the adoption of a special set of rules to regulate members has been a common characteristic of professions. WILBERT E. MOORE, *THE PROFESSIONS: ROLES AND RULES* 116 (1970).

<sup>7</sup> ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953).

<sup>8</sup> Frank J. Connors, *Complying With the Lobbying Disclosure Act of 1995*, 45 PRAC. LAW. 15 (1999). The word "lobbying" refers to the lobby or anteroom outside the chamber where legislators vote on bills. *Id.* at 17. Under the Lobbying Disclosure Act of 1995, a

"lobbyist" is any individual employed or retained by a "client" . . . for financial compensation to perform services including *more than one*

opinions to both legislators and the executive branch.<sup>9</sup> Many, although not all, lobbyists are lawyers.<sup>10</sup>

A great deal of government policymaking involves the flow of information between private groups and public officials.<sup>11</sup> In situations where there exists inequality among the competing interests, a distortion of the political process can result.<sup>12</sup> Lobbying is very different from advocacy in the courtroom, and often a competing interest is not organized or is unknown to the legislators. It stands to reason that "[a]ll points of view on an issue should be sought. All competing interests should have a fair shot at each member's attention and vote."<sup>13</sup>

Regretfully, sometimes lobbyists engage in practices that cross the line from permissible persuasion to impermissible conduct. To prevent corruption in lobbying, federal<sup>14</sup> and state<sup>15</sup> laws now impose

*lobbying contact*, except for an individual whose lobbying activities constitute less than 20 per cent of the time engaged in the services provided by that individual to that client over a six-month period.

*Id.* at 18. A "client" is "any person or entity that employs or retains another person for compensation to conduct 'lobbying activities' . . . on behalf of that person or entity." *Id.* "Lobbying activities" are "lobbying contacts . . . and efforts in support of lobbying contacts, including preparation and planning activities, research, and other background work intended at the time it is performed for use in lobbying contacts." *Id.* A "lobbying contact" is "any oral or written communication to a 'covered official' . . . with regard to: [f]ederal legislation, regulations, or programs; and [t]he negotiation, award, or administration of contracts, grants, loans, permits, or licenses." *Id.* at 17. "Covered officials" include "fairly high-level officers of the executive branch," as well as "legislative branch officials." *Id.* "Covered legislative branch officials" include "members of Congress, elected officers of either house of Congress, and employees of members of Congress, of committees of either house, of the leadership staff, of a joint committee, or of a caucus or working group." *Id.* at 17-18.

<sup>9</sup> *Id.* at 17.

<sup>10</sup> William R. Bruce, *Professional Responsibilities of Lobbyists*, 23 MEMPHIS ST. U. L. REV. 547, 547 (1993).

<sup>11</sup> Burdett A. Loomis & Allan J. Cigler, *Introduction: The Changing Nature of Interest Group Politics*, in INTEREST GROUP POLITICS 1, 26-27 (Allan J. Cigler & Burdett A. Loomis eds., 1995).

<sup>12</sup> *Id.* at 27-28.

<sup>13</sup> Alan A. Parker, *Congress and Special Interests*, TRIAL, Dec. 1987, at 16.

<sup>14</sup> The Lobbying Disclosure Act of 1995, a uniform system replacing a patchwork of federal lobbying disclosure laws, went into effect on January 1, 1996.

obligations that make certain lobbying practices public. For instance, federal law imposes registration and reporting requirements on those who seek to influence legislation.<sup>16</sup> When addressing the ethics of lobbying, however, the question arises regarding whether lawyer lobbyists and nonlawyer lobbyists are held to different standards.<sup>17</sup> The answer to this inquiry appears to be in the affirmative, because lawyer lobbyists are obligated to "fulfill the professional responsibilities applicable to attorneys, as well as those responsibilities which apply to lobbyists."<sup>18</sup> Conversely, "non-lawyer lobbyists are not subject to the ethical restrictions on . . . solicitation, advertising, fee splitting, and conflicts of interest which are applicable to attorneys."<sup>19</sup> Nor are nonlawyer lobbyists subject to other professional obligations of

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2 U.S.C. §§ 1601-1612 (Supp. IV 1999).

