

# Steering Clear of Ethics Pitfalls

By Susan Kidd

Ethical questions sometimes lurk in the midst of everyday, common tasks. They may arise when interacting with opposing counsel, responding to discovery requests, dealing with *pro se* litigants, and communicating with clients. Often the answers are not neatly laid out in the rules of professional conduct, but rather they require analysis, experience, and a bit of just plain common sense. Determining how to respond to these problems adds one more layer to our daily workload.

One of the goals of the Government and Public Sector Lawyers Division (the Division) is to help public lawyers respond to these ethical issues through articles, web resources, and especially through the presentation of the Division's continuing legal education (CLE) program *Ethical Considerations in Public Sector Law*. Using an entertaining interactive format, *Ethical Considerations* panelists creatively dramatize hypothetical scenarios, and include a discussion period following each skit. Audience members observe real-life situations that they may encounter in their own practice. Compared to the traditional "talking head" format, rules and issues seem to be understood and retained much more effectively when this program format is used. (See sidebar, page 2, for more information about the program.)

In the summer of 2004, *The Public Lawyer* analyzed two scenarios from our *Ethical Considerations* program involving conflicts of interest, confidentiality, meritorious claims and contentions, and reports of professional misconduct. This summer, Division staff wrote several new program scenarios. We brainstormed, spoke with colleagues, and imagined ethical nightmares. Two products of our efforts are analyzed here by Division Ethics Committee Chair Ellen Lazarus, Deputy Assistant Director, Congressional Research Service, American Law Division, Library of Congress; and Continuing Legal Education Committee Chair Sharon Pandak, Counsel, Local Government Practice Group, Sands, Anderson, Marks & Miller, P.C.

## BIG SCREEN PIZZA V. ST. MARY'S COUNTY

*Is a Cookie Worth a Thousand Words?*

### Scene 1

Stephen Eager, a St. Mary's County Assistant County Attorney, has a case before the county appeals board. The board hears appeals of agency decisions and the members of the board are notoriously obnoxious. Eager is representing the

county in a case involving the denial of a permit to allow Big Screen Pizza to build a delivery-only pizza establishment. The question is whether the county agency interpreted the zoning ordinance correctly in denying the permit.

Eager does not have much experience in zoning matters; he was assigned this case because he is a plebe and because of the rotation system in the office, which randomly assigns the dreaded appeals board cases. Eager also has a huge caseload of personnel matters and civil rights cases in federal court.

The issues surrounding this case are complicated, the agency has left five messages, a reporter has just called, and the hearing is next week. Eager has been in trial all week and has not had time to work on the case. He is beginning to panic. He starts to fantasize about how restful it would be to take a short break in the hospital after a small, not too serious, car accident. He shakes himself and opens the case file. He really needs a vacation.

### Scene 2

Eager realizes he has to bone up on the zoning issues fast. He needs the help of the expert in his office: Connie Flict. She is the land-use team leader and really knows her stuff. In fact, she helped draft the ordinance in question. Also, she is sort of the mother hen of the office; she is always helping out, organizing office get-togethers, and bringing in fresh baked goods. The problem is, she is counsel to the appeals board. (Each assistant county attorney, in addition to his or her normal caseload, is assigned as counsel to one or more of the various county agencies.) But Eager is desperate — so he knocks on her office door and asks for her help.

"Connie, I need your help. I have a case next week before the appeals board involving the denial of a permit based on the interpretation of a zoning ordinance that you helped draft. Can you help me?"

"Now, Steve, you know I am the counsel to the board. I can't assist you."

"Connie, can't you simply help me with some basic information on the interpretation of the zoning ordinance? I'm desperate for some assistance here, and in order to

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competently represent my client, I need to talk to the expert in this office — you.”

Flict sighs and says, “Steve, let me think about it,” as she hands him a cookie.

### Questions to Consider

**PL:** May Eager represent the county in this zoning matter while at the same time, his office colleague, Flict, represents the adjudicative body that he will appear before?

**Lazarus:** The situation in which one employee of an office represents the adjudicative body that another employee of the same office must appear before is not specifically addressed by the rules. Rule 1.11, Special Conflicts of Interest for Former and Current Government Officers and Employees, although not directly on point, gives some guidance regarding this situation in its discussion of screening (isolating a lawyer from participation in a matter).<sup>1</sup> Rule 1.11(b) states that office colleagues of a former government lawyer may represent a client in connection with a matter in which the former government lawyer would be disqualified from participating under Rule 1.11(a) if a screening system is used to prevent the former government lawyer from any involvement in the matter and if written notice is given to the appropriate government agency to ensure compliance with the rule.<sup>2</sup> Thus, if Flict is carefully screened, it would be permissible for her colleague to appear before the board that she represents. [Former or current government lawyers are also subject to the prohibition against concurrent conflicts of interest stated in Rule 1.7 as well as to the requirement to protect confidences of a former client under Rule 1.9(c)].

