Lawyer Ethics
and
the Government Attorney

International Municipal Lawyers Association
2020 Virtual Annual Conference
September 22, 2020

Three Perspectives

- Court of Appeals of Maryland
  - State supreme court
  - Regulates practice of law in Maryland
  - Bar admission
  - Adopts rules of professional responsiblity
  - Attorney discipline



Court of Appeals of Maryland

Three Perspectives

- United States Attorney's Office
  - Prosecutor
  - Special rules relating to prosecutors
- Maryland Attorney General's Office
  - Opinions and advice
  - Clearinghouse for ethics rules governing AAGs

A Higher Standard

- "The government wins when justice is done."
  - Frederick W. Lehmann
  - Justice Department inscription

A Higher Standard

- "The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

  – *Berger v. United States*, 295 U.S. 78, 88 (1935)

A Higher Standard

- Restating the premise in *Berger*:

The [government attorney] is the [adviser or] representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.

A Higher Standard

- Attorney General Jackson (April 1940):
  - "a rededication to the spirit of fair play and decency that should animate the [government attorney]"
  - "Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement, you can also afford to be just."

A Higher Standard

- Attorney General Jackson (April 1940):
  - "The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility."

A Higher Standard

- Attorney's oath in Maryland:
  - "demean myself fairly and honorably"
  - Uphold Maryland Constitution
  - Support and defend United States Constitution
- Constitutions
  - Structure of government
  - Limits on government
- Role of Government Attorney

Attorney Discipline Cases

- 2009 – 2019:
  - 599 attorneys sanctioned
  - 6 government attorneys

Attorney Discipline Cases

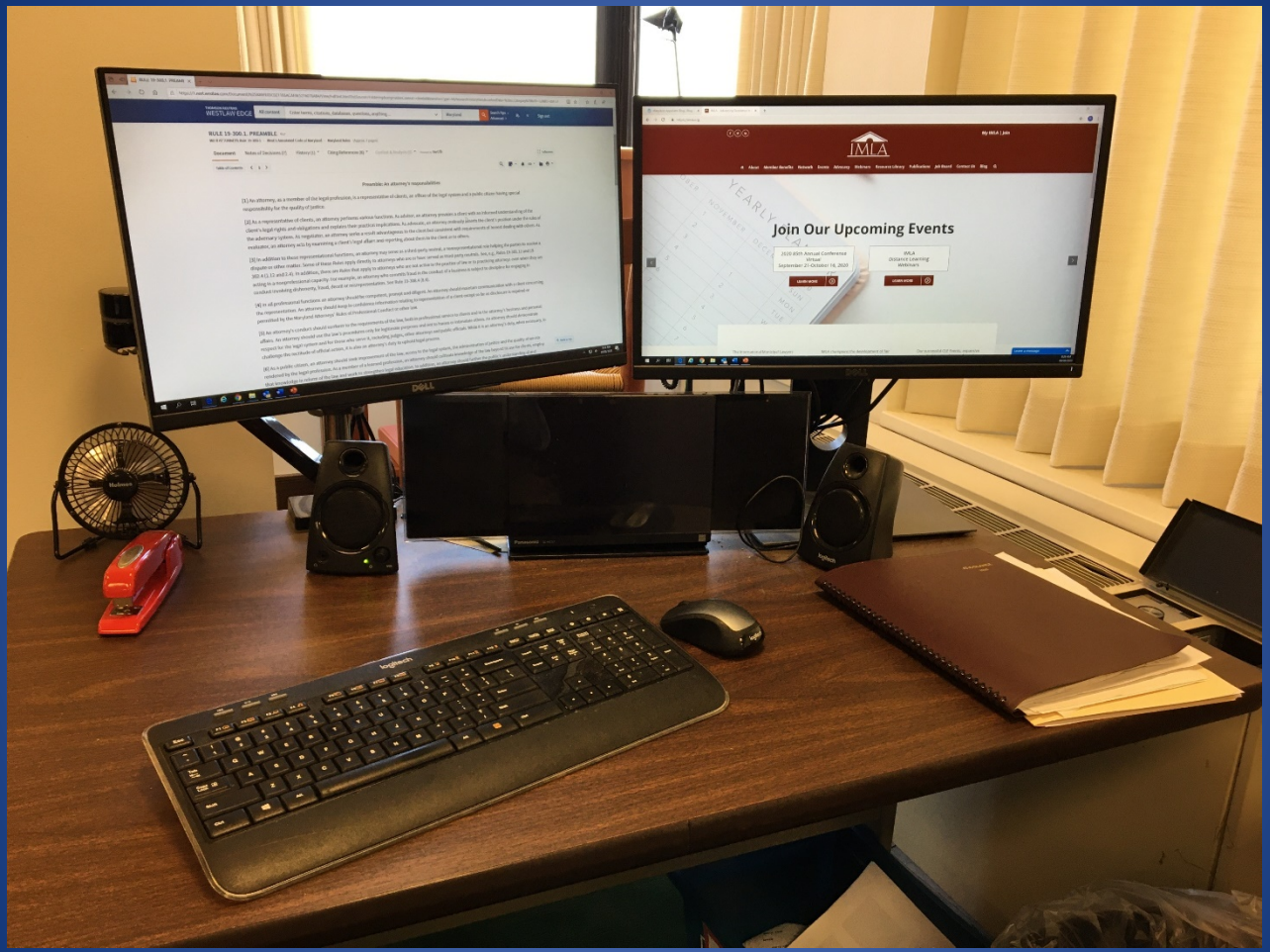
- Common violations – private attorneys:
  - Minimum standards
    - Competence (Rule 1.1)
    - Scope of representation (Rule 1.2)
    - Diligence (Rule 1.3)
    - Communication (Rule 1.4)
  - Money
    - Mishandling trust account
    - Unreasonable fee
    - Misappropriation