<sup>15</sup> Taking effect on August 1, 1999, the Lobbying Disclosure Act, Act 93 of 1998, was signed into law in Pennsylvania on October 15, 1998. Act 93 of 1998 (visited 3/20/00) <[http://www.ethics.state.pa.us/PA\\_Exec/Ethics/lobby.html](http://www.ethics.state.pa.us/PA_Exec/Ethics/lobby.html)>. Addressing the administration and enforcement responsibilities for registration and reporting requirements, the "Lobbying Disclosure Act vests jurisdiction of lobbyists and principal registration and disclosure with the Pennsylvania State Ethics Commission." *Id.*

<sup>16</sup> 2 U.S.C. §§ 1603, 1604. Professional lobbyists must register and report the issues on which they lobby, and the clients for which they lobby, along with their receipts and expenditures. Businesses and organizations that employ lobbyists must register the lobbyists they employ and report the issues on which they lobby with an estimate of the total lobbying expenses incurred. *See Connors, supra* note 8, at 15-16.

<sup>17</sup> Bruce, *supra* note 10, at 547 & n.1.

<sup>18</sup> *Id.* at 547.

<sup>19</sup> *Id.*

lawyers, such as Model Rule of Professional Conduct 4.1,<sup>20</sup> which requires truthfulness when dealing with others.

Thus, in lobbying efforts, as in other conduct, a lawyer has professional responsibilities that must be fulfilled. Some might argue that a lawyer-lobbyist should strive to ensure that multiple points of view on an issue are presented to government officials. If this mandate were placed only on lobbyists who are lawyers, however, it stands to reason that the services of nonlawyer lobbyists would be in greater demand than those of their lawyer counterparts. It seems that the system would be well served by an expansion of the disclosure obligations, beyond the existing requirements of registration and reporting.<sup>21</sup> Society would benefit from a broad disclosure or notice obligation applicable to both lawyer and nonlawyer lobbyists, which would serve to illuminate competing interests.<sup>22</sup> This would facilitate the flow of information and further enhance the process of representative government.

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<sup>20</sup> Model Rule 4.1 provides that

[i]n the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 (2000). In addressing misrepresentation, the comments to Rule 4.1 provide the following:

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentation can also occur by failure to act.

*Id.* Rule 4.1 cmt. 1. In addressing statements of fact, the comments note that "[w]hether a particular statement should be regarded as one of fact can depend on the circumstances." *Id.* cmt. 2. Within the context of lobbying, it can be argued that Rule 4.1 is not applicable, because the "client" referred to in the rule differs from the "client" for whom one lobbies. Perhaps within the context of lobbying, there should be an obligation to inform the covered official of relevant facts relating to competing interests, because the covered official should not be viewed as an opposing party.

<sup>21</sup> See *supra* notes 14-16 and accompanying text.

<sup>22</sup> See *supra* note 20.

## III. DUTY TO SEEK JUSTICE

By common understanding, the professional responsibility of government lawyers involved in criminal litigation is to seek justice.<sup>23</sup> In explaining why prosecutors are subject to professional obligations that differ from those governing private lawyers, Professor Bruce Green believes that the quasi-judicial role of prosecutors "reflects a recognition that the adversary process is an imperfect means of achieving the truth and a belief that, if prosecutors temper their advocacy, unfair and erroneous convictions are less likely to occur."<sup>24</sup> Professor Green asks whether "government lawyers in civil litigation" are "simply 'zealous advocates' like lawyers for private clients" or whether they are "subject to more stringent ethical standards borne [from] the duty to 'seek justice'?"<sup>25</sup> After a very thought-provoking analysis, Professor Green leans in favor of the latter.<sup>26</sup> He concludes that the rationale for the distinctive role of the government lawyer in criminal cases "seems generally applicable to government lawyers in civil litigation as well."<sup>27</sup>

Looking to judicial decisions and other professional writings that support the existence of a higher duty for government lawyers in civil litigation, Professor Green notes that the ethical codes themselves impose "no distinctive disciplinary obligations upon the government's civil litigators[.]"<sup>28</sup> The 1969 Model Code of Professional Responsibility contained an ethical consideration bestowing "the responsibility to seek justice" on the government lawyer, calling for the government lawyer to "refrain from instituting or continuing litigation that is obviously unfair."<sup>29</sup> The 1983 Model Rules of

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<sup>23</sup> Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 236 (2000).

<sup>24</sup> *Id.* at 237.

<sup>25</sup> *Id.* at 238.

<sup>26</sup> *Id.* at 277.

<sup>27</sup> *Id.* at 279.

<sup>28</sup> *Id.* at 258.

