

# Everyday Ethical Dilemmas

By Susan Kidd

**P**ublic lawyers, like all lawyers, confront ethical dilemmas every day. Ethics questions are often interwoven into common situations and may arise from a variety of circumstances: interacting with opposing counsel, responding to discovery requests, dealing with *pro se* litigants, and communicating with clients. Unfortunately, the dilemmas often don't fall neatly within the confines of a specific rule of professional conduct, but rather into the ubiquitous gray area. The task of determining how to respond to these problems adds a significant amount of stress to life's everyday pressures.

One of the goals of GPSLD is to assist public lawyers with responding to these ethical issues, principally through the presentation of the Division's hallmark continuing legal education (CLE) program *Ethical Considerations in Public Sector Law*. Below are two scenarios from the program illustrating situations that, regrettably, are not all that uncommon. *The Public Lawyer (PL)* asked David Caylor, City Attorney, Irving Texas and chair of GPSLD's Ethics Committee, and Sharon Pandak, County Attorney, Prince William County, Virginia, and chair of GPSLD's CLE Committee, to contribute their advice on ethically appropriate responses based upon the Model Rules of Professional Conduct (state rules may vary).

## MAKE IT WORK

### Scene 1

Paul Politico is the county attorney for Probiz County. Politico is famous for his sensitivity to the political winds. Probiz County is home to the corporate headquarters of Bonnuitt Corporation, one of the county's largest employers. Bonnuitt is a major hotel and food services corporation, with hundreds of hotels worldwide. Bonnuitt holds the county contract to provide concessions at Probiz Airfield. Bonnuitt's contract with the airfield is about to expire.

County Manager John Gottem calls Politico. Gottem asks Politico about the status of the concession contract renewal. Gottem notes that Bonnuitt's corporate headquarters provides a very important economic development draw for Probiz County.

Politico then receives a call from Jane Bonn, the president of Bonnuitt. Politico knows Bonn in several capaci-

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ties. Bonn also serves on the boards of directors of several charitable and economic development organizations in Probiz County. After pleasantries, Bonn notes that Bonnuitt wants to continue to provide the airfield concessions. Bonn ends the conversation to take a call from the governor of a nearby state whom Bonn says has been pressing Bonnuitt to move its headquarters to that state.

### Scene 2

Politico calls Assistant County Attorney Sherri Arbitrarie into his office. Arbitrarie handles most of the procurement work.

"Sherri, as you know, that airport concessions contract is up next month. Bonnuitt wants that contract renewed. Bonnuitt has been making noise about moving its corporate headquarters out of the county. That would be devastating for Probiz County. Bonnuitt has always been community friendly and is a significant taxpayer. The Board of Supervisors will not be able to explain to the citizens why the government did not encourage Bonnuitt to stay."

"Well, there's a very good chance that the Bonnuitt contract will be renewed, Paul. They've provided a good service, and we've had no major complaints about them. Bonnuitt will probably come out on top after all the bids are reviewed," Arbitrarie responds.

"Actually, the advice of this office will be that there aren't going to be any bids, Sherri. This will be a sole source award," says Politico.

"But, Paul, what about the law? You know that there are no grounds for making this a sole source award. At least ten other companies would love to have that contract, and they are certainly capable of performing it!" says Arbitrarie.

"Look," Politico responds, "Bonnuitt has the current concession. They know the system, they are doing a great job, and they are uniquely suited to perform this contract. You know how to make it work under the procurement process, so I want you to do it. It's important for many reasons for Bonnuitt to get this contract."

Politico's phone rings and he waves Arbitrarie out.

### Scene 3

Arbitrarie returns to her office with a sinking feeling. On the way, she stops to explain the situation to her friend and confidante, Assistant County Attorney Lily Rose.

"I'm no procurement expert, but can't you just make the

argument that this should be a sole source award? Is it that unreasonable?" asks Rose.

"Oh, Lily, it would be entirely contrary to county and state procurement law, which requires a competitive bid process unless there is only one provider available." Arbatrarie pauses. "Also, there is another wrinkle to this little mess. Will you promise not to breathe a word?"

"Of course," responds Rose.

"I've been seeing a member of the Board of Directors at Bonnuit," says Arbatrarie. "Actually, he's been spending so much time at my apartment, we're practically living together."

"Who?" Rose asks eagerly.

"You better keep your promise, Lily . . . Ricardo Fontana."

"Wow, Sherri, you are in a mess!" says Rose.

