ETHICS PRESENTATION FOR DOE/CAA LAWYERS

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Federal Government Lawyers Are Different: In this session, we will discuss the following topics.

I. Practice Setting Defines Various Lawyer Duties

II. Federal Government Lawyers' Duty of Confidentiality Is Different from That of Private Lawyers

III. A Few Recent Developments in Lawyer Law Generally

IV. A Few Recent Cases of Government Lawyer Discipline

I. Ethics, Role, and Independence [excerpted from Moliterno, The ALJ Independence Myth, 41 Wake Forest L. Rev. 1191 (2006)].

Ethics issues are all about role. Once past the simplistic "don't lie, cheat or steal" rule, and past just staring at the text of the rules themselves in an entirely formalist way, everything in professional ethics is about role and context. Role and context determine the appropriate actions and attributes of law professionals. To be sure, the profession has produced a formalized version of the lawyer's and judge's role by adopting sets of ethics rules the violation of which produces professional consequences. But those rules are a starting point rather than an ending point for most serious analysis of lawyer and judge conduct. They play a part, but only a part, in lawyer regulation.[1] They cover lawyers and judges in a general way, but mostly fail to account for differences in practice setting. And they say little at all about what makes a good lawyer or judge. To play a role well, whether it be in a play, in a sport, or in a professional milieu, knowing the rules of acting or of the game or of the profession is far from fulfilling the role well. Understanding the role gives knowledge of the rules meaning.[2]

Consider, generally, the attributes of the lawyer's role: Lawyers act as representative of a client (as a special sort of agent), pursuing that client's interests within

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[1] David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1990)

[2] James E. Moliterno, *An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprentice System in the Academic Atmosphere*, 60 U. CIN. L. REV. 83, 99 (1991). ("[L]earning to play the game well (learning to lawyer ethically) is accomplished not so much by learning the game's rules, though learn them the players must, as by the activity of playing (experience with lawyering behavior)... A player might well learn the text and basic meaning of the rules by reading and discussing them; but to learn the subtleties that define what it means to play well, the player must experience the play itself.")

prescribed boundaries, while maintaining an eye on the public interest. These simple attributes of the lawyer's role dictate the nature, scope and interpretation of the lawyer ethics rules, confidentiality rules, conflicts rules, and so on. Yet, this general description belies the complexity of the wide variety of sub-roles that lawyers serve, depending on their particular practice setting:

Prosecutors and other government lawyers have no individual client and by role must serve the public interest to an extent greater than other lawyers must, creating different confidentiality[3] and conflicts implications all while facing the special burdens, joys, and challenges of being a public employee and a public official.[4] Lawyers for corporations fill a slightly different role as well, representing as they do an entity rather than a flesh and blood individual, and different ethics rules and interpretations apply to them as a result.[5] In-house corporate lawyers have as well their lawyer role swirled with that of employee, creating further complications in the law that governs their conduct and its implications.[6] Criminal defense lawyers, in recognition of their special role in

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[3] James E. Moliterno, *The Federal Government Lawyer's Duty to Breach Confidentiality*, ___ TEMPLE POL. & CIV. RTS. REV. ___ (forthcoming 2005).

[4] *See* Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L.REV. 789 (2000); MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2004) (discussing that a prosecutor has the responsibility of being not only an advocate, but also a minister of justice which carries the obligation of ensuring the defendant is given procedural justice and that guilt is decided upon the basis of sufficient evidence.)

[5] *See* Upjohn Co. v. United States, 449 U.S. 383 (1981); MODEL RULES OF PROF'L CONDUCT R. 1.13 (2004); The Sarbanes-Oxley Act § 307, 15 U.S.C. § 7245 (2002)(requiring the Securities and Exchange Commission (SEC) to issue rules setting forth minimum standards of professional conduct for attorneys appearing and practicing before the SEC).

[6] *See e.g.*, Balla v. Gambro, Inc., 145 Ill. 2d 492 (1991); Crews v. Buckman Laboratories Intern., Inc., 78 S.W.3d 852 (Tenn. 2002); General Dynamics Corp. v. Rose, 7 Cal. 4th 1164 (1994); Mourad v. Automobile Club Ins. Ass'n., 186 Mich. App. 715 (1991); ABA Comm. on Ethics and Prof'l

representing the individual at jeopardy against the power of the state, face particular ethical challenges. And on and on from practice setting to practice setting.[7]

And then there is the judge's role and the range of ethics standards with which they must comply. Judges who are also licensed to practice law must abide by the lawyer ethics rules that are not representation-related. The judge's role requires an entirely new lens for ethics analysis: forget (largely) about confidentiality; forget about client loyalty and those sorts of conflicts. Judicial ethics focus is on integrity, impartiality, independence, fairness, competence, and, because of the judge's closer connection with the system of justice and the public interest involved, appearance of impropriety as it relates to public confidence in the justice system.

