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Government Lawyers

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GOVERNMENT LAWYERS

by Robert E. Rodes, Jr.*

I am grateful to Professor Lee for the opportunity to comment on this fine set of papers regarding the ethical obligations of government lawyers. These papers shed light on many interesting aspects of serving the government. Professors Shaffer and Lee explore the peculiar challenges to integrity that a lawyer experiences when he has a client who can chop his head off.[1] The challenges are less today, but a lawyer with large student loans to pay may not realize that they are. Professor Hazard points out that government lawyers are government employees with the responsibilities that government employment entails.[2] Professor Green shows that government lawyers may also be public officials with the duty of fairness that all public officials share.[3] These are all important points.

In stressing the obligation of government lawyers to seek justice, Professor Green explicitly, and perhaps the whole panel implicitly, indicates that private sector lawyers have no such obligation.[4] That view, I believe, must be firmly resisted. Lawyers are not "generally expected to pursue their private clients' objectives, even if the truth is derailed or the outcome is unjust."[5] Or if they are generally expected to do so, they are not rightly expected to do so. In Indiana, and in a number of other states, we still take an oath not to "counsel or maintain any action, proceeding, or defense which shall appear to [us]

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[1] *See* Thomas L. Shaffer, *More's Skill*, 9 WIDENER J. PUB. L. 295 (2000); Randy Lee, *Robert Bolt's* A Man for All Seasons *and the Art of Discerning Integrity*, 9 WIDENER J. PUB. L. 305 (2000).

[2] *See* Geoffrey C. Hazard, Jr., *Conflicts of Interest in Representation of Public Agencies in Civil Matters?*, 9 WIDENER J. PUB. L. 211 (2000).

[3] *See* Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 WIDENER J. PUB. L. 235 (2000).

[4] Green, *supra* note 3, at 235-36.

[5] *Id.* at 235.

unjust."[6] This language was adopted by the American Bar Association in 1908.[7] The Pennsylvania oath is differently worded,[8] but the Supreme Court of Pennsylvania stated in 1845 that a lawyer violates the oath when he consciously presses for an unjust judgment.[9]

At another place, Green contrasts the duty of government lawyers not to bring "bad" or undeserving civil cases with the duty of private lawyers, which he limits to not taking frivolous positions.[10] It is not altogether clear to me what sort of case would be bad or undeserving, but yet not frivolous. Whatever such a case would look like, I think to bring it would be a violation of the Federal Rules of Civil Procedure Rule 11 and comparable state rules. Granted, Rule 11, as it has stood since 1993, allows lawyers to be creative in their legal contentions as long as their claims are "nonfrivolous."[11] But it requires all of their factual claims to "have evidentiary support."[12] The version in force from 1983 to 1993 required a pleading to be "well grounded in fact and warranted by existing law or by a good faith argument for the modification, extension, or reversal of existing law."[13] The pre-1983 version simply required "good ground to support" the pleading.[14] Many states use one of the earlier versions. Pennsylvania, as is often the case, goes its own way. Rule 1023(b) of the Pennsylvania Rules of Court requires good ground, but adds language about good faith arguments for changing the law.[15] Rule 1024 requires all factual assertions or denials to be verified.[16] I do not believe any of these rules will permit private lawyers in civil litigation to content themselves with avoiding frivolity.

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[6] IND. A.D.R. 22.

[7] CANONS OF ETHICS OF THE AMERICAN BAR ASSOCIATION Oath of Admission (1908).

[8] 42 PA. CONS. STAT. § 2522 (1998).

[9] Rush v. Cavenaugh, 2 Pa. 187 (1845).

[10] Green, *supra* note 3, at 240-41.

[11] FED. R. CIV. P. 11(b)(6).

[12] *Id.* (b)(3).

[13] FED. R. CIV. P. 11 (amended 1993).

[14] FED. R. CIV. P. 11 (amended 1983).

[15] PA. R. CT. 1023(b).

[16] *Id.* 1024.

