PUBLIC SECTOR ETHICS DECISIONS 2005: SELECTED SUMMARIES OF OPINIONS FROM COURTS AND ETHICS COMMITTEES

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PUBLIC SECTOR ETHICS DECISIONS 2005

I. INTRODUCTION

Government officials and government attorneys are held to a high ethical standard. The public's trust in its government is critical for our society to succeed. As public attorneys, we should welcome this challenge and strive to exceed society's expectations. It is through the application of high ethical standards that justice is achieved and our profession is enhanced.

In many states across the country, governmental entities are adopting ethics codes that provide standards by which all government officials, including public attorneys, must follow. These codes remind us that the public demands that the actions of its government be beyond reproach. The more our profession can openly discuss these issues and stress ethics in every action taken, the stronger our profession will be.

The Model Code of Professional Responsibility and the Model Rules of Professional Conduct set forth the ethical obligations for attorneys. We should continuously review decisions interpreting these rules to ensure compliance. The following report provides a summary of some of the 2005 court decisions and opinions issued by state bar ethics committees that addressed ethical issues facing public attorneys.

I would like to acknowledge the efforts of Jack Pritt, a paralegal in the Mesa City Attorney's Office. His assistance in preparing this report is greatly appreciated.

II. DEFINING THE ATTORNEY-CLIENT PRIVILEGE FOR PUBLIC ATTORNEYS

***In re Grand Jury Investigation v. Doe*, 399 F.3d 527 (2d Cir. 2005)**

> **Holding**: The attorney-client privilege attaches to confidential communications between government officials and government attorneys, even in criminal proceedings.

A federal grand jury subpoenaed the testimony of George, the former attorney to the Office of the Governor of Connecticut, in connection with allegations that the elected officials received gifts in exchange for the award of public contracts. The grand jury sought private communications between George and the Governor. The Governor asserted the attorney-client privilege.

The trial court entered an order compelling George to disclose the communications, stating that "any governmental attorney-client privilege must yield because the interest served by the grand jury's fact-finding process clearly outweighs the interest served by the privilege." The trial court went on to say "'unlike a private lawyer's duty of loyalty to an individual client, a government lawyer's duty does not lie solely with his or her client agency,' but also with the public." *Grand Jury*, at 530.

Before the Second Circuit, the government argued that, when criminal allegations arise, the attorney-client privilege is different for government attorneys than for private attorneys. The loyalty owed to the public outweighs the loyalty owed to the elected official, thus the testimony should be compelled. The Second Circuit disagreed. "[I]f anything, the traditional rationale for the privilege applies with special force in the government context. It is crucial that government officials, who are expected to uphold

and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice."[1] *Id.* at 534.

The Court, however, notes that it is the government that holds the privilege, not the individual elected official. Thus, while one official may have the confidential communication, a new administration may elect to waive the privilege.

***Ross v. City of Memphis*, 423 F.3d 596 (6th Cir. 2005)**

> **Holding:** A former city official's assertion of qualified immunity based on legal advice from a city attorney does not prevent the city from asserting the attorney-client privilege to prevent the disclosure of confidential communications.

Former police director, Crews, was sued in his individual capacity under Section 1983 for alleged discrimination and retaliation. Crews asserted qualified immunity, based on legal advice received from the city attorney, but he refused to disclose the content of the advice because the city claimed it was protected by the attorney-client privilege.

The trial court ordered the disclosure of the information. It found that "in the particular context of a City official claiming qualified immunity based on advice of counsel, the City's privilege 'must give way' so that Crews can mount his defense." *Ross*, at 600-01.

The Second Circuit begins with the acknowledgment that, *in civil cases*, the scope of the attorney-client privilege is the same for government clients as for private clients. Governmental entities, especially municipalities, are not protected by sovereign

[1] There is a split, however, in the Court of Appeals. Some hold that the government cannot prevent disclosure of attorney-client communications during a grand jury investigation. *In re Witness Before Special Grand Jury 2000-2*, 288 F.3d 289 (7th Cir. 2002); *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998).

immunity, thus, the attorney-client privilege allows the entity to investigate wrongdoing and implement remedies without threat of civil liability. Based on this reasoning, the Court held that "a municipal official's assertion of the advice of counsel defense does not require the City to relinquish the privilege it holds." *Id.* at 604. Thus, Crews would not be permitted to disclose the confidential communications, even if it means his defense theory is deemed insufficient.

