

## Professional Responsibility For Government Attorneys

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June 21, 2000

### I. Introduction: Rules Governing Government Attorneys

#### A. Start at the Beginning:

Definition: Webster's - "A system of values dealing with what is right and wrong and with moral duty and obligation."

#### B. No government-wide code of professional conduct for government attorneys. Therefore, look to:

1. State & Local codes of professional conduct
2. American Bar Association Model Rules of Professional Conduct (1983)
3. Agency Specific Codes and regulations
4. Codes Adopted by the Federal and State Courts
5. Federal Bar Association Model Rules (1990)
  - a. OGC Response: February 1991
    1. Most questions that we deal with are resolved in detail by the laws and regulations governing our conduct as federal employees. Many of these rules parallel our state bar rules, and some are even more restrictive (such as gifts and financial interests).

#### C. Generally, government attorneys representing government agencies are held to higher standards than attorneys are in private practice.

1. Ethics Canon 7-14 of the ABA Code prohibits govt. attorneys from instituting or continuing litigation that is "obviously unfair" and a subordinate attorney has an

obligation to recommend the discontinuation of such litigation. We need to seek justice and to develop a full and fair record.

2. Govt. attorneys are held to higher standard:  
Freeport McMoRan Oil & Gas Co. v. FERC, 962 F.2d 45 (D.C. Cir. 1992)

3. E.O. 12778 (10/23/91): govt. attorneys set the example for private litigation by adhering to higher standards than those required by the rules of procedure in the conduct of government litigation in federal court

## II. A Lawyer's Responsibilities

A. A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

B. As a representative, a lawyer:

1. Provides a client with an informed understanding of the client's legal rights and obligations and practical implications (adviser)
2. Zealously asserts the client's position under the rules of the adversary system (advocate)
3. Seeks a result advantageous to the client but consistent with requirements of honest dealing with others (negotiator)
4. Seek to reconcile divergent interests as an adviser, and to a limited extent, as a spokesperson (spokesman)
5. Examines a client's legal affairs and reports about them to the client or to others (evaluator)

C. A lawyer should be competent, prompt and diligent, and maintain communication with a client. A lawyer should keep the confidences of the client (but note: the client is the Department of the Navy, and not the individual)

D. A Lawyer's Conduct

1. Conform to the requirements of the law
2. Use the law's procedures only for legitimate purposes and not to harass or intimidate others
3. Demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials

4. As a public citizen, a lawyer should seek improvement of the law, the administration of justice, and the quality of service rendered by the legal profession.

E. The lawyer as an Officer of the Court

F. The lawyer must be mindful of conflicts of interest

G. The Self-Governing Nature of the Legal Profession

H. Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

### **III. The Scope of the Rules of Professional Conduct**

A. Rules of Reason

B. Imperatives versus permissive areas

C. The rules presuppose a larger legal context shaping the lawyer's role. They provide a framework for the ethical practice of law.

D. The client-lawyer relationship -- a key concept that depends on the circumstances and may be a question of fact.

E. The Unique Nature of Government Lawyers -- representing the "public interest". This parallels and expands upon the concept that "Public Service is a Public Trust". The uniqueness of taking an oath, not only to the profession, but also to uphold the public interest as a representative of the people.

### **IV. The Basic Obligations of Public Service (as stated in the Department of Defense Joint Ethics Regulation, DOD Directive 5500.7-R)**

A. Honesty

B. Integrity

- C. Loyalty
- D. Accountability
- E. Fairness
- F. Caring
- G. Respect
- H. Promise-keeping
- I. Responsible citizenship
- J. Pursuit of excellence

**V. Diligence (Model Rule 1.3)**

- A. A lawyer shall act with reasonable diligence and promptness in representing a client

1. Under 1.3, an attorney should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client.

2. Be careful about procrastination!

- B. A lawyer should carry through to conclusion all matters undertaken for a client.

**VI. Communication (Model Rule 1.4)**

- A. A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

- B. Adequacy of communication depends in part on the kind of advice or assistance involved.

- B. Conflict of Interest: General Rule

- 1. Loyalty to a Client
- 2. Loyalty is an essential element in the lawyer's relationship to a client
- 3. If there is a conflict, the lawyer should withdraw

4. Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. See parallel to 18 U.S.C. 208 (the Federal conflicts of interest statute) and the appearance standards in 5 C.F.R. 2635.502).