**PL:** Is it ethically permissible for Eager to approach Flict for assistance?

**Lazarus:** Eager may approach Flict for help if he makes it clear from the start that he is seeking only general help about the zoning ordinance and not confidential information related to the board’s proceedings.

**PL:** Can Flict help Eager? If so, how much? Where should she draw the line?

**Lazarus:** Flict may assist Eager with general information about the ordinance and other information that is in the public domain. She may not provide confidential information relating to her client, the Board of Appeals or tell Eager how she will advise the board. If Flict is properly screened from lawyers in her office who have business before the board, then confidential information of the board will be protected. Flict should acknowledge the obligation not to communicate with any of the other lawyers in the office with respect to the board’s work, and other lawyers in the office should be formally informed that the screening is in place.<sup>3</sup>

*Ethical Considerations in Public Sector Law*, the Division’s acclaimed continuing legal education program, focuses on the unique ethical issues confronted by public lawyers. The program uses short skits to illustrate hypothetical scenarios in an entertaining, interactive format. Examples of topics examined include scope of representation, public sector attorney-client privilege issues, candor toward the tribunal, responsibilities of supervisory lawyers, meritorious claims and contentions, office management issues, and more. The Division has teamed up with state bars and other groups across the country to present this program more than 50 times in 25 states and Canada.

There are several different versions of the program, and it can be tailored to meet the needs of a particular group.

Cosponsoring groups assist the Division with program logistics. This seminar is an easy, inexpensive way to provide programming specifically designed for public lawyers in your community. Interested in exploring the possibility of presenting the program in your area? Please contact Division Director Susan Kidd at [susankidd@staff.abanet.org](mailto:susankidd@staff.abanet.org) or 202-662-1022.

### TUFFIE v. CITY of MARLBORO

*To Settle or Not to Settle — Is That the Question?*

#### Scene 1

Kate E. Thickle is an assistant city attorney for the City of Marlboro. She represents the city and Officer Fister in an excessive use of force suit naming the city and Fister as defendants. Seeking monetary damages, the 5’ 2”, 105-pound plaintiff, Ima Tuffie, has alleged that after Fister arrested her for DWI and took her to the police station for processing, he hit her several times. Tuffie has photos of bruises that she claims were caused by Fister. Her parents will testify that she had the bruises when she returned home from the police station early the next morning after her arrest.

Fister claims Tuffie “went ballistic” as he tried to escort her into the holding cell at the station. He says that Tuffie tried to kick him in the groin area and tried to gouge out his eyes. Fister claims that he was only using self-defense against Tuffie. There are two previous Internal Affairs Office (IAO) investigations concerning allegations of excessive force against Fister, but IAO determined the allegations in both matters were without merit.

## Scene 2

Several months prior to the scheduled trial date, Thickle, City Attorney Mitch Powell, Chief of Police Rodney Ferrell, and representatives from the city's insurance company meet to discuss the merits of the case.

"We've got to settle this one, I'm telling you, Fister is a hot head," Ferrell says. "These photos are scary . . . and did you see the plaintiff, . . . she's tiny; she must weigh a total of 100 pounds!"

"Please hear me out before you make any decisions," Thickle pipes up. "We actually have a very strong case, and I think a jury will agree. Also, her lawyer is very green. Fister's deposition and responses to interrogatories didn't give him anything to work with. The attorney didn't even ask for Fister's IAO reports."

"I hear you," Ferrell says, "but I do not want this case to go to trial — I think that would be a huge mistake. And the fact that she has a bozo lawyer makes me think we could settle this easily and inexpensively."

Thickle tells them that she has already spoken to Fister about the possibility of settling. "Well, you need to know that Fister is dead set against settling the case. He is sick and tired of criminals making unfounded accusations of excessive use of force by police officers."

"Okay, we've heard your side, but I agree with the chief, this one should be settled," Powell says. "Tell Fister we have to settle."

Thickle leaves the meeting dreading her call to Fister.