The Second Circuit then turned to the question of when might a government official hold the privilege rather than the entity? If the official "clearly claims" that he is seeking advice in his individual capacity and not in his official capacity, the privilege belongs to the individual and not the entity. Absent this clear statement, the privilege resides with the government. *Id.* at 606. This clear statement made by the official, however, should cause the government attorney to consider the potential conflict that arises in providing this advice.

***State of Arizona v. Hanna*, 130 P.3d 991 (Ariz. App. 2006)**

> **Holding**: The attorney-client privilege attaches to confidential communications between government officials and government attorneys even in criminal proceedings.

Then Glendale City Attorney, Flaaen, was placed on administrative leave for violating the city's internet usage policy. He resigned shortly thereafter, but filed a lawsuit claiming constructive discharge. Flaaen then sent a letter to the county attorney alleging that members of the city council and the city clerk had violated the state's financial disclosure laws.

Flaaen disclosed that in 2002, the city clerk erroneously told several councilmembers that financial disclosure statements were due in August. In fact, they were due in January 2002. When the councilmembers came to file their disclosure statements, the documents were backdated to January. The clerk's office date stamp was also backdated.

Flaaen had private discussions with the councilmembers regarding this situation. This issue was also discussed in a subsequent executive session. Before the grand jury, Flaaen disclosed the substance of the discussions with the councilmembers during the private meetings and during the executive session. Flaaen admitted that he never told the elected officials that he did not represent them in this matter or that the communications were not privileged. Four of the councilmembers were indicted for presentment of false documents. The city clerk was indicted for tampering with public records and destroying public records. The government officials challenged the indictment, claiming that Flaaen's testimony was protected by the attorney-client privilege.

The court of appeals noted that the State did not contend that this issue was outside the scope of the duties of the elected officials or that Flaaen was not acting as their attorney at the time of the communications. Instead, the State argued that the attorney-client privilege does not apply in criminal proceedings against government officials. The Arizona Court of Appeals disagreed and followed the analysis in *In re Grand Jury Investigation United States v. Doe*, 399 F.3d 527 (2d Cir. 2005). The Court stated "there is a rational policy that supports the extension of the attorney-client privilege to conversations between a government official and a government attorney, even in the context of a criminal investigation." *Hanna*, at 997.

In analyzing when the privilege attaches to a communication, the test is a subjective one, based on the "state of mind of the client." *Id.* at 998. "'An attorney-client relationship is said to exist when the party divulging confidences and secrets to an attorney believes that he is approaching the attorney in a professional capacity with the intent to secure legal advice.'" *Id.* at 998 (quoting *Alexander v. Superior Court*, 685 P.2d 1309, 1314 (1984)). It is the ethical responsibility of the government attorney to advise both the entity and the officials that a potential conflict may exist. Since Flaaen did not provide such advice, the officials reasonably believed the communications were privileged. Thus, the disclosure was found to be inappropriate.

***Brainerd Daily Dispatch v. Dehen*, 693 N.W.2d 435 (Minn. App. 2005)**

> **Holding**: It is appropriate for the municipality to use an executive session to provide legal advice to its attorney when litigation has been threatened. The legal advice exception to the open meeting law is not limited to pending litigation.

The City of Brainerd's Fourth of July celebration includes a parade, which is managed by Brainerd Community Action (BCA), a nonprofit organization that receives substantial funding from the City. Citing safety concerns, BCA denied the Brainerd Area Coalition for Peace's (Coalition) request to march in the parade. The Coalition threatened to sue the City and the BCA if denied the opportunity to march in the parade. The attorney for the City's insurance carrier requested an executive session to discuss possible legal strategies to resolve or defend future litigation by the Coalition. The local media challenged the use of the executive session, asserting that the exception only applied to "pending" litigation, not possible litigation.