## VII. Obligations of Candor (Model Rule 3.3)

A. Under 3.3, an attorney shall not:

1. Make a false statement of fact or law to a tribunal

2. Fail to disclose a material fact when such fact is an omission that assists the fraudulent or criminal act of a client

3. Fail to disclose legal authority **in the controlling jurisdiction** (same district or circuit) known to the lawyer to be **directly adverse** (is the lawyer unhappy about the case?) to the position of the client and not disclosed by opposing counsel; or

4. Offer evidence that the lawyer **knows** to be **false**. If a lawyer has offered **material** evidence and comes to **know** of its falsity, the lawyer shall take remedial measures. **(what is false? -- probably a broad interpretation is best)**

B. These duties continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

C. Lawyers may reuse to offer evidence that the lawyer reasonably believes is false.

Conclusion: You must play fair with the court--protect the integrity of the decision of the decision-making process.

D. Canon 7 of the Code of Prof. Resp.: "Zealousness within the bounds of law."

U.S. v. Shaffer Equipment Company, 11 F.3d 450 (4th Cir. 1993)(EPA suit to recover costs for cleaning up a hazardous waste site): Govt. attorney failed to inform the court of

repeated false academic credentials of a material witness (the EPA site coordinator) and his being investigated for false material declarations during a previous trial. The suit was dismissed and reasonable attorney's fees were granted. The 4th Circuit found this sanction to be too harsh.

E. Obligation to verify truthfulness of representations made by agency personnel. All memoranda and papers of the agency lawyer represents that are to be delivered to the court or opposing counsel must be signed by an attorney of that agency (F.R.C.P. 11).

**F. Discovery Obligations:**

F.R.C.P. 26, 30 and sanctions under Rule 37

ABA Model Rules:

**3.4 -- Fairness to Opposing Party and Counsel.**

An attorney shall not obstruct access to evidence or unlawfully alter, **destroy**, conceal or falsify a document or other material having potentially evidentiary value (or assist or counsel another person to do such an act). Nor may an attorney make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request

**3.2 -- Requires an attorney to make reasonable efforts to expedite litigation consistent with the interests of the client**

4.2 -- Prohibits an attorney from communicating about the subject of the representation with a party the attorney knows is represented in the matter, unless the other attorney has consented to such contacts. See also 28 C.F.R. Part 77

Chilcutt v. U.S. (4 F.3d 1313) (5th Cir. 1993)  
Due to flagrant discovery violations, court ordered attorneys fees to be paid by the government attorney without reimbursement from the government and required the government attorney to attend 15 hours of ethics training at his own expense.

**VIII. Attorneys as Managers**

A. As a manager, an attorney must be aware of the behavior of those lawyers and nonlawyers who work with him in subordinate positions.

**5.1 -- A lawyer having direct supervisory responsibility over another shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct**

B. A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if the lawyer orders or, with knowledge of the specific conduct, ratified the conduct involved; or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

**C. Duties of a subordinate lawyer -- 5.2**

Following orders of a supervisor does not completely insulate a subordinate from discipline

Acting in accordance with a supervisor's reasonable resolution of an arguable question of professional responsibility is not a violation of the rule

D. An attorney supervising non-attorneys may be held accountable for the non-attorneys' conduct

**5.3 -- a lawyer having direct supervisory authority over a nonlawyer employed, retained or associated with the lawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;** and a lawyer shall be responsible for the conduct of such person that would be a violation of the rules of professional conduct if engaged in by a lawyers if:

1. The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved, or

2. The lawyer has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigate but fails to take reasonable remedial action

The supervising lawyer has the obligation to provide appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client. The supervising lawyer should be responsible for the assistant's work product as well.

5.3 applies to all assistants employed under the direction of the attorney, including paralegal, secretaries, student interns, paraprofessionals, etc.

## **IX. SNITCH RULE:**

**8.3** -- a lawyer having knowledge that another lawyer has committed a violation of the rules of professional conduct, raising a substantial question as to fitness to practice, must report the violation to the appropriate professional authority.

### **Reporting Attorney Misconduct:**

Misconduct within DOJ: report to Office of Professional Responsibility

Misconduct by other federal attorneys: report to the attorney's state bar or to the inspector general of the particular agency

Misconduct by private attorneys: report to the state bar of which the violator is a member

Limitations on reporting misconduct, include grand jury secrecy rules, tax confidentiality, legislation and the Privacy Act. See also 1.6

## **X. Outside Practice of Law**

18 U.S.C. 203 and 205 prohibit federal employees from:

Representing anyone before a federal court or a federal agency in a matter in which the U.S. is a party or has an interest with or without compensation.

