ETHICAL CONSIDERATIONS IN PUBLIC SECTOR LAW

presented by the

American Bar Association
GOVERNMENT & PUBLIC SECTOR LAWYERS DIVISION

and the

INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

Sunday, October 12, 2003

Minneapolis, Minnesota

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ETHICAL CONSIDERATIONS IN PUBLIC SECTOR LAW

INTRODUCTION

Welcome to “Ethical Considerations in Public Sector Law”, created by the American Bar Association's Government and Public Sector Lawyers Division.

The Government and Public Sector Lawyers Division was created by the House of Delegates in February 1991 with the mission of serving the needs of the nation’s public lawyers. By promoting integrity and excellence among public advocates, providing services not obtainable elsewhere, and by highlighting their extraordinary work, the Division works to enhance the position of public lawyers and create camaraderie and pride within the public sector.

One of the Division’s most important goals is to serve as a national leader in rededicating adherence to the highest standards of professional conduct and competence, fairness, social justice, diligence and civility. Adherence to the highest standards of professional conduct requires strict adherence to ethical norms. This continuing legal education program focuses on a series of hypothetical scenarios involving complex ethical dilemmas that will be acted out by the panelists. After the scenario is presented, there will be a discussion period - and audience members are strongly encouraged to participate. Discussion questions and a review of relevant rules of professional conduct are included in the materials that you have been provided.

Final expressions of appreciation go to our CLE Committee members; to GPSLD’s Director Susan Kidd and Associate Director Katherine Mikkelson, who composed several of the hypothetical cases; and to our Division's former Director Richard Lynch, who created the innovative and interactive format for the production of this program.

Sharon E. Pandak
Chair, CLE Committee
American Bar Association
Government and Public Sector Lawyers Division

MODERATOR

DeWITT F. "Mac" McCARLEY
City Attorney, Charlotte, North Carolina

THE PLAYERS

JAY B. DOEGAY
City Attorney, Arlington, Texas

JORGE L. FERNANDEZ
County Attorney, Sarasota, Florida

SHARON E. PANDAK
County Attorney, Prince William County, Virginia

PEOPLE V. MARVEL

The Facts

Scene 1

Don Diligentts, is staff counsel for Mayor Margie Marvel. Diligentts has a good relationship with the Governor who is in the second year of her first term. Diligentts' position requires him to provide legal advice in matters that affect the Office of the Mayor. Because Diligentts and Marvel have become good friends, Marvel also comes to him for personal and political advice.

One Monday morning, Marvel calls Diligentts into her office. They discuss some proposed legislation on campaign finance reform. He updates Marvel on the status of the bill and agrees to make some changes to the draft. Marvel tells him that she has just learned that the U.S. Attorney's Office is investigating her for possible campaign finance violations, related to the reporting of contributions. Marvel is very unhappy about the investigation. Marvel says that John Warrant, the Assistant U.S. Attorney assigned to the case, wants to talk to him. She asks Diligentts what she should do and hands him a file on her campaign finances. Diligentts tells Marvel he needs some time to research the issue and will get back to her right after lunch.

Scene 2

When Diligentts returns to his office, he gets a phone call from the Mayor's Chief of Staff who wants to know when the changes to the bill will be ready.

Scene 3

One minute later, Diligentts gets a call from AUSA John Warrant who threatens to subpoena him to obtain evidence against Marvel.

The Players

Jay Doegay as Don Diligentts
Sharon Pandak as Mayor Margie Marvel
Jorge Fernandez as AUSA John Warrant
Jorge Fernandez as Governor Marvel's Chief of Staff
Mac McCarley as Moderator/Commentator

Questions

1. **Can or should Diligentts give Mayor Marvel any advice on the AUSA investigation?**

2. **Can Diligentts advise Mayor Marvel on changes to the legislation?**

3. **Two days later, Diligentts receives a subpoena for documents relating to Mayor Marvel's campaign finances. Diligentts was given a file and made notes of the conversation with Mayor Marvel, should he turn these over?**

4. **Could Diligentts have avoided this situation?**

CUMMINGS v. DEPARTMENT OF PUBLIC WORKS

The Facts

Scene 1
Penny Prentiss has been City Solicitor for Hopewell for the past 10 years. She has represented City agencies and departments in litigation. Prentiss has established a reputation with the bench and bar of Morgan County as an able, forthright lawyer and litigator. For the past two years, a good deal of her time has been spent defending employment discrimination suits against Hopewell's Department of Public Works and the Department's Director, Simon Slees.

