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SYMPOSIUM LEGAL ETHICS FOR GOVERNMENT LAWYERS: STRAIGHT TALK FOR TOUGH TIMES

INTRODUCTION

by Randy Lee*

The Preambles to both the Pennsylvania Rules of Professional Conduct and the Model Rules, from which the Pennsylvania Rules have been derived, remind us that "[t]he legal profession is largely self-governing[.]"¹ and with that autonomy comes "special responsibilities[.]"² Paramount among these responsibilities is the duty of every lawyer to assure that the regulations embraced by the bar "are conceived in the public interest and not in furtherance of parochial or

* Professor of Law, Widener University School of Law, Harrisburg; Chairman, Symposium 2000 Committee. The author would like to thank Dean Douglas E. Ray, Vice Dean Loren D. Prescott, Jr., Professor Anthony J. Fejfar, and Professor John L. Gedid, Executive Director-Law and Government Program, for their contributions to this symposium. The technical assistance of Paula Heider and Shannon Whitson in the development of the author's materials for the symposium are also appreciated. Finally, a special thank you goes out to Ms. Sandy Graeff, Conference Coordinator, for her tireless efforts to make the symposium a success.

¹ MODEL RULES OF PROFESSIONAL CONDUCT Preamble 9 (2000); PA. RULES OF PROFESSIONAL CONDUCT Preamble 9 (2000).

² MODEL RULES OF PROFESSIONAL CONDUCT Preamble 11 (2000).

self-interested concerns of the bar."³ Without such selfless regulations, both "government under law" and society itself are at risk.⁴

In selecting the topic for the symposium to commemorate the tenth anniversary of our Harrisburg Campus, the Widener University School of Law Program in Law and Government turned to this particularly profound duty of lawyers: this duty to come together as a profession to think seriously and selflessly about the rules that govern us. In this light, the faculty of the program were determined to bring together leading practitioners from throughout Pennsylvania and leading legal scholars from across the country to discuss the special meaning of professional responsibility for the government lawyer.

A career in government legal service is a noble calling. Attorneys employed by the government serve in every branch of the government and at every level. They prosecute and defend, advise on policy, and protect the Constitution. They are the voice of the weak and the conscience of the strong. Each day they work on behalf of no single interest but on behalf of all the people in their community. It is their job to carry forward the government created by their friends and neighbors.

Yet, during the 1990s the image of government lawyers was tarnished. In a series of high-profile legal confrontations from Los Angeles, California, to Washington, D.C., government lawyers found themselves characterized as inept, overzealous, and even unethical. Pennsylvania lawyers were not spared from such unfortunate imagery. Tragically, government scandals involving lawyers today can no longer prompt the public to ask, as they did during Watergate, "Can you believe lawyers did that?"

Despite the handful of high-profile negative images of the last decade, the overwhelming majority of government lawyers continue to serve their communities well and with great integrity. Still, recent history has affirmed that a legal career in government service is intensely demanding on many levels. Government lawyers must navigate across a sea of conflicting loyalties, ambiguous objectives, and ethical pressures. But as they do so, they include themselves

³ *Id.*

⁴ *Id.* Preamble 10.

among the ranks of many of the noblest public servants this nation has ever known.

Each presenter at the symposium, in his or her own way, embraced this notion of the government lawyer as a noble servant while wrestling with the challenges the role necessarily presents. In his opening address to the symposium, Mr. Robert J. DeSousa, Inspector General of the Commonwealth of Pennsylvania, elaborated on the concept of a legal career in government service as being a noble calling. The Inspector General acknowledged that today private lawyers must struggle with whether law will remain a profession with the goal to do justice or become merely a trade.⁵ He pointed out that government service, however, has risen above this debate and offers itself as an oasis where a lawyer can practice law nobly, even as a vocation.⁶ While acknowledging the awesome responsibilities that accompany government service, the Inspector General argued that the reward for accepting these responsibilities is a career marked by "honor, duty, pride, self-satisfaction, and justice[.]"⁷

