

PRO BONO WEEK – L.A. COUNTY LAW LIBRARY—

NOTES: ETHICAL DILEMMAS FOR GOVERNMENT LAWYERS

1. TODAY WE ARE GOING TO FOCUS ON THE ROLES OF THE CIVIL GOVERNMENT LAWYER IN STATE, LOCAL AND FEDERAL PRACTICE. THE CIVIL LAWYERS IN GOVERNMENT PLAY MANY ROLES. THEY ARE LITIGATORS, ADVISORS, NEGOTIATORS AND SOMETIMES POLICYMAKERS. THE AMERICAN BAR ASSOCIATION ESTIMATES THAT AS MANY AS 15% OF ALL LAWYERS WILL PRACTICE CRIMINAL OR CIVIL LAW AS GOVERNMENT LAWYERS AT SOME POINT IN THEIR CAREER, SO IT IS SOMEWHAT SURPRISING THAT COMPARATIVELY LITTLE IS STUDIED ABOUT OUR ROLES AS GOVERNMENT LAWYERS, AND WHETHER THERE ARE OR SHOULD BE DIFFERENT ETHICAL DUTIES WHEN REPRESENTING GOVERNMENTAL ENTITIES.
2. MORE SPECIFICALLY, DO THE ETHICAL RULES PROMULGATED BY THE AMERICAN BAR ASSOCIATION AND THE STATE BARS TO GOVERN THE CONDUCT OF LAWYERS IN CIVIL PRACTICE MAKE SENSE FOR THE GOVERNMENT LAWYERS? WE WILL FIRST SPECIFICALLY ASK WHO IS THE CLIENT OF THE GOVERNMENT

LAWYERS WORKING FOR THE STATE, LOCAL OR FEDERAL GOVERNMENT?

3. SECOND, WE WILL CONSIDER WHETHER THE GOVERNMENT LAWYER HAS A DIFFERENT OR HIGHER RESPONSIBILITY TO "SEEK JUSTICE" THAN A LAWYER REPRESENTING A PRIVATE CLIENT? WHO MAKES THAT DECISION? WE KNOW THERE IS A DIFFERENT STANDARD FOR THE GOVERNMENT LAWYERS WHO ARE PROSECUTORS. AS THE UNITED STATES SUPREME COURT SAID LONG AGO IN BERGER VS. UNITED STATES, THE PROSECUTOR MAY HIT HARD BLOWS, BUT THEY MUST BE FAIR BLOWS. THE COURT WARNED IT IS AS MUCH THE PROSECUTOR'S DUTY TO REFRAIN FROM IMPROPER METHODS CALCULATED TO PRODUCE A WRONGFUL CONVICTION AS IT IS TO USE EVERY LEGITIMATE MEANS TO BRING ABOUT A JUST ONE.

4. THE THIRD AND FINAL QUESTION FOR TODAY IS DIRECTED AT THOSE GOVERNMENT LAWYERS WHO SERVE IN OFFICES OF THE STATE ATTORNEY GENERAL, WHERE THE ATTORNEY GENERAL OF THE STATE, HAS DUAL RESPONSIBILITIES TO REPRESENT THE PEOPLE OF THE STATE AND THE VARIOUS STATE DEPARTMENTS AS WELL AS THE GOVERNOR.

5. HAVING SERVED AS A LAWYER IN STATE, LOCAL AND FEDERAL OFFICES FOR MORE THAN TWENTY FIVE YEARS, I HAVE SEEN HOW DIFFICULT THOSE QUESTIONS CAN BE AND HOW THE ANSWERS HAVE CHANGED OVER TIME. THERE ARE SO MANY OTHER QUESTIONS, BUT IN THIS HOUR I HOPE WE CAN SCRATCH THE SURFACE OF LEGAL ETHICS FOR THE GOVERNMENT LAWYERS

BUT BEFORE WE FOCUS ON THE GOVERNMENT LAWYERS—A FEW WORDS ON THE GENERAL ETHICAL PRINCIPLES GOVERNING ALL LAWYERS.

6. LAWYERS, LIKE MANY OTHER PROFESSIONS, HAVE A PROFESSIONAL CODE OF ETHICAL BEHAVIOR--PRINCIPLES BY WHICH THE PROFESSION IS TO BE GOVERNED, ABOVE AND BEYOND THE LAWS WHICH PROHIBIT LYING, STEALING AND CHEATING THAT ARE APPLICABLE TO ALL OF US. THE PROFESSIONAL CODE OF ETHICS SETS OUT THE LAWYER'S RESPONSIBILITIES AND THE SPECIFIC PROVISIONS ARE FOUND IN NATIONAL RULES WHICH ARE NOT BINDING BUT WHICH ARE FOLLOWED BY THE STATES.

