2002

Modern Ethical Dilemmas for ALJs and Government Lawyers: Conflicts of Interest, Appearances of Impropriety, and Other Ethical Considerations, Introduction

Robert C Power, *Widener University - Harrisburg Campus*

WIDENER JOURNAL OF PUBLIC LAW

Volume 11 2002 Number 1

SYMPOSIUM

MODERN ETHICAL DILEMMAS FOR ALJs AND GOVERNMENT LAWYERS: CONFLICTS OF INTEREST, APPEARANCES OF IMPROPRIETY, AND OTHER ETHICAL CONSIDERATIONS

INTRODUCTION

Robert C. Power*

This issue of the *Widener Journal of Public Law* focuses on the application of legal ethics rules to public attorneys. Two articles were first presented to the legal community at a symposium at the Harrisburg Campus of the Widener University School of Law in November 2001, and the others respond to papers presented at that event. The symposium brought together practicing lawyers, judges, government officials, and students to consider this controversial and important area of law. The topic is at the center of the mission of the law school's Law and Government Institute. It is a topic that we take very seriously, and we thank the bench and bar for their support.

The lead article is by Associate Dean Patricia E. Salkin, Director of the Government Law Center of Albany Law School, who was the keynote speaker at the symposium. Dean Salkin's article, *Judging Ethics for Administrative Law Judges: Adoption of a Uniform Code of Judicial Conduct for the Administrative Judiciary*, recounts the development of the American Bar Association's (ABA)

* Vice Dean and Professor of Law, Widener University School of Law, Harrisburg, Pennsylvania.

recommendation that administrative law judges be subject to a code of conduct similar to the Model Code of Judicial Conduct.[1] As an active participant in the ABA process, Dean Salkin brings first-hand experience to the subject. She is a strong and convincing advocate for regulating the administrative judiciary in this fashion. Whether one agrees or disagrees with her concerning the form of the applicable ethical rules, however, the severity of the problems she addresses and the need for some codified form of ethical authority in this area are both evident.

Two additional articles address the issue raised by Dean Salkin. Widener University School of Law Professor John L. Gedid, Director of the Law and Government Institute, follows with the aptly titled *ALJ Ethics: Conundrums, Dilemmas, and Paradoxes*.[2] Professor Gedid addresses Dean Salkin's thesis and reaches a different conclusion. Professor Gedid views the judicial canon approach as inappropriate for non-central panel states and problematic even with respect to central panel states. The problem, as he sees it, remains the separation of powers concept. Assignment of administrative judges to specific agencies is inconsistent with judicial independence, and even central panel judges are part of the administrative side of government rather than a judicial check on it. This structure is at odds with the sort of judicial independence that underlies the Model Code of Judicial Conduct.[3]

Next, Robert A. Christianson, Chief Administrative Law Judge for the Pennsylvania Public Utility Commission, addresses the problem from the critical yet very different perspective of a member of the administrative judiciary. His article, *Thoughts Relating to the Proposal of a Uniform Code of Judicial Conduct for Administrative Law Judges*, acknowledges many of the problems identified by Dean Salkin and provides other, equally significant observations on the relationship between administrative law judges and their agencies.[4]

---

[1] Patricia E. Salkin, *Judging Ethics for Administrative Law Judges: Adoption of a Uniform Code of Judicial Conduct for the Administrative Judiciary*, 11 WIDENER J. PUB. L. 7 (2002).

[2] John L. Gedid, *ALJ Ethics: Conundrums, Dilemmas, and Paradoxes*, 11 WIDENER J. PUB. L. 33 (2002).

[3] *Id.* at 33-36.

[4] Robert A. Christianson, *Thoughts Relating to the Proposal of a Uniform*

That relationship between agencies and judges, of course, is what most differentiates the administrative judiciary from the constitutionally independent courts, especially in those states without central ALJ panels.