"Gee thanks, Lily, I can always count on you to make me feel better," responds Arbatrarie.

Arbatrarie returns to her office. Her phone begins to ring. Politico is on the line.

"Sherri, I'm meeting with the county manager tomorrow. I'll need a brief outlining your arguments supporting that concession contract sole source award. I want to review the matter with him."

"But, but . . ." stammers Arbatrarie.

Politico interrupts, "Like I said, Sherri, no *buts*. . . I know you can make it work."

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**PL:** Should Arbatrarie ask to be recused from the matter because of her intimate relationship with Fontana, a member of the Bonnuit Board of Directors?

**Caylor:** In an ideal world, a lawyer's conscience would guide her to exercise the "sensitive professional and moral judgment"<sup>1</sup> necessary to resolve such questions. Her standards might well exceed the minimum standards established by the Model Rules. Sometimes, though, ideals cost more than a lawyer can or will pay. Then she may ask not what she should do, but what the law says she may do or must do. In this case, Arbatrarie could ask to be recused, pursuant to Model Rule 1.7,<sup>2</sup> because of the risk that her representation of the county will be materially limited by her intimate relationship with board member Fontana. Arbatrarie's situation would probably fall within section (b) allowing her to represent the county, notwithstanding the existence of a conflict, if

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.<sup>3</sup>

Obtaining the informed consent, in writing, however, would be awkward and unrealistic, to say the least.

Arbatrarie could reasonably argue that she does not have a conflict because her personal interest (a sexual relationship with a member of a board of directors of a

company that has a contract with the county) is too tangential to the matter at hand and thus does not violate the rules. Comment 19 of Model Rule 1.8 would help Arbatrarie's argument against recusal:

When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with the lawyer concerning the organization's legal matters.<sup>4</sup>

This comment bolsters an argument against recusal because Fontana is not a constituent of the county who supervises, directs, or regularly consults with her concerning the county's legal matters.

Good sense, however, would dictate that she advise her supervisor, Paul Politico, of her relationship with Fontana so that he could assist her with making the proper ethical call on whether to recuse herself.

**PL:** Assuming there are no conflict issues, may Arbatrarie legitimately argue that the concessions contract should be a sole source award?

**Caylor:** Pursuant to Model Rule 3.1,<sup>5</sup> Arbatrarie should research the issue carefully to determine if there is any nonfrivolous basis to support an argument for a sole source award. If she cannot find any plausible basis for the argument, I recommend that her brief simply explain the results of her research. That way, Arbatrarie is on the record with a truthful analysis of the situation. It is the county attorney who, in light of his assistant's conclusions, must make the ultimate decision about what advice his office will give regarding the contract.

**PL:** If Politico decides to advise the county that a sole source award contract is appropriate even though Arbatrarie found no legal or factual support for that conclusion, does Arbatrarie have an obligation to report her boss for professional misconduct?

**Caylor:** This is a close question. Although Arbatrarie's conscience, as opposed to formal rules of ethics, would not let her proceed on a sole-source basis, she is not entitled to impose the standards of her conscience on someone else. She could reasonably conclude that Politico's decision to recommend that the contract be awarded on a sole-source basis, although questionable, did not technically violate Rule 3.1: Meritorious Claims and Contentions. That rule states, *inter alia*, that

[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.<sup>6</sup>

Furthermore, according to comment (1) of the rule,

[t]he advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static.

Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.<sup>7</sup>

Rule 8.3 only requires Arbitrarie to report a violation that raises a "substantial" question as to Politico's fitness to practice law.<sup>8</sup> She may reasonably conclude that the question is not so substantial that she would be required to report it.

Arbitrarie could reasonably support a decision not to report her boss if she were contacted by the disciplinary authority. Nevertheless I would encourage her to attempt to convince him of the proper legal analysis through a well-reasoned memorandum which allows him to reach the right conclusion.

## STATE v. MARVEL

### Scene 1

Don Diligentts is staff counsel for Governor Margie Marvel. Diligentts has a good relationship with the governor, who is in the second year of her first term. Diligentts's position requires him to provide legal advice in matters that affect the office of the governor. Because Diligentts and Marvel have become friends, Marvel also discusses personal and political matters with him.

One morning, Marvel calls Diligentts into her office. They discuss some proposed legislation on campaign finance reform. He updates Marvel on the status of the bill and agrees to make some changes to the draft.