<sup>29</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-14 (1969). Within the Model Code, ethical considerations are statements of activity and conduct to which practitioners should aspire. *Id.* Preliminary Statement. Ethical consideration 7-14 provides that

Professional Conduct, however, are silent on the matter. A review of the Model Rules indicates that this silence is intentional, because the drafters of the Model Rules specifically addressed issues relating to government lawyers in "Special Responsibilities of a Prosecutor" at Rule 3.8 and in "Successive Government and Private Employment" at Rule 1.11.<sup>30</sup> In reflecting on the matter, American Bar Association Formal Opinion 94-387 provides that "[w]hile some courts have held that ethical codes impose different requirements of advocacy on government litigators, we find no basis in the Model Rules for doing so, at least in the context of a noncriminal matter."<sup>31</sup>

Professor Green notes that whether government litigators have a distinctive role in civil cases may turn on the context in which the question arises, because some civil proceedings are quasi-criminal.<sup>32</sup> Some argue that it is "the distinctive nature of the government lawyer's client[,]" the sovereign, that imposes a duty for government lawyers to seek justice in civil litigation.<sup>33</sup> Professor Green takes the

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[a] government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.

*Id.* EC 7-14.

<sup>30</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.8, 1.11 (2000). Additionally, the comments to the Model Rules make Rule 1.13, Organization as Client, and Rule 5.1, Responsibilities of a Partner or Supervisory Lawyer, expressly applicable to government organizations. Comment 6 to Rule 1.13 provides that "[t]he duty defined in this Rule applies to governmental organizations." *Id.* Rule 1.13 cmt. 6. Comment 1 to Rule 5.1 provides that "[p]aragraphs (a) and (b) refer to lawyers who have supervisory authority over the professional work of a firm or legal department of a government agency." *Id.* Rule 5.1 cmt. 1.

<sup>31</sup> ABA Comm. on Ethics and Professional Responsibility, Formal Op. 387 (1994) (footnotes omitted).

<sup>32</sup> Green, *supra* note 23, at 246.

<sup>33</sup> *Id.* at 266. Professor Green notes that there is disagreement on precisely



position that, be it civil or criminal litigation, "the government lawyer represents a sovereignty whose interests include seeking justice,"<sup>34</sup> and "government lawyers should exercise discretion in accordance with" that duty.<sup>35</sup>

A review of the Model Rules reveals that Model Rule mandates impose obligations on lawyers without regard to the status of their employment. Model Rule 1.3 calls for a lawyer to "act with reasonable diligence."<sup>36</sup> The comments to Rule 1.3 indicate, in aspirational language, that "[a] lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf[.]" although noting that the lawyer "is not bound to press for every advantage that might be realized for a client."<sup>37</sup> The Model Rules direct all lawyers to "exercise independent professional judgment" and, in rendering advice, to "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."<sup>38</sup> As Professor Catherine Lancot notes, while government lawyers may have a duty to consider the public good, "the responsibility to decide which government policy will serve the public good ordinarily rests with elected officials, not with government lawyers."<sup>39</sup>

In the context of representation, the government lawyer should be mindful not to substitute the lawyer's independent policy views for those of elected officials.<sup>40</sup> Elected officials are put in office for the

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who the government represents, but takes the position that "it does not follow that the lawyer should be 'seeking justice' as opposed to some other objective." *Id.* at 270. Comment 6 of Model Rule 1.13 provides that "defining precisely the identity of the client . . . may be . . . difficult in the government context." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 cmt. 6 (2000).

<sup>34</sup> Green, *supra* note 23, at 277.

<sup>35</sup> *Id.*

<sup>36</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (2000).

<sup>37</sup> *Id.* Rule 1.3 cmt. 1.

<sup>38</sup> *Id.* Rule 2.1.

<sup>39</sup> Catherine J. Lancot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 986 (1991).

<sup>40</sup> *Id.* at 985. See also Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1295 (1987).

purpose of making policy.<sup>41</sup> The political system in this country puts the burden of determining "fairness" and "justice" on these elected officials, and ultimately on the courts.<sup>42</sup> Both "[a]s government officials and as lawyers representing clients, government lawyers should participate in this decision-making process" in civil litigation.<sup>43</sup> Nevertheless, the determination of a matter of policy by elected officials should be pursued by the government lawyer as any other lawyer would pursue a claim.<sup>44</sup>

An underlying principle of the adversary system is that "justice" can best be achieved by the meeting of "advocates before a neutral decision maker."<sup>45</sup> If the adversary system is the chosen way to achieve fair results, though it may be imperfect, the government lawyer should advance the client's goals in court in the same way as a private lawyer, letting the court decide what is required to arrive at both "fairness" and "justice."<sup>46</sup> Arguably, the duty to seek justice rests with the client as the sovereign, not with the government lawyer, even though seeking justice is implemented by the government lawyer within the context of civil litigation.