A little farther on, Green asks the following: "Must the government's civil litigators . . . correct or 'confess error,' or, like private lawyers in civil litigation, may they freely encourage and exploit it?"[17] I do not believe private lawyers in civil litigation may freely encourage and exploit error on the part of the courts before whom they litigate. In the first place, I do not see how you can "encourage" an erroneous decision except by advocating it, and advocating a decision you know to be erroneous would seem to violate Rule 11 as well as the other rules just discussed. Also, if you know a decision is erroneous, it must be because there is controlling authority in the jurisdiction that goes the other way. If such controlling authority exists, a lawyer is obliged by Rule 3.3(a)(3) of the Model Rules of Professional Conduct to be candid and reveal it to the court.[18]

So much for "encouraging" error. How about "exploiting" it? I suppose you would be exploiting an error if you were to enforce a judgment that the court erroneously awarded your client. On the other hand, if the judgment is unjust, you should not have sought it in the first place–for reasons I have already stated. If it is just, then you should be able to take advantage of it as long as it is not being appealed. But I cannot see why a government lawyer should not be able to do the same.

Suppose the judgment is appealed. Can you brief and argue a case for the appellee knowing for certain that the decision being appealed from is dead wrong? Not without violating Rule 3.1 of the Model Rules of Professional Conduct, unless you have a basis for affirmance that is not frivolous.[19] Rule 11 of the Federal Rules of Civil Procedure does not apply to proceedings in the appellate courts, but some of the state counterparts apply to all courts of the state. In any event, you could not be certain a decision was erroneous unless you were sure it would be reversed on appeal, in which case it would be a waste of your time and your client's money to argue for affirmance.

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[17] Green, *supra* note 3, at 241.

[18] MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(3) (2000).

[19] *Id.* Rule 3.1.

Green offers a number of specific instances to illustrate the special responsibility of government lawyers.[20] It is a little difficult to find persuasive nongovernmental analogies for them, but as far as the analogies go, they impose the same obligations on the lawyers involved.

Green's first case is *Williams v. Taylor*,[21] in which a state prisoner sought federal habeas corpus on account of the prosecutor's failure to make proper discovery at the trial or in post-conviction proceedings in the state courts.[22] In supporting his claim, Green did not accuse the state's lawyers of anything that would not have caused a private lawyer's judgment to be set aside for misconduct under Federal Rule 60(b)(3) or a state counterpart.[23] For instance, one of the decisions in *Anderson v. Cryovac, Inc.*,[24] part of the litigation described in the famous book *A Civil Action*,[25] set aside a judgment on just that ground: the winning party had failed to make discovery of a discoverable document.[26] Neither the absence of wrongful intent nor the lack of perceptible effect on the outcome prevented the finding of misconduct and the setting aside of the judgment.

Another case Green discusses is a proceeding brought by lawyers for the New York City Commission on Human Rights on behalf of a woman who complained of discrimination by her employer.[27] As the case proceeded, the City's lawyers came to believe that the complainant was lying and the employer had done nothing wrong.[28] Green asks the following question:

> As advocates, was it proper for the city's lawyers to publicly ask the administrative tribunal to credit the former employee's testimony and find that the employer acted impermissibly, even though the lawyers privately concluded

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[20] Green, *supra* note 3, at 243-56.

[21] 189 F.3d 421 (4th Cir. 1999), *aff'd in part and rev'd in part*, 529 U.S. 420 (2000). *See* Green, *supra* note 3, at 243-46.

[22] *Williams*, 189 F.3d at 427.

[23] FED. R. CIV. P. 60(b)(3).

[24] 862 F.2d 910 (1st Cir. 1988).

[25] JONATHAN HARR, A CIVIL ACTION (1995).

[26] *Anderson*, 862 F.2d at 933.

[27] Green, *supra* note 3, at 246-48.

[28] *Id.* at 246-47.

> that the testimony was probably false and the claim unjust, or, were they required to take the public position that accorded with their genuine views?[29]

The City's lawyers decided they had to dismiss the case, because as public servants they were obliged to seek justice.[30] Green contrasts their stand with that appropriate to a private attorney. He says that "if . . . they represented the discharged employee–they could ethically offer the questionable testimony in support of a claim they considered unjust as long as they did not *know* that the former employee's testimony was false."[31] I disagree.