7. AS IT SAYS IN THE PREAMBLE TO THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: "A LAWYER, AS A MEMBER OF THE LEGAL PROFESSION, IS A REPRESENTATIVE OF CLIENTS, AN OFFICER OF THE LEGAL SYSTEM AND A PUBLIC CITIZEN HAVING SPECIAL RESPONSIBILITY FOR THE QUALITY OF JUSTICE. AS A REPRESENTATIVE OF CLIENTS, A LAWYER PERFORMS VARIOUS FUNCTIONS. AS AN ADVISOR, A LAWYER PROVIDES A CLIENT WITH AN INFORMED UNDERSTANDING OF THE CLIENT'S LEGAL RIGHTS AND OBLIGATIONS AND EXPLAINS THEIR PRACTICAL IMPLICATIONS. AS AN ADVOCATE, A LAWYER ZEALOUSLY ASSERTS THE CLIENT'S POSITION UNDER THE RULES OF THE ADVERSARY SYSTEM".

8. IN CALIFORNIA, LAWYERS ARE BOUND BY THE CALIFORNIA RULES OF PROFESSIONAL CONDUCT. THESE RULES IN MANY WAYS ECHO THE ABA MODEL RULES AND SET OUT THE OBLIGATIONS OF LAWYERS TO THEIR CLIENTS, TO THE COURTS AND THIRD PARTIES. THESE RULES HAVE EVOLVED OVER TIME AND HAVE BEEN LITIGATED IN HUNDREDS OF CASES IN THE TRIAL AND APPELLATE COURTS. EVEN AS WE ARE DISCUSSING

TODAY THE STATE BAR AND THE SUPREME COURT ARE CONSIDERING MODIFICATION TO THE CURRENT RULES. FOR OUR PURPOSES TODAY, WE WILL BE TALKING IN BROAD GENERAL TERMS AND ARE NOT CONCERNED ABOUT SUBTLE DIFFERENCES BETWEEN THE STATES AND THE ABA MODEL RULES.

9. THE ABA MODEL RULES—MODEL RULES 1.2 AND 1.3 AND THE COMMENTS, SPECIFICALLY TELL LAWYERS: A LAWYER MUST ALSO ACT WITH COMMITMENT AND DEDICATION TO THE INTERESTS OF THE CLIENT AND WITH ZEAL IN ADVOCACY UPON THE CLIENT’S BEHALF. THE COMMENTS TO THE RULES EMPHASIZE THE DUTY OF THE LAWYER TO ABIDE BY THE CLIENT’S WISHES, ALTHOUGH THE RULES RECOGNIZE THAT THE LAWYER NEED NOT PRESS FOR EVERY ADVANTAGE

10. UNDER THE ADVERSARY SYSTEM, THE CLIENT IS ULTIMATELY IN CHARGE OF THE LITIGATION AND THE LAWYER HAS A DUTY OF LOYALTY , A DUTY TO PROTECT CONFIDENTIALITY AND TO TAKE WHATEVER LAWFUL AND ETHICAL MEASURES THAT ARE REQUIRED TO VINDICATE THE CLIENT’S CAUSE.

11. RETURNING NOW TO THE GOVERNMENT LAWYERS, AND OUR FIRST QUESTION OF THE DAY:

DEFINING THE CLIENT: WHO IS THE CLIENT?

12. IF YOU ARE A GOVERNMENT LAWYER—WHO DO YOU REPRESENT? IF YOU ARE A DEPUTY CITY ATTORNEY WHO DEFENDS CITY EMPLOYEES WHO HAVE BEEN SUED FOR DAMAGES, DO YOU REPRESENT THOSE EMPLOYEES? THE DEPARTMENT FOR WHICH THEY WORK? THE CITY? THE PUBLIC?

AND IF THE CLIENT IS THE CITY, WHO SPEAKS FOR THE CITY?
DOES ANYONE SPEAK FOR THE PUBLIC?