The Minnesota Court of Appeals applied a balancing test. Does the need for a confidential attorney-client communication outweigh the public's right to attend the meeting? The Court began the analysis stating "the [attorney-client] privilege is narrower in the context of the Open Meeting law." *Brainerd*, at 440 (citing *Prior Lake American v. Mader*, 642 N.W.2d 729, 739 (Minn. 2002)). The Court notes that an executive session would rarely be permitted for general legal advice and "seldom in situations *other than in relation to threatened or pending litigation.*" (emphasis original) *Id.* at 440 (citing *Minneapolis Star & Tribune Co. v. Housing & Redevelopment Authority*, 251 N.W.2d, 620, 626 (Minn. 1976)).

The Court acknowledged the danger of providing exceptions to the open meeting law, but concluded that the statute contains sufficient safeguards to prevent abuses. First, the municipality is required to disclose the subject of the meeting and the specific grounds for the executive session. Second, city attorneys have an ethical duty to ensure compliance with the open meeting law. *Id.* at 443. ("[A] government lawyer has greater authority than a private lawyer to question a client's conduct because public business is involved"). Third, the penalties for violating the open meeting law are severe. Applying the balancing test, the Court concluded the use of the executive session was legally permissible.

***Leslie v. Ohio Housing Finance Agency*, 824 N.E.2d 990 (Ohio 2005)**

> **Holding:** The attorney-client privilege extends to government entities consulting with in-house legal advisors. This privilege is not limited to attorneys within the Attorney General's Office.

A former employee of the Ohio Department of Development (Leslie) filed suit against Ohio and its officials alleging that state officials violated state law, including improper disbursement of funds. During the course of the litigation, Leslie disclosed legal advice that he had received from an in-house legal advisor employed by the Department. The state filed a motion to have the information stricken from the record, arguing that it was protected by the attorney-client privilege. Leslie argues that the attorney-client privilege does not exist between government officials and government attorneys or, if it does, it is limited to assistant attorneys general.

The Ohio Supreme Court discussed the purpose of the attorney-client privilege and the need to encourage open, honest discussions between government officials and government attorneys. The Court concluded "governmental agencies and employees enjoy the same privilege as [their] nongovernmental counterparts." *Leslie*, at 997 (quoting Restatement of the Law 3d, Law Governing Lawyers (2000), Section 74, Comment b). The Court further concluded that this same privilege exists whether the attorney works for the Attorney General's Office or is an in-house legal advisor. *Id.* at 998.

III. CONFLICT OF INTEREST

***United States v. Ketner*, 370 F.Supp.2d 1045 (Cal. 2005)**

> **Holding:** An entire law firm will be disqualified if a newly hired attorney brings confidential information to the firm. However, an attorney departing a firm will not automatically be assumed to have confidential information with regard to all clients that firm represented. A case-by-case analysis is required.

Defendant Ketner was charged with criminal activity resulting from his work at Mortgage Capital Resources (MCR). Ketner sought to disqualify prosecutor and U.S. Attorney Stolper on the basis that Stolper had been an attorney in a law firm that represented Ketner in the MCR bankruptcy proceeding. The evidence presented showed that Stolper had not worked on the bankruptcy case and possessed no confidential information regarding MCR when he became a prosecutor.

In denying defendant's motion to disqualify, the Court reasoned that an attorney will not be disqualified unless there is "a possibility that the firm-switching attorney had access to confidential information while at his or her former firm . . ." *Ketner*, at 1047 (quoting *Adams v. Areojet-General Corp.*, 86 Cal.App.4th 1324, 1340 (2001)). In this case, Stolper did not work on the bankruptcy case; was not in the firm's bankruptcy section; and did not even work in the same building where the file was maintained. The Court held there was neither a legal conflict nor an appearance of a conflict. The motion to disqualify was denied.

***Burns v. State,* 618 S.E.2d 600 (Ga. App. 2005) *cert. granted* (Jan. 17, 2006).**

> **Holding:** In a government law firm, it is not per se a conflict of interest for two attorneys to represent clients with conflicting interests, so long as the attorneys do not have access to the opposing party's confidential information.