It seems that placing a duty to seek justice on government lawyers by virtue of their client's status would place the same duty on private lawyers retained by a municipality. If government lawyers have a higher standard than their private counterparts in civil cases, would litigation be conducted differently if a municipality retained outside counsel? Approaching the question from a different perspective,

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<sup>41</sup> *Lancot*, *supra* note 39, at 1006.

<sup>42</sup> *Id.* at 1014.

<sup>43</sup> *Id.* at 1015.

<sup>44</sup> *Id.* at 985. Professor Lancot presents a hypothetical situation where an individual pursuing government benefits, to which she is otherwise entitled, is denied benefits because of the government's assertion of the statute of limitations. Should a sympathetic factual setting lead the government lawyer to waive the statute of limitations? Apparently, no. Professor Lancot notes that there is nothing inherently unfair in establishing time periods in which cases must be brought. Congress can and does restrict benefit programs to preserve scarce government resources. In enforcing the statute of limitations, the government lawyer is enforcing the will of the public, as expressed through the vote of the elected representatives adopting this limitation. *Id.* at 983-84.

<sup>45</sup> *Id.* at 985.

<sup>46</sup> *Id.*

should representation of the sovereign differ based on whether its lawyer is a government employee or a private firm? It seems that this question should be answered in the negative. Otherwise, an imbalance is created based on the status of the entity providing the representation, rather than on the status of the entity being represented.

#### IV. CONCLUSION

Professor Geoffrey C. Hazard, Jr. takes the position that "the rules of ethics and the rules of common law governing government lawyers are, for the most part, the same as those governing lawyers generally."<sup>47</sup> Model Rule 1.13, addressing an organization as the client, applies to government entities as well as private organizations.<sup>48</sup> A pivotal question government lawyers may face within the context of representation, however, is the identity of the client.<sup>49</sup> A "government lawyer has at least four possible clients: (1) the agency official, (2) the agency itself, (3) the government, and (4) [the public]."<sup>50</sup> In addressing conflicts of interest in the representation of public agencies in civil matters, Professor Hazard notes that "[t]his involves analysis of the legal structure both of the legal services office with which the lawyer is affiliated and the legal structure of the recipient of the lawyer's services."<sup>51</sup>

The identity of the client is an important matter to one who represents an organization. Client identity is crucial to the lawyer's evaluation of ethical requirements, and it is the client that controls the objectives of the representation. Model Rule 1.13 provides general guidelines relating to representation of an organization, and addresses situations where those acting on behalf of the organization violate the law or engage in conduct likely to result in substantial injury to the organization.<sup>52</sup> The mandates of Rule 1.13 are applicable to the

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<sup>47</sup> Geoffrey C. Hazard, Jr., *Conflicts of Interest in Representation of Public Agencies in Civil Matters*, 9 WIDENER J. PUB. L. 211, 212 (2000).

<sup>48</sup> See *supra* note 30.

<sup>49</sup> Green, *supra* note 23, at 266-70.

<sup>50</sup> Lanctot, *supra* note 39, at 1004.

<sup>51</sup> Hazard, *supra* note 47, at 222.

<sup>52</sup> See *supra* note 30.

government lawyer, but unlike most of the guidelines in the Model Rules, the comments to Rule 1.13 impose a standard on the government lawyer that differs from that imposed on a lawyer in private practice. Comment 6 of Model Rule 1.13 provides that

when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved . . . [and] in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances.<sup>53</sup>

While government lawyers may have some obligations that vary from those of lawyers in the private sector, any lawyer representing an organization owes allegiance to that entity as a whole, rather than to an individual component of the organization. A government lawyer must identify the client and see that ethical requirements are followed. Regardless, however, of who or what is identified as the client, the government lawyer must make sure not to substitute the individual policy views of the lawyer for those of officials elected to formulate policy.<sup>54</sup> No matter who the client of the government lawyer happens to be, the sovereign has a duty to the public to seek justice, and this duty is implemented by the government lawyer within the context of litigation.

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<sup>53</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 cmt. 6 (2000).

<sup>54</sup> Lanctot, *supra* note 39, at 1014 n.269.