13. ALTHOUGH THERE ARE OFTEN DISAGREEMENTS IN PRACTICE, THIS FIRST QUESTION IS THE EASIEST TO ANSWER, AT LEAST IN PRINCIPLE. CASE LAW AND THE ABA RULES AND THE CALIFORNIA RULES OF PROFESSIONAL CONDUCT WOULD ALL AGREE IN THAT IN THIS EXAMPLE THAT THE CITY IS THE CLIENT, NOT THE INDIVIDUAL EMPLOYEES, NOT THE COMMUNITY.
14. THE LAWYER TAKES HIS DIRECTION OR GUIDANCE FROM THE HIGHEST AUTHORIZED OFFICER, EMPLOYEE, BODY WITH AUTHORITY TO SPEAK FOR THE WHOLE CITY ON THE GIVEN SUBJECT MATTER, NOT THE INDIVIDUAL EMPLOYEE, OR EVEN THE HEAD OF THE DEPARTMENT.
15. FOR AN EXCELLENT AND PRACTICAL ANALYSIS OF THE MANY ETHICAL ISSUES FACING MUNICIPAL LAWYERS, SEE PRACTICING ETHICS, A HANDBOOK FOR MUNICIPAL LAWYERS, 2ND EDITION, 2014. IT SETS OUT IN CLEAR LANGUAGE THE NATURE OF THE RELATIONSHIP OF THE CITY ATTORNEY AND HIS OR HER CLIENT.
16. THE HANDBOOK GIVES COMMON SENSE ADVICE ON HOW TO NAVIGATE THE REPRESENTATION OF THE CITY, WHILE WORKING ON A DAILY BASIS WITH CONSTITUENTS OF THE CITY WHO DISAGREE ON MATTERS OF POLICY, AND THE EVEN MORE THORNY ISSUE OF A CITY ATTORNEY LEARNING THAT CONDUCT OF A CITY OFFICIAL OR EMPLOYEE IS OR MAY BE IN VIOLATION OF LAW THAT MAY BE "REASONABLY IMPUTED TO THE ORGANIZATION" OR IS "LIKELY TO RESULT IN SUBSTANTIAL INJURY TO THE ORGANIZATION." ALTHOUGH WE WILL NOT BE DISCUSSING WHEN, WHETHER OR HOW THE LAWYER WHO

REPRESENTS THE CITY CAN ALSO BE A WHISTLEBLOWER—THE HANDBOOK IS A GOOD START IN UNDERSTANDING THE RULES.

17. BUT EVEN AFTER READING THE HANDBOOK'S THOUGHTFUL ANALYSIS OF THE ISSUES FACED BY THE MUNICIPAL ATTORNEY EVERY DAY, IT DOES NOT ANSWER THE SECOND QUESTION FOR TODAY'S DISCUSSION:

DOES THE GOVERNMENT LAWYER IN CIVIL LITIGATION HAVE A HIGHER DUTY OR DIFFERENT DUTY THAN THE LAWYER REPRESENTING A PRIVATE INTEREST?

18. BRUCE A. GREEN, LAW PROFESSOR AT FORDHAM UNIVERSITY SCHOOL OF LAW, BEGAN THE DEBATE IN 2000 IN HIS ARTICLE: LEGAL ETHICS FOR GOVERNMENT LAWYERS: STRAIGHT TALK FOR TOUGH TIMES: MUST GOVERNMENT LAWYERS "SEEK JUSTICE" IN CIVIL LITIGATION?", A DEBATE THAT IS STILL RAGING IN ACADEMIC CIRCLES.
19. HE ASKED: "WHAT IS THE PROFESSIONAL ROLE OF A GOVERNMENT LAWYER IN CIVIL LITIGATION? IS IT MORE LIKE THAT OF A LAWYER FOR A PRIVATE PARTY OR THAT OF A CRIMINAL PROSECUTOR"? HE ARGUED THEN AND NOW THAT CIVIL LAWYERS ARE MORE LIKE CRIMINAL PROSECUTORS WHO HAVE THE DUTY TO "SEEK JUSTICE" AND SHOULD BE HELD TO A HIGHER STANDARD. HE ARGUES THAT THE GOVERNMENT LAWYERS SHOULD TAKE INTO ACCOUNT NOT JUST THE NARROW OBJECTIVE OF THEIR GOVERNMENT CLIENTS, BUT LOOK TO THE BROADER CONSIDERATION OF "DOING JUSTICE", EVEN IF IT MEANS IGNORING TECHNICAL DEFENSES, WHICH WOULD PERMIT THE GOVERNMENT CLIENT TO WIN THE CASE.

20. OTHERS, LIKE PROFESSOR CATHERINE LANCTOT, IN HER ARTICLE "GOVERNMENT LAWYERS IN CIVIL LITIGATION AND THE MODEL RULES OF PROFESSIONAL CONDUCT" POINT OUT THAT THERE IS NO BASIS IN THE PROFESSIONAL CODES OF CONDUCT FOR SUCH A HIGHER DUTY.