Widener University School of Law Professor Randy Lee takes a slightly different approach from Dean Salkin and Professor Gedid.[5] Professor Lee asks not *what* the proper standards governing ethical conduct of ALJs should be, but rather *who* should decide those standards.[6] What is compelling about all four articles is their clear agreement on the need for increased attention to ethics-related issues peculiar to the administrative judiciary. Their disagreements underscore the complexity of those issues.

Widener University School of Law Professor Patrick Johnston analyzes a different ethics issue in *Amended Model Rule of Professional Conduct 1.11: Long-Standing Controversy, Imperfect Remedy, and New Questions*.[7] This issue, which was also a major topic at the November symposium, considers the application of conflict of interest provisions to the revolving door between private law practice and government service. ABA consideration of this problem has paralleled that of the administrative law judge code of conduct, with the most recent action occurring as recently as February 2002. Professor Johnston comments on the unique conflict of interest problems that result from movement to or from government service, as well as on the somewhat ambiguous history of attempts at reform in this area. One intriguing aspect of the conflict problem is that in this area, government attorneys seem to be held to a lower standard of ethical conduct than are private attorneys. This differs from most public-private distinctions in ethics, which purport to hold government attorneys to higher standards. Professor Johnston notes that despite the ABA's attempts to resolve the revolving door problem in a

---

Code of Judicial Conduct for Administrative Law Judges, 11 WIDENER J. PUB. L. 57 (2002).

[5] Randy Lee, *The State of Self-Regulation of the Legal Profession: Have We Locked the Fox in the Chicken Coop?*, 11 WIDENER J. PUB. L. 69 (2002).

[6] *Id.* at 69.

[7] Patrick Johnston, *Amended Model Rule of Professional Conduct 1.11: Long-Standing Controversy, Imperfect Remedy, and New Questions*, 11 WIDENER J. PUB. L. 83 (2002).

dispositive fashion, questions remain. He concludes that the scope of duties in this area will be uncertain for some time to come.[8]

These articles continue the *Widener Journal of Public Law*'s tradition of publishing thoughtful presentations on important questions about the law of government. This began in Volume 1, perhaps most clearly in American University of Law Professor Thomas O. Sargentich's article *Teaching Administrative Law in the Twenty-First Century*,[9] which has been excerpted in administrative law casebooks and collections of readings. More and more we have found that these topics relate to ethical concerns. For example, two years ago, American Law Institute President Geoffrey C. Hazard, Jr., spoke at an earlier administrative law symposium. His remarks were published in *Conflicts of Interest in Representation of Public Agencies in Civil Matters*.[10] It was a part of a symposium devoted to the "higher standard" issue. The symposium was titled *Legal Ethics for Government Lawyers: Straight Talk for Tough Times*, and its articles were published as in Volume 9, number 2 of the *Widener Journal of Public Law*.

It is no coincidence that ethical issues pervade the Law and Government Institute's most recent work. The legal profession is beginning to recognize that ethics rules and the profession's "course of dealing," to borrow a concept from the Uniform Commercial Code, define who we are and what we must, should, may, and cannot do as attorneys. These questions are at least as complex as the substantive or procedural law that lawyers apply in representing their clients. This problem is redoubled when public sector attorneys are considered. The category necessarily includes staff attorneys, supervisors, and appointed and elected officials, performing functions that range from advising other government employees on routine legal questions to exercising virtually unreviewable prosecutorial discretion in serious criminal cases. As these articles remind us, the category also includes government employees who perform a quasi-judicial function and government attorneys who have legal obligations to private clients.

---

[8] *Id.* at 83-86.

[9] Thomas O. Sargentich, *Teaching Administrative Law in the Twenty-First Century*, 1 WIDENER J. PUB. L. 147 (1992).

[10] Geoffrey C. Hazard, Jr., *Conflicts of Interest in Representation of Public Agencies in Civil Matters*, 9 WIDENER J. PUB. L. 211 (2000).

The *Widener Journal of Public Law* will continue to address such problems in future years. We know that you will continue to find the symposium issues valuable to you as attorneys, citizens, and the "clients" of public attorneys.