Two criminal defendants were represented by attorneys from the same public defenders office. The defendants had conflicting interests. A joint trial was held and both defendants were convicted. One defendant sought to have the conviction overturned claiming his attorney had a conflict of interest.

The Court distinguished between the potential conflict of a private law firm and a government law firm. In a private firm, the entire firm is barred from representing a client with interests adverse to another client. However, the entire government law office may not be disqualified. In cases involving government attorneys, the Court will look at the individual facts to determine if the attorney had access to confidential information. Absent a showing of such access, the government law firm will not be disqualified.

***Villalpando v. Reagan*, 121 P.3d 172 (Ariz. App. 2005)**

> **Holding:** Criminal Defendant's right to due process is not denied when a conflict-barred city attorney's office designates the substituted counsel.

Assistant Scottsdale city attorney, Villalpando, was arrested for DUI. The Scottsdale City Attorney's Office declared a conflict and requested that the Mesa City Prosecutor's Office handle the Villalpando prosecution. Villalpando argued that once the Scottsdale City Attorney's Office declared a conflict, it could not participate in the selection of substitute counsel. This, defendant argued, would violate her substantive and procedural due process rights.

Violation of a defendant's substantive due process rights occurs when the government's conduct clearly violates a general sense of justice. A procedural due process violation occurs when a defendant is denied a fair and objective tribunal. *Villalpando*, at 175. Neither occurred in this case. Defendant has the burden to show that the Mesa Prosecutor's Office should be disqualified. The Arizona Supreme Court had previously stated that only in extreme circumstances should a party be permitted to interfere with the opponent's attorney-client relationship. *Id.* at 176 (citing *Alexander v.*

Superior Court, 685 P.2d 1309, 1313 (1984)). Furthermore, a court should "view with suspicion" motions to disqualify opposing counsel based on a conflict of interest. *Id.* at 176 (quoting *Gomez v. Superior Court*, 149 Ariz. 223, 226, 717 P.2d 902, 226 (1986)). Here, defendant presented nothing more than a general claim that because Scottsdale declared a conflict of interest, it cannot participate in selection of substitute counsel. This is not sufficient to justify disqualification.

***Ex parte Renatta Riley Adams*, 910 So.2d 827 (Ala. App. 2005)**

> **Holding**: A conflict of interest did not exist when a criminal defendant was brought before a Judge, who had been the city attorney at the time the district attorney filed charges against defendant. Motion to recuse the Judge was denied.

Defendant was charged with felony theft. Charges were brought by the District Attorney's Office. The case was assigned to Judge Hollingsworth. Defendant filed a writ of mandamus directing Judge Hollingsworth to recuse himself because the Judge was the city attorney at the time defendant was arrested and charged.

The court held that since all felony charges are filed and prosecuted by the District Attorney's Office and Judge Hollingsworth was the city attorney at the time charges were filed, there is no basis for recusal. The court held that Judge Hollingsworth did not have a legal conflict or even an appearance of a conflict.

IV. SIMULTANEOUS REPRESENTATION

***Iowa Supreme Court Attorney Disciplinary Board v. Howe*, 706 N.W.2d 360 (Iowa 2005)**

> **Holding:** An attorney may not represent both the prosecuting city and the defendant in resolving misdemeanor charges. Nor may an attorney represent a client charged with a felony at the same he is prosecuting the client for misdemeanor charges.

Howe was a part-time city prosecutor for Spencer, Iowa, handling misdemeanor charges filed by the Spencer police. In 2002, a defendant was charged with one felony count of burglary and three related misdemeanor counts. Howe represented the defendant in the burglary case filed by the county attorney. Although Howe denies it, the Disciplinary Board found that Howe also represented both the defendant and the city in the three misdemeanor cases. The Disciplinary Board produced a letter to the Court, which established that Howe billed both the city and the defendant for his time spent resolving the charges.

The Iowa Supreme Court found a direct and clear violation of the ethical rules in resolution of the misdemeanor charges. The ethical rules require an attorney "to decline employment if the lawyer's exercise of independent professional judgment on behalf of the client will likely be adversely affected." *Howe*, at 373.

The Court also found a conflict in Howe's representation of the defendant in the burglary charge. The charge is based on an investigation conducted by the Spencer police. Howe frequently relied upon the police witnesses in his capacity as a prosecutor.