21. NOT ONLY IS THERE NO SPECIFIC MENTION OF GOVERNMENT LAWYERS HAVING SUCH A HIGHER DUTY IN THE ABA MODEL RULES, THE SINGLE MENTION OF GOVERNMENT LAWYERS IN THE SCOPE SECTION OF THE RULES APPEARS TO LEAVE THE APPLICABILITY OF MODEL RULES TO GOVERNMENT LAWYERS TO STATE OR FEDERAL LAW.

22. ALSO SHE POINTS OUT THAT AN ABA FORMAL OPINION EXPRESSLY CONCLUDES THAT GOVERNMENT LAWYERS ARE SUBJECT TO THE SAME DUTY OF ZEALOUS REPRESENTATION AS THEIR PRIVATE COUNTERPARTS. DESPITE SOME CASE LAW TO THE CONTRARY, THE OPINION FINDS THAT THE GOVERNMENT LAWYER "HAS NO GREATER OR LESSER RIGHT OR DUTY THAN THE PRIVATE LAWYER" TO SIT IN JUDGMENT OF THE CLIENT'S CAUSE.

23. SHE ARGUES THAT THE BETTER RULE IS THAT GOVERNMENT LAWYERS SHOULD FOLLOW THE SAME RULES OF ETHICAL CONDUCT AND REPRESENT THE GOVERNMENT WITH THE SAME OBLIGATIONS OF ZEAL, CONFIDENTIALITY AND LOYALTY.

24. TO DEMONSTRATE THAT THIS IS NOT JUST AN ABSTRACT OR ACADEMIC ARGUMENT AMONG PROFESSORS AND JUDGES, I AM GOING TO TELL YOU A SHORT STORY ABOUT A CIVIL CASE IN THE FICTIONAL CITY OF PLEASANTVILLE. I WOULD LIKE TO HEAR

YOUR VIEWS ON WHAT A GOVERNMENT LAWYER FOR THE FICTIONAL CITY OF PLEASANTVILLE OUGHT TO DO IN THIS SITUATION:

25. LET'S SUPPOSE YOU ARE THE DEPUTY ASSIGNED TO DEFEND DAMAGES FOR PERSONAL INJURY BROUGHT BY A YOUNG MAN WHO HAD FALLEN ASLEEP ON THE BEACH AND WAS HIT BY TRUCK DRIVEN BY A PLEASANTVILLE EMPLOYEE. THE YOUNG MAN WAS SERIOUSLY INJURED AND THE INTERNAL INVESTIGATION OF THE EVENT BY THE DEPARTMENT OF BEACHES CONFIRMS THAT EMPLOYEE WAS DISTRACTED, AND SPEEDING, AND THAT THE YOUNG MAN WAS IN NO WAY AT FAULT.

26. LET'S ALSO SUPPOSE THAT THE YOUNG MAN HIRED A LAWYER, WHO FILES THE MANDATORY CLAIM FOR DAMAGES, BUT DOES NOT SERVE IT ON THE RIGHT PARTY IN THE CITY WHICH IS NOT DISCOVERED UNTIL THE STATUTE OF LIMITATIONS FOR THE LAWSUIT HAS RUN. UNDER PLEASANTVILLE LAW, IF THE CLAIM IS NOT FILED TIMELY ON THE CORRECT PERSON, THE CITY HAS NO LIABILITY. THE DEPUTY KNOWS THE YOUNG MAN WOULD RECOVER HIS DAMAGES. SHOULD HE FILE TO DISMISS THE CASE BECAUSE THE STATUTE OF LIMITATIONS HAS RUN? IF BRUCE GREEN IS RIGHT, WHAT SHOULD THE DEPUTY CITY ATTORNEY DO?

27. IF WE HAVE TIME, JUST ONE MORE ETHICAL ISSUE FOR YOU, AND THEN I WOULD LIKE TO HEAR QUESTIONS FROM YOU:

28. AS YOU KNOW, THE STATE ATTORNEYS GENERAL ARE ELECTED LAWYERS. THEY HAVE A RESPONSIBILITY TO REPRESENT ZEALOUSLY THEIR CLIENTS, EVEN THE GOVERNOR, WHO MIGHT BE FROM A DIFFERENT POLITICAL PARTY. DOES

THE ATTORNEY GENERAL HAVE THE SAME ETHICAL DUTIES AS A PRIVATE LAWYER OR EVEN THE LAWYERS SHE SUPERVISES?