Prentiss also provides the Public Works Department with advice on contracts related to the development of park facilities. She generally deals with Slees' deputy but sometimes with him.

Prentiss discusses her concerns about Slees with her sole assistant John Juste, who joined the office 3 months ago. Prentiss briefs him on the case which Kay Cummings has filed against Slees and which goes to trial in three days. Prentiss tells Juste that the last suit she defended, *Tiffin v. Department of Public Works*, was tried six months ago. The Department was found liable and Hopewell found itself on the wrong end of a very sizable award of damages. Slees was livid at the outcome and had heated words with Prentiss following the case. He went so far as to threaten to seek Mayoral permission to retain outside counsel in the future. Juste is taken aback by this. He offers to provide any assistance he can on the current *Cummings* case or other work in the office. He leaves for a meeting.

Scene 2
Slees arrives unannounced at Prentiss' office. He says that he thinks he needs more preparation for testifying in the case *Cummings* case. Slees blurts out the fact that he had lied to Prentiss in the *Tiffin* case and that he had proffered perjured testimony in that case. Prentiss has an angry exchange with Slees. Slees insists that he has given Prentiss the straight facts in the Cummings matter. He pledges to play it equally straight in court when he testifies, and says, "What difference does it make anyway - you lost the *Tiffin* case: no harm, no foul?"

Prentiss never liked Slees to begin with, and now she likes him even less. She replies, "I'm not certain what I need to do about your disclosure. But I know it's a serious matter and I need to think it through."

As Prentiss starts to usher Slees out, in his mercurial, and now smoozy, way, Slees asks about the progress on contract negotiations with StreetScape, Inc. for median landscaping. He asks if Prentiss can have Assistant City Solicitor Juste meet with him and StreetScape to resolve the outstanding issues. He is willing to meet later today or tomorrow to do that.

The Players

Sharon Pandak as City Solicitor Penny Prentiss
Jay Doegay as Assistant Solicitor John Juste
Jorge Fernandez as Director Simon Slees
Mac McCarley as Moderator/Commentator

Questions

1. **Does Slees's admitted deception and subsequent perjury allow/require Prentiss as City solicitor to withdraw from the *Cummings* case?**

2. **Does Slees's pledge - notwithstanding his conduct in the *Tiffin* case - that he has told the truth and will tell the truth on the stand in the *Cummings* case change your answer to question 1 above?**

3. **May Prentiss reveal the fact that Slees lied to her and committed perjury in the *Tiffin* case?**

4. **Do the answers to any of the above questions differ depending upon Prentiss' status as either a private or public lawyer?**

5. **Can Prentiss or Juste assist Slees with the contract negotiations with StreetScape?**

6. **What does Prentiss or Juste do if Slees lies in the contract negotiations with StreetScape?**

DONNE V. COUNTY OF WRITUS, ET AL.

The Facts

Scene 1
Tom Goode is an Assistant County Attorney for the County of Writus. For years he has provided advice to County management regarding the personnel policies.

Writus, the County Manager and Human Resources Director have been sued by Sean Donne, who challenges the County's personnel policies and, specifically, his termination as a County employee. Goode reviewed the policy before it was adopted and Donne's termination before it occurred. Goode has reviewed the suit with the Board of County Supervisors at a recent meeting in closed session and the Board said that Goode should vigorously defend the suit.

Donne's attorney has proposed a settlement whereby the pertinent Personnel Policy will be amended and Donne will be reinstated with no back pay or other damages. Goode has advised the Board by voice mail of the proposal because no meeting is scheduled for a week.