In his address, Professor Bruce A. Green, Chairman of both the Professional Ethics Committee of the New York State Bar Association and the American Association of Law Schools' Section on Professional Responsibility, challenged the recent view that government lawyers are merely the zealous advocate of the state. Instead, he advocated that even in civil litigation the government lawyer must seek justice.⁸ In support of his position, Professor Green pointed out that traditionally conventional wisdom has been that the government's civil litigators "must 'temper their advocacy in the interests of justice.'"⁹ Furthermore, similarities between government

⁵ Robert J. DeSousa, *Opening Remarks*, 9 WIDENER J. PUB. L. 207, 208 (2000).

⁶ *Id.* at 209.

⁷ *Id.* at 210.

⁸ Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 279-80 (2000).

⁹ *Id.* at 238-39 (quoting Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 955 (1991)).

litigators in civil and criminal contexts argue in favor of the two having similar duties to seek justice.¹⁰

Professor Green also noted, however, that differences in the nature of civil and criminal litigation may require that the duty to seek justice means something different for civil government litigators than it does for prosecutors.¹¹ To account for these differences, Professor Green called on government lawyers individually, government law offices collectively, and the legal profession generally to think seriously about the role of the civil government litigator and the manner in which that role impacts the administration of justice.¹²

Professor Green's remarks were responded to by the Honorable Yvette Kane, federal judge for the Middle District of Pennsylvania and former Secretary of the Commonwealth, Professor Robert E. Rodes, Jr., Paul J. Schierl/Fort Howard Corporation Professor of Legal Ethics at the Notre Dame Law School,¹³ and Professor James W. Diehm of Widener-Harrisburg, former United States Attorney for the Virgin Islands.¹⁴

Professor Geoffrey C. Hazard, Jr., Reporter for ABA Special Commissions for both the Rules of Professional Conduct and the Standards of Judicial Administration, addressed the perplexing questions that conflicts of interest pose to the attorneys of public agencies in civil matters.¹⁵ Professor Hazard pointed out that the rules of ethics, as well as the common law rules governing government lawyers, are largely identical to those governing lawyers generally.¹⁶ Government lawyers, however, still face unique ethical problems for two reasons. First, government lawyers, like all public officials, are regulated by laws that apply to them because of their public

¹⁰ *Id.* at 257-79.

¹¹ *Id.* at 279.

¹² *Id.* at 239-40.

¹³ Robert E. Rodes, Jr., *Government Lawyers*, 9 WIDENER J. PUB. L. 281 (2000).

¹⁴ James W. Diehm, *The Government's Duty to "Seek Justice" in Civil Cases*, 9 WIDENER J. PUB. L. 289 (2000).

¹⁵ Geoffrey C. Hazard, Jr., *Conflicts of Interest in Representation of Public Agencies in Civil Matters*, 9 WIDENER J. PUB. L. 211, 211-212 (2000).

¹⁶ *Id.* at 212.

employment; private lawyers obviously need not concern themselves with such laws.¹⁷ Second, government lawyers represent not a person but an organization, and the people with whom these lawyers deal are agents of the client rather than the actual client.¹⁸

Professor Hazard indicated that because of the dichotomy presented in the second reason, government lawyers must ask themselves whether a person with whom they are dealing has the authority to act for the public agency and how the lawyer might most appropriately question that person's authority if necessary.¹⁹ The dichotomy may also invite conflicts because "the 'client person'[] may believe or assert that he personally is the lawyer's client."²⁰ Professor Hazard stressed that the basic model for analysis of these and similar issues for public lawyers are the "rules, issues, and determinations" used to analyze the "legal representation of private corporations."²¹ The ultimate resolution of these issues, however, will depend on the legal structure of both the legal services office of the lawyer "and the legal structure of the recipient of the lawyer's services."²²