## Questions to Consider

**PL:** Does Thickle have a conflict of interest due to the divergent objectives of Ferrell and Fister?

**Pandak:** Under Model Rule 1.8(g) differences in parties' willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement.<sup>4</sup> A conflict, in violation of Model Rule 1.7, may arise because of a substantial discrepancy in settlement possibilities for the parties.<sup>5</sup> If after Thickle thoroughly explains the chief's concerns to Fister and Fister remains opposed to settling

# Ethics Ruling Keeps Pace with Present Day-Law Practice: *U.S. v. Ketner*, 370 F. Supp. 2d 1045 (C.D. Cal. May 12, 2005)

By Sarah Hilton

In the U.S. District Court for the Central District of California, defendant Kenneth Ketner (Ketner) sought to disqualify the prosecutor, Assistant U.S. Attorney Andrew Stolper (Stolper), on the ground that Stolper had previously worked in an office of Irell & Manella LLP (Irell), the law firm that represented Ketner in a bankruptcy resulting from the demise of Mortgage Capital Resources (MCR). The federal criminal prosecution was related to Ketner's activities at MCR.

This case raised two issues: First, does a general application of California's ethics rules require disqualification of Stolper? Second, is there a higher standard that requires disqualification of a government prosecutor solely based on the appearance of conflict?

The district court denied the motion to disqualify and held that disqualification under governing state ethics rules was not warranted since the prosecutor never worked on the defendant's bankruptcy and was virtually unknown to the firm's attorneys who had. In addition, no appearance of conflict of interest that might warrant disqualification arose from the fact of the prosecutor's previous employment.

In applying California's ethics rules, the court recognized that the days when lawyers worked for the same organization throughout their careers are over and that disqualification based on a conclusive presumption of imputed knowledge arising from a lawyer's past association with a law firm is out of touch with today's practice of law. Today a California lawyer who has changed firms will not be disqualified unless a possibility exists that the firm-switching lawyer had access to confidential information while at his former firm that is related to the current representation.

According to the record, Stolper worked for Irell but never worked on Ketner's bankruptcy. He worked in Irell's Century City office, not the Newport Beach office that handled Ketner's bankruptcy and maintained its records; he was virtually unknown to the Irell lawyers who worked on Ketner's bankruptcy. Protecting client confidences is a principle consideration in cases of successive representation, and the court was satisfied on the record that Stolper had no access to confidential information.

Defendant Ketner argued that U.S. attorneys are held to a higher standard than private practitioners, and they must recuse themselves when there is the appearance of conflict of interest. Assuming that an appearance of conflict would disqualify an assistant U.S. attorney, the court found none in the record. Ketner asserted the proposition that an attorney without confidential information still brings with him by imputation any taint his firm possesses. The court did not find this persuasive. Because Stolper never represented Ketner, the court found no basis to assume that Stolper had access to Ketner's confidential information while working at Irell and found that appearances are not sufficient to support disqualification here.

Finding no rationale for creating insurmountable problems for lawyers — public or private — who make career changes, the court denied the motion to disqualify. ❖

the case, Thickle would have a conflict of interest under Rules 1.7 and 1.8. Because Fister may decide to assert a claim against the city (such as improper training), it may be imprudent to attempt to resolve the conflict under Model Rule 1.7(b).

**PL:** How should Thickle proceed?

**Pandak:** Thickle should carefully explain in a written memorandum to the city attorney the efforts that she made to communicate to Fister the chief's concerns about the case and the chief's reasons for wanting to settle. She should then set forth Fister's reasons for wanting to go forward. Then she should request that because of the conflict between the chief and the officer, the city should hire an outside counsel to represent Fister and that she should be relieved of the case because of Rule 1.9, unless Fister consents in writing allowing her to continue to represent the city. Model Rule 1.9(a) states that unless a former client gives informed consent, in writing, a lawyer may not represent anyone with materially adverse interest in the same or substantially related matter.<sup>6</sup>

**PL:** Could Thickle have avoided this?

**Pandak:** Maybe. Better disclosure to her clients about her representation of them *at the beginning of the representation* may have avoided this situation. In any event, she should, as standard operating policy, advise all her clients, in writing, about the scope of her representation. This memorandum and discussion should include an indication of the process that will be used if a conflict occurs, and also whether the client will be personally responsible if the client refuses to settle. ❖

## Endnotes

1. MODEL RULES OF PROF'L RESPONSIBILITY R. 1.0(k). "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

2. MODEL RULES OF PROF'L RESPONSIBILITY R. 1.11(b). When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless: (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

3. MODEL RULES OF PROF'L RESPONSIBILITY R. 1.0, cmt. 9. The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the

screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

4. MODEL RULES OF PROF'L RESPONSIBILITY R. 1.8, cmt. 13.

5. *Id.* at 112, 127.

6. *Id.* at 171.