Marvel says, "Well, I have some news for you, Diligentts—you're not going to believe this one!"

"What is it?" Diligentts quietly groans.

"You know that Assistant U.S. Attorney John Warrant?"

"Yeah, I went to law school with him," replies Diligentts.

"Well, I've found out that he is investigating me for campaign finance violations, something about reporting contributions I think. I can't believe that with everything else on my plate, I have to deal with this now! What should I do, Don?"

Before Diligentts has a chance to respond, Marvel thrusts a file into his hands. "Look, here's my campaign contributions file. Please review it and tell me what to do!!"

Diligentts mumbles, "Let me look into this, and I'll get back to you."

### Scene 2

When Diligentts returns to his office, he gets a phone call from AUSA John Warrant, who threatens to subpoena him to obtain evidence against Marvel.

**PL:** May Diligentts advise Governor Marvel on the AUSA investigation?

**Pandak:** This type of situation was brought to the forefront in 1998 by *In re Bruce Lindsey*.<sup>9</sup> That case highlighted the distinction between discussions involving personal and governmental matters when Deputy White House Counsel Lindsey was subpoenaed to testify before a grand jury regarding information about President Clinton. In that case, the court held that when government attorneys learn through communications with their clients of information "related to criminal misconduct" or "pertinent to possible criminal violations," the client may not, by asserting the government attorney-client privilege, prevent such information from being disclosed to a grand jury.<sup>10</sup>

Rule 1.6 makes clear that an attorney-client communication relating to the representation is confidential.<sup>11</sup> However, Diligentts is a public lawyer representing the office of the governor, not the governor personally. Therefore, he should not give advice regarding the AUSA investigation because the investigation involves actions of the governor performed in her personal capacity. Conversations about that matter may not be protected under Rule 1.6 and may not be considered protected by attorney-client privilege.

**PL:** Can Diligentts advise Governor Marvel on changes to the legislation?

**Pandak:** In my opinion, Diligentts may advise the governor on changes to the legislation, but he must be careful that he does not provide advice on the legislation with the goal of assisting the governor with her personal legal issue. This may be a difficult distinction to make, and, if Diligentts becomes familiar with the details of her potential personal problems, it may be impossible for him to avoid a conflict of interest situation in violation of Rule 1.7.<sup>12</sup>

**PL:** Governor Marvel handed Diligentts a file regarding her campaign finances. Diligentts also took notes about their conversation on the subject. How should Diligentts respond to a subpoena relating to Governor Marvel's campaign finances?

**Pandak:** Diligentts probably does not have a choice in this matter. He likely will have to turn over the file and the notes or face contempt charges. If Diligentts decided not to turn the notes over, he would have the burden of showing that the notes are not discoverable in this case based on attorney-client privilege. As I have noted previously, this privilege would not apply because he is only counsel to the governor in her official capacity.

**PL:** Could Diligentts have avoided this situation?

**Pandak:** Probably not entirely, but he may have been able to reduce the severity of the situation. As soon as Diligentts entered into his role as counsel to the governor, he should have reached a clear understanding with the governor as to the parameters of his legal representation of her. He should have unambiguously explained that his representation of her would not include personal matters. It would have been wise for him to document his advice in a letter or memorandum to Governor Marvel. In the everyday ebb and flow of conversations between officials and their lawyers, it is often difficult to draw a bold line between personal and official matters. But counsel to public officials should remain cognizant of this potential problem, address it early and in writing, and offer reminders to the official when necessary.

## Endnotes

1. MODEL RULES OF PROF'L CONDUCT PREAMBLE ¶ 9 (2003).
2. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2003) (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.
3. *Id.* § (b).
4. MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 19 (2003).
5. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2003) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.
6. MODEL RULES OF PROF'L CONDUCT R. 3.1.
7. *Id.* cmt. 1 (2003).
8. MODEL RULES OF PROF'L CONDUCT R. 8.3 (2003). (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
9. *In re Bruce Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998).
10. *Id.* at 1274 and 1278.
11. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003). (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b). (b) A lawyer may reveal information related to the representation of a client to the extent that lawyer reasonably believes necessary: 1. to prevent reasonably certain death or substantial bodily harm; 2. to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial

interests or property of another and in furtherance of which the client has used or is using the lawyer's services; 3. to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; 4. to secure legal advice about the lawyer's compliance with these Rules; 5. to establish a claim or defense on behalf of a lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or 6. to comply with other law or court order.

12. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 2 (2003).