Robert H. Davis, Jr., former president of the National Organization of Bar Counsel and now a private practitioner specializing in legal ethics, responded to Professor Hazard's remarks. Widener-Harrisburg Professor Anna P. Hemingway responded as well.²³

Professor Kathleen Clark of Washington University in Saint Louis²⁴ led an animated discussion on legal ethics and lobbying. During this discussion it was observed that government lawyers

¹⁷ *Id.* at 218. Examples of such laws are restrictions on "outside employment, receipt of gifts or other emoluments, integrity in financial dealings, and affiliations after leaving government employment." *Id.*

¹⁸ *Id.* at 220.

¹⁹ *Id.* at 221.

²⁰ *Id.*

²¹ *Id.* at 222.

²² *Id.*

²³ Anna P. Hemingway, *The Government Attorney's Conflicting Obligations*, 9 WIDENER J. PUB. L. 227 (2000).

²⁴ Professor Clark has served as counsel to the United States Senate Judiciary Committee and is currently visiting at the University of Michigan School of Law.

sometimes assume a role equivalent to that of a lobbyist when they approach the legislature to seek changes in policy or agency authority, or to justify requests for increases in funding for their arm of the government. It was further observed that when placed in such a role, the government lawyer must remember keenly his responsibility to serve the people and do justice and not succumb to the temptation to serve his own professional interests.

Although public service, justice, and integrity enjoy universal support in the abstract, disputes remain on their meanings in specific situations, and the nature of the demands they place on our daily lives may seem subtle, if not elusive.²⁵ The final pieces included in the symposium wrestled with the meaning of integrity. Each of these pieces pursued these concerns by examining the behaviors and motivations of the characters in Robert Bolt's play, *A Man for All Seasons*.²⁶

In the first, Professor and former Dean Thomas Shaffer, Robert and Marion Short Professor of Law Emeritus at the Notre Dame Law School, eloquently explained why the government lawyer must be a bearer of hope.²⁷ In the second, integrity was considered as a function of three attributes:

- (1) one's primary motivation for one's behavior;
- (2) one's understanding of the world; and
- (3) one's attitude toward the law.²⁸

Responding to these reflections was Widener-Harrisburg Professor of Law Mary Kate Kearney.²⁹

The symposium closed with three general responses. The first was delivered by James J. West, former United States Attorney for the

²⁵ ROBERT BOLT, *A MAN FOR ALL SEASONS* 66-67 (First Vintage International, Vintage Books 1990) (1960); Randy Lee, *Lawyers and the Uncommon Good: Navigating and Transcending the Gray*, 40 S. TEX. L. REV. 207, 207-11 (1999).

²⁶ BOLT, *supra* note 25.

²⁷ See Thomas L. Shaffer, *More's Skill*, 9 WIDENER J. PUB. L. 295 (2000).

²⁸ See Randy Lee, *Robert Bolt's A Man for All Seasons and the Art of Discerning Integrity*, 9 WIDENER J. PUB. L. 305, 308 (2000).

²⁹ See Mary Kate Kearney, *A Lawyer's Call to Integrity: A Response*, 9 WIDENER J. PUB. L. 339 (2000).

Middle District of Pennsylvania. The final two were delivered by Widener Professors Louise L. Hill³⁰ and Robert C. Power, both former Assistant United States Attorneys.

The Widener University School of Law Program in Law and Government is proud to present the proceedings of this important symposium in Volume 9 of the *Widener Journal of Public Law*. We hope that the thoughtful and provocative pieces presented here will stimulate future opportunities for the noble men and women who serve their communities as government lawyers to come together as a profession and to embrace their duty to think seriously and selflessly about the rules that govern them.³¹

³⁰ See Louise L. Hill, *The Professional Responsibility of Lawyers*, 9 WIDENER J. PUB. L. 343 (2000).

³¹ See *supra* notes 1-4 and accompanying text.