The risk of "divided loyalties" between the city and the defendant was sufficient to create a conflict for Howe.[2] *Id.* at 375.

***Alabama State Bar*, Ethics Opinion No. 2005-01**

> **Holding:** A case-by-case analysis is required to determine if a firm may represent defendants in municipal court when the same firm represents the municipality in civil cases.

An attorney, whose firm represents a municipality in civil matters, requested an opinion as to whether his firm may represent defendants in criminal matters in municipal court. The attorney acknowledges a conflict of interest, but seeks advice as to what conditions must be met to constitute a valid waiver.

The Alabama State Bar relied on ER 1.7. Obviously, the interest of the city in prosecuting cases is adverse to the interest of the criminal defendants. The question is whether the attorney's ability to defend either client will be "materially limited" by his representation of the other client. If the answer is yes, the conflict cannot be waived. Here, the State Bar concluded that "this conflict situation is so fraught with potential ethical pitfalls that the advisability of waiver and consent appears to be, at best, highly questionable. However, this office will not go so far as to hold this conflict to be absolutely unwaivable, despite the many ethical concerns discussed herein." Ala. Ethics Op.No.2005-01, at 2. If the attorney wishes to pursue the joint representation, he must review the cases individually and determine if a conflict arises, based on, among other things, his relationship with the witnesses to be called in the case.

[2] See also, *Iowa Supreme Court Attorney Disciplinary Board v. Zenor*, 707 N.W.2d 176 (Iowa, 2005). (It is

2005 WL 3067731 (N.J. Adv. Comm. Prof. Eth.) Opinion No. 697, August 8, 2005.

> **Holding:** A municipal attorney may not represent a private client before the municipality or any of its boards or commissions.

An attorney that represents the zoning board wished to represent criminal defendants in municipal court. The Ethics Committee found that a municipal attorney's client is the "entire" city, not just the department the attorney directly reports to. The criminal defendant's interests are different than the municipality, thus, a direct conflict of interest exists.

2005 WL 3046318 (N.Y. St. Bar. Assn. Comm. Prof. Eth.) Opinion No. 788, October 21, 2005

> **Holding:** "A lawyer who has a private practice and serves as a part-time assistant district attorney may not represent a client in a civil matter where the client is being prosecuted by the district attorney's office. This conflict cannot be cured by consent."

An attorney in a private firm is also a part-time prosecutor for the district attorney's office. In the course of representing a husband and wife in the preparation of their wills, the attorney learns that the husband is being prosecuted by the district attorney's office. The New York State Bar Association Committee on Professional Ethics concluded that DR5-105(D) imputes the conflicts of one attorney onto all attorneys in the firm. The knowledge is imputed to all attorneys in the district attorney's office as if a private law firm. The Committee reasoned that the attorney has full access to the file and attends staff meetings where cases are discussed. The Committee stressed

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improper for an attorney to represent both the city and the defendant in a criminal speeding case.)

the need to avoid even an appearance of impropriety. Moreover, this type of conflict is nonwaivable due to the appearance of impropriety that would be created.

V. MISCELLANEOUS OPINIONS

***United States v. Holmes*, 413 F.3d 770 (8th Cir. 2005)**

> **Holding:** It is improper for a prosecutor to make unsubstantiated comments about the integrity of the defense counsel.

A prosecutor, during closing arguments, made comments regarding the honesty and integrity of the defense counsel, suggesting that defense counsel was misstating the evidence. The Court found these comments to be improper because (1) the comments encourage the jury to focus on the defense attorney, not the defendant's actions; (2) the prosecutor's comments often carry more weight with the jury; and (3) the prosecutor's duty is to seek justice, not a conviction.

***Legal Ethics Committee of the Indiana State Bar Association*, Opinion No. 2 (2005)**

> **Holding**: Release-dismissal agreements are per se improper.

The Indiana Ethics Committee found that there is direct conflict of interest when prosecutors agree to dismiss criminal charges in exchange for the defendant's agreement to waive all potential civil claims against the governmental entity. The Committee concluded that release-dismissal agreements are improper.

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