Granted, Rule 3.3 of the Model Rules of Professional Conduct merely *permits* refusing to offer testimony the lawyer reasonably *believes* to be false.[32] The rule, however, *requires* refusal if the lawyer *knows* the testimony is false.[33] But if the lawyer believes that the false testimony will lead to an injustice as well as a deception, the oath I have already referred to will preclude using it.[34] And even without an oath, no system, however elaborate, can have it be morally acceptable for anyone, lawyer or layman, to intentionally perpetrate an injustice.

But suppose we just *think* the discharged employee is lying. Can we properly deprive her of her day in court–or her day before the relevant administrative tribunal–on the basis of a guess? No, but no more can the City's lawyers properly do so. Neither city lawyers nor private lawyers are appointed to be judges. The 1908 Canons of Ethics of the American Bar Association provide that a lawyer's appearance in a case is "equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination."[35] No more than that should be required of a government lawyer, and no less should be required of a private lawyer.

Next, Green presents a hypothetical where a lawyer pursues a time-barred claim and gets a favorable settlement because the

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[29] *Id.* at 247.

[30] *Id.*

[31] *Id.* (emphasis in original).

[32] MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(c) (2000).

[33] *Id.* Rule 3.3(a)(4).

[34] *See supra* notes 6-9 and accompanying text.

[35] CANONS OF ETHICS OF THE AMERICAN BAR ASSOCIATION Canon 30 (1908).

defendant's lawyer does not realize that the statute of limitations has expired.[36] Green thinks this is acceptable conduct for a private lawyer but not for a government lawyer.[37] He reports that the American Bar Association thinks it is acceptable for either.[38] I think it is acceptable for neither. Deliberately to initiate a time-barred claim is a violation both of Procedure Rule 11[39] and of Conduct Rule 3.1.[40] Also, the resulting settlement would be voidable under section 253 of the Second Restatement of Contracts.[41]

Green concludes his set of examples with lawyers asked to cope with various forms of misconduct on the part of their governmental clients.[42] He believes, quite rightly, that their responsibility to the public precludes simply circling the wagons and defending the officials involved.[43] He says "government lawyers must take a firm position in favor of conforming government practices to the law."[44] But should not corporate lawyers do the same for corporate practices? I remember being told by the general counsel of a corporation that more of his time was spent advocating the law before the corporation than advocating the corporation before the law.

His point is reinforced by a body of cases that extend whistle-blower protection to corporate in-house lawyers in the same way the protection is afforded other employees.[45] Model Rule 1.13

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[36] Green, *supra* note 3, at 248.

[37] *Id.*

[38] *Id.*

[39] FED. R. CIV. P. 11.

[40] MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (2000).

[41] *See* RESTATEMENT (SECOND) OF CONTRACTS § 253 (1979).

[42] Green, *supra* note 3, at 249-54.

[43] *Id.*

[44] *Id.* at 250 (citing Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 ME. L. REV. 155, 163 (1966)).

[45] *See, e.g.*, General Dynamics Corp. v. Superior Court, 876 P.2d 487, 502-03 (Cal. 1994) (en banc) (holding that an in-house counsel could bring a retaliatory discharge claim where such counsel was discharged for following mandatory ethical obligations); Parker v. M & T Chemicals, Inc., 566 A.2d 215, 220 (N.J. Super. Ct. App. Div. 1989) (holding that an employee-attorney may bring a wrongful discharge suit against his employer-client); *but see* Balla v. Gambro, Inc., 584 N.E.2d 104, 110 (Ill. 1991) (holding that tort actions for wrongful discharge are unavailable to in-house counsel).

indicates that it is the lawyer's duty to blow the whistle if corporate officials are acting contrary to the best interest of the corporation, or are engaging in illegalities that might be attributed to the corporation.[46] But the best interest of the corporation *qua* corporation is to carry out the public purpose for which it was chartered. My first job after law school was working in the General Counsel's Office of Liberty Mutual. My superiors made it clear to me from the first day that it was as much in the interest of the company to pay claims that were covered by its policies as to resist claims that were not covered.

I do not at all mean by these criticisms to take anything away from the importance of these papers in shedding light on the special role of the government lawyer as a public servant. Government lawyers are unique in their opportunity to serve the peace, order, and well-being of their fellow citizens. They are unique in their opportunity to maintain the democratic accountability of our leaders. But they are not unique in their duty to refrain from perpetrating injustice. That is the duty of every lawyer–indeed, of every human being.

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[46] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (2000).