Exceptions include representing yourself or members of your immediate family (parents, spouse, children (testifying under oath, or representing another federal employee in an administrative proceeding).

CHANGE: P.L. 104-177: Federal employees can represent nonprofits if a majority of its members are federal employees.

Williams v. IRS, 919 F.2d 745 (D.C. Cir. 1990): IRS attorney attempts to represent class action suit for compensation without obtaining approval from his agency first. Court upholds agency policy requiring prior approval for outside employment and upholds 5-day suspension.



## **XI. Substance Abuse Issues**

A. Is the rate of addiction higher among attorneys than other occupations?

Apparently so. A survey done by the Young Lawyer's Division of the ABA in 1990 found that 13% of male attorneys and 20% of female attorneys reported "looking for focus in a bottle", downing more than 6 drinks a day. Studies completed in Oregon and Washington states show rates of alcoholism as high as 15-18%.

B. What might predispose attorneys to substance abuse?

Clearly, significant pressure is part of the territory, although the pressure for Government attorneys are different than these in the private sector. 75% of all attorneys and 84% of female attorneys in practice feel worn out at the end of each workday.

A study completed at Johns Hopkins University and published in the Journal of Occupational Medicine in 1990 found that attorneys were 3.6 times more likely to suffer from depression than any other occupation.

There is a significant relationship between depression and alcohol abuse. Depressed people are more likely to abuse alcohol (studies suggest at least 2 times as likely). And people who abuse alcohol are more likely to be depressed.

The rate of alcoholism in males has always been higher than for women. There is reason to believe that women who assume traditional male occupational roles have more drinking problems than women occupying more traditionally female roles.

There appears to be a close relationship between substance abuse and malpractice. Several states report that as many as 60% of discipline cases involve substance abuse.

C. What is addiction?

1. Alcoholism: Primary, progress, chronic and potentially fatal diseases which follow an identifiable course (i.e. has symptoms allowing for diagnosis) involving impairment of major areas of a person's life including social, emotional, occupational and physical.

2. Addiction is usually characterized by some kind of loss of control with regard to consumption of alcohol.

Specifically, drinking often results in negative consequences (inappropriate behavior as they continue to drink (often despite their own best intentions)).

3. Failure to learn from experience.  
Hangovers  
DWI/DUI

Another feature of addiction is the use of psychological defenses, the most common of which is denial.

D. Who gets addicted?

1. Genetics clearly play a role (more than 2x as likely to develop a problem if you have a family history of alcoholism).

2. Alcohol is selective addictive (in the range of 20 to 25% of people who drink become dependent whereas a drug like heroin is more like 90%).

3. Learning to drink, learning the mood swing

4. Most people (even the non-addicts) drink because of the way it makes them feel. Alcohol does not taste good, you learn to like it because of the way it makes you feel (coffee and cigarettes are similar).

5. Most people stop after a small number of drinks because the sedating effects of chemicals take effect. However, people who have the predisposition feel good longer and are therefore inclined to keep drinking.

E. What is the line between social drinking and abuse, and between abuse and addiction?

1. Social drinkers have few, if any, negative consequences of their drinking. And if they do, they learn from them and change their behavior.

2. Abusers are beginning to have more negative consequences and loss of control

3. People who are dependent (alcoholic) are experiencing increased loss of control, significant impairment and pathological physical changes
  - a. Tolerance
  - b. Blackouts

### c. Withdrawal

#### F. What about drug addiction?

1. Definition is essentially the same as with alcohol, however, most, if not all, of the drugs are illegal. Often the negative consequences are more dramatic.

##### 2. Primary drugs of abuse

- a. Narcotics
- b. Depressant
- c. Stimulants
- d. Hallucinogens
- e. Cannabis

#### G. What about Recovery?

##### 1. How do people get help?

- a. Hitting bottom before ready of help
- b. Penalties increasing, benefits decreasing
- c. Early bottom aided by intervention from work, family or legal problems

#### H. Where do people get help?

1. Employee Assistance Programs
2. Physicians
3. Churches
4. A.A.
5. Lawyer assistance programs. Lawyers helping lawyers. All states now have them, most with professional staff and guarantees of confidentiality.

#### I. What does recovery involve?

1. Addiction is a physical, mental and spiritual disease and recovery must deal with all three.
2. Medical recovery usually involves detoxification, stabilization and nutrition.
3. After abstinence is achieved, mental recovery can begin.