Board of County Supervisors' Chairman Bo Cross calls and asks about the case. After Goode's review of the foregoing information, Cross tells Goode to proceed with preparation of a settlement agreement. He says that the Board generally agrees with the termination but some supervisors are uneasy about it and they do not like the adverse publicity. Cross asks about Goode's role in the dismissal. He says that County Manager Queasi said that he relied on Goode's advice. Cross says that he has spoken with four supervisors who agree with his desire to settle.

Scene 2
Supervisor Jane Kant is impatiently waiting to meet with Goode. Kant has been in contact with a couple of supervisors. Kant wants to continue the litigation. She also tells Goode that Supervisor John N. Dark is concerned that he has not been receiving information about the litigation and, while he does not know all the details of the settlement proposal, does not like it. She says that he wants Goode to "keep talking" with Donne's counsel.

Scene 3
Donne's counsel, Whitney Whan, calls Goode to set up a deposition of those persons who were responsible for the drafting of the subject Personnel Policy and dismissal of Donne. She wants to know who they are in order to draft the subpoenas. She also wants to know whether the Board will accept the settlement which will avoid depositions and, importantly, a hearing in the case which is scheduled for tomorrow.

The Players

Jorge Fernandez as Assistant County Attorney Tom Goode
Jay Doegay as Board Chairman Bo Cross
Sharon Pandak as Supervisor Jane Kant
Sharon Pandak as Donne's Attorney Whitney Whan
Mac McCarley as Moderator/Commentator

Questions

1. **What does Goode tell Whan about whether he can settle the case? How Does he proceed?**

2. **From whom can Goode take direction as to settlement?**

3. **What does Goode do if he cannot obtain clear direction from the Writus Board with respect to the hearing?**

4. **What does Goode tell Whan about who he can depose?**

5. **Does Goode have a problem with becoming a witness in the case?**

THORNTONVILLE V. LETCHER

The Facts

Scene 1

Neville Overwork is the lawyer for the Town of Thortonville. He is discussing a personnel matter with Human Resources Director Tom Person. The matter involves Larry Letcher, the Youth Program Director for the Thortonville Recreation Department, has worked for the Town for 18 years with no disciplinary record. After investigating the complaints of several program participants, Overwork tells Person that he has concluded that Letcher has made obscene jokes in the presence of children, touched at least 2 teenage females inappropriately, stared down the shirts of other female program participants, offered in a "joking" way to include a mediocre female athlete on the All Star Team if she would sleep with him, and had a sexual relationship with a 17 year old girl who was a member of last year's All Star Team. Letcher denies all the allegations, but Overwork feels confident that he is lying. Person asks for Overwork's help in preparing the disciplinary charges.

Person tells Overwork that, because the Town refuses to take the risk of keeping Letcher on the job, he has been suspended pending the outcome of a hearing. Person states that, according to the Town personnel policy, Letcher is entitled to be paid his full salary until a final determination is made on the charges.

Based on Overwork's experience with disciplinary hearings, he expects that Letcher will offer a vigorous defense. The hearing and subsequent appeals, followed almost certainly by a wrongful discharge suit, will probably end up costing Thortonville $75,000, including Overwork's fees and the costs of Letcher's salary during his suspension. Because the Town is financially strapped, this expense will mean that the Town will have to cut the summer recreation program entirely or lay off one or two permanent employees. Because the parents of many of the key witnesses are reluctant to let their daughters cooperate, Overwork tells Person that there is a 50% chance that Letcher may prevail in the hearings or the lawsuit.

Scene 2

Letcher's lawyer, Stephanie Swarm, calls Overwork with an offer to settle the whole matter. She tells Overwork that Letcher has found a job with another town in the state, and he is willing to resign from his current position immediately. The *quid pro quo* is that the Town must refrain from "defaming" him by publicizing the charges or by communicating any of this incident to the Town where he is planning to move. Swarm says that, since there is a dispute over the facts, and a neutral fact finder has not resolved the dispute, Overwork can do this with a clear conscience. She tells Overwork that, if Overwork does not accept this deal, Letcher will stay in Thortonville, to "clear his good name" and to enjoy the paid vacation of the continuing suspension.