Diligence
Competence
Communication



Attorney Discipline Cases

- Common violations – government attorneys:
  - Conduct prejudicial to the administration of justice (Rule 8.4(d))
  - Dishonesty (Rule 8.4(c))
  - Misuse of government property
  - Violation of rules relating to prosecutors
  - computers


RULE 19-300.1. PREAMBLE
Preamble: An attorney's responsibilities
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Attorney Discipline Cases

- *Attorney Grievance v. Markey*
  - VA lawyers – "Forum of Hate"
  - Emails disparaging others on basis of sex, race, sexual orientation
    - During working hours
    - Government computers
    - Government email addresses
  - Two Maryland attorneys
  - Violation of Rule 8.4(d) (conduct prejudicial to the administration of justice) and Rule 8.4(e) (bias or prejudice)
  - Suspended indefinitely

Attorney Discipline Cases

- *Attorney Grievance v. Greenleaf*
  - Former Assistant State's Attorney
  - Chief deputy clerk, appellate court
  - Sexually explicit Internet conversations with undercover officer posing as 14-year girl
  - Arrested
  - Alford plea – probation before judgment
  - Violations of Rule 8.4(b) (criminal act), Rule 8.4(c) (dishonesty), Rule 8.4(d) (conduct prejudicial to administration of justice)
  - Disbarred

Attorney Discipline Cases

- *Attorney Grievance v. McDonald*
  - Deputy State's Attorney
  - "inappropriate relationship" with office manager
  - Embezzlement by office manager
  - Intervened on her behalf
  - Deleted emails from her computer
  - Violations of Rule 8.4(c) (dishonesty) & Rule 8.4(d) (conduct prejudicial to administration of justice)
  - "higher standard"
  - Disbarred

Attorney Discipline Cases

- "Disbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position with intent to obtain a significant benefit or advantage for himself or another."

  - ABA, Standards for Imposing Lawyer Sanctions §5.21 (1992)

Some Rules to Know

- Preamble
- Rules relating to organizations
  - Rule 1.13 (organizational clients)
  - Rule 4.2 (communications with represented person)

Some Rules to Know

- Conflicts & government employment
  - Rule 1.11

- Rules for prosecutors
  - Rule 3.8 (special responsibility of prosecutor)
  - Rule 3.6 (trial publicity)

Preamble

- "A Lawyer's Responsibilities"

- "Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government attorneys may include authority concerning legal matters that ordinarily reposes in the client in private client-attorney relationships."

- "[Government attorneys] may be authorized to represent several government agencies in intra-governmental legal controversies where a private attorney could not represent multiple private clients."

Who is the client?

- Government agency or entity
- Rule 1.13: Government attorney "represents the organization acting through its duly authorized constituents."
- Rule comment: Look to local law to determine who speaks for client.

Who is the client?

- When organization's agents make decisions, "the decisions must ordinarily be accepted by the lawyer even if their utility or prudence is doubtful." Rule 1.13, *Comment [3]*

- But: Government attorney may have duties beyond loyalty to agency or its agents

- Government lawyers "may have authority under applicable law to question such conduct more extensively [than a lawyer for a private organization]." Rule 1.13, *Comment [9]*

Multiple representation

- Two public agencies in same proceeding
  - Tribunal
  - Agency litigant
- Preamble:
  - Look to local law
  - Exception to conflict and imputation rules

Special Conflict Rules

- Government practice to private practice
  - Conflicts – Rule 1.11(a)
  - Imputation – Rule 1.11(b)
  - "Confidential government information" – Rule 1.11(c)

- Private practice to government practice
  - Conflicts – Rule 1.11(d)

Special Issues for Prosecutors

- *Attorney Grievance v. Gansler*
  - State's Attorney
  - Statements concerning investigations
    - Confessions
    - Details of evidence
  - Statement concerning plea offer in pending case
  - Statement concerning intent to prosecute

Special Issues for Prosecutors

- *Attorney Grievance v. Gansler*
  - ”substantial likelihood of materially prejudicing an adjudicative proceeding”
  - Prosecutor speech more limited than defense speech
  - Violations of Rule 3.6
  - Reprimand

Special Issues for Prosecutors

- *Attorney Grievance v. Smith*
  - Assistant State's Attorney
  - Child sex abuse case
  - Plea bargain
  - Failure to provide statutory notice to victim
  - Victim had no opportunity to participate

Special Issues for Prosecutors

- *Attorney Grievance v. Smith*
  - "gross negligence in the discharge of the prosecutorial function"
  - Violated:
    - Rule 1.3 (diligence)
    - Rule 8.4(d) (conduct prejudicial to the administration of justice)
  - Indefinite suspension