Overwork tells Swarm, “Fine, let me relate those conditions to the Town Manager and the Town Council, and I will get back to you.”

The Players

Jay Doegay as Neville Overwork
Jorge Fernandez as Tom Person
Sharon Pandak as Stephanie Swarm
Mac McCarley as Moderator/Commentator

Questions

1. **What advice should Overwork give to the Town Council when he reports Swarm's offer?**

2. **Thortonville's personnel policy states that only the information to be given out as a reference is that the person has left Town employment. There is no State case holding one employer liable for failing to disclose relevant and damning information when asked for a reference on a present or former employee by a prospective employer. Does this affect Overwork's advice?**

3. **If Swarm told Overwork that Letcher has agreed to undergo counseling, would this affect Overwork's advice?**

4. **If Swarm represented to Overwork that the threat of charges has sufficiently scared Letcher as to alter his future conduct and Overwork agreed with Swarm's assessment, should this alter Overwork's advice?**

5. **What does Overwork do if the Town Manager recommends and the Town Council unanimously votes to accept Swarm's deal?**

Mission Statement

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Government and Public Sector Lawyers Division

Within the framework of the American Bar Association and in furtherance of its long range goals and objectives, the mission of the Government and Public Sector Lawyers Division shall be to serve:

- as a national advocate for government and public sector lawyers in their quest for excellence, fairness and justice in the performance of their sworn duties;

- as a national voice to highlight the community service roles performed by the nation's government and public sector lawyers;

- as a national educator to advance public understanding about the central roles played by government and public sector lawyers in preserving freedom and ensuring domestic tranquility;

- as a national network system to enable government and public sector lawyers to benefit from practices and procedures successfully implemented in their counterparts' offices;

- as a national network system to enhance the professional growth and the upward mobility of government and public sector lawyers; and,

- as a national leader in rededicating adherence - within our profession and within all of the nation's justice systems - to the highest standards of professional conduct and competence, fairness, social justice, diligence and civility.

For further information about how you can become a member of this vibrant Division serving the needs of America's public lawyers, call 202-662-1020.

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If you enjoyed this program, why don't you join us? The following is a message from the Membership Committee of the ABA's Government and Public Sector Lawyers Division.

As an Assistant City Attorney for North Miami Beach, I'm in the trenches every day. I don't have the time to ferret out information about the "big picture" issues that affect my government practice and public lawyers in general. That's why I value my membership in the Government and Public Sector Lawyers Division – because it conveniently delivers information specific to *my* needs – information that I can not easily obtain elsewhere.

Membership in this division **costs only $20.00 per year - less than 39 cents per week**. When I want to find out what is going on with public lawyers nationwide, I turn to the benefits that I receive as a member of this Division:

■ ***The Public Lawyer,*** **the Division's journal, provides the latest information on complex issues such as government attorney–client privilege, the hiring of private outside counsel, politically motivated dismissals, restrictions on *pro bono* work and more**;

■ ***Pass It On,*** **the quarterly newsletter, reports on Division activity and carries shorter pieces on topics such as transitioning to private practice, who is the government lawyer's client and tips on litigation;**

■ **Members-only access to the Public Lawyer Career Center web page where members can connect with experienced mentors via e-mail, access a comprehensive list of public law offices across the country including job listings and download resources on career development;**

■ **Members-only access to the Division's listserv group – allowing members a convenient way to speak with each other on any topic relevant to their practice;**

■ **Nationally acclaimed CLE programs on the unique ethical issues confronting public lawyers; and**

■ **Division meetings and receptions held several times a year where members can meet and network with other public lawyers from around the country in a relaxed setting.**

This Division helps to break through the clutter in my life by providing relevant information about my practice and about issues that affect public lawyers nationwide. Join me and thousands of other public lawyers by calling the ABA Service Center at **1-800-285-2221** to become a member. If you have questions, please call Theona Salmon at 202-662-1023 or check out our website: **www.governmentlawyer.org.** We look forward to hearing from you.

Sincerely,

Darcee S. Siegel

Membership Committee

Government and Public Sector Lawyers Division
American Bar Association

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