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In the end, the role question is always the same: what does the system within which this person functions expect of her?

Responsibility, Formal Opinion 01-424 (2001).

[7] *See* James E. Moliterno, *Practice Setting as an Organizing Theme for a Law and Ethics of Lawyering Curriculum*, 39 WM. & MARY L. REV. 393 (1998).

II. The Federal Government Lawyer's Duty to Breach Confidentiality, 14 Temple Pol. Civ. Rights L. Rev.633 (2005).

The Federal Government Lawyer=s Duty to Breach Confidentiality

James E. Moliterno*

The lawyer=s duty of confidentiality springs from the lawyer-client relationship and its parameters are determined by the nature of that relationship. The federal government lawyer=s client is like no other. The uniqueness of representing the United States calls for a unique approach to the duty of confidentiality. Unlike the private individual client, the government as a client does not speak with a single, unmistakable voice. Unlike the private entity client, the federal government has a paramount interest in the public good, including the public=s right to know about government (the entity=s conduct), especially its misconduct. The result is a client in whose interest it is for confidentiality to be waived in instances of client misconduct, giving rise to the federal government lawyer=s duty to breach confidentiality.

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Conclusion

Introduction

The federal government lawyer=s client is like no other. The uniqueness of representing the United States calls for a unique approach to the duty of confidentiality. Unlike the private individual client, the government as a client does not speak with a single, unmistakable voice. Unlike the private entity client, the federal government has a paramount interest in the public good, including the public=s right to know about government (the entity=s conduct), especially its misconduct. The result is a client in whose interest it is for confidentiality to be waived in instances of client misconduct, giving rise to the federal government lawyer=s duty to breach confidentiality.

I. U.S. as a Client

Government lawyers certainly have some confidentiality duty to their client, but their lawyer-client relationship is in so many ways strikingly different from that of a private lawyer and client that the government lawyer=s duty is much more modest in scope and perhaps even different in kind. The client of the government lawyer is plainly not the private lawyer=s privately interested client without special public-abiding interests and duties. Just who the government lawyer=s client is has been subject to widely different claims. Roger Cramton has usefully articulated the spectrum of possibilities, ranging from the people and the public interest,

to the United States as a whole, to the branch of government within which the lawyer works, to the specific agency for whom the lawyer works.[1] Some have argued that the specific identity of the government lawyer=s client does not matter so much as an understanding of the lawyer=s particular role.[2] Whatever may be the precise answer, if indeed the answer matters, it is plain that the government lawyer represents a public-abiding client whose genuine interests will not be served by the same level of secrecy as private clients may be entitled to, no matter how much particular agents of the government may sometimes wish to have that higher level of secrecy.

Confidentiality proceeds from a well-known starting point: we balance the moral force pressing for revelation against our lawyer role and its force toward non-disclosure or active concealment. In the easy cases, in the everyday work of lawyers, when little moral force demands revelation, this balance is easy to strike. But when some stronger moral force arises, when revelation would help remedy a wrong or prevent a wrong or prevent further harm from a past wrong, the moral force toward revelation increases and the balance gives us pause. The bar rules provide an institutional expression of the profession=s balance point for us as lawyers, dictating when future wrongs or harms may be revealed, prohibiting revelation of past wrongs in most instances, and providing for other exceptions to the general duty to maintain client confidences.[3]

When a court or other government power such as a grand jury gets involved, we speak of this same balancing process by invoking the attorney-client privilege. The balancing work to be

[1] Roger C. Cramton, *The Lawyer As Whistleblower: Confidentiality and the Government Lawyer,* 5 Geo. J. Legal Ethics 291, 296 (1991).

[2] Robert P. Lawry, *Who Is the Client of the Federal Government Lawyer: An Analysis of the Wrong Question,* 37 Fed. B. Ass=n J. 61 (1978).

[3] Model Rules of Prof=l Conduct R. 1.6 (as amended August 2003).

done is largely the same. Now, however, the court=s need for the information adds to the moral force toward revelation and inserts into the equation an entity with the power to command revelation. The privilege, to be sure, has different parameters from the general duty of confidentiality, but the process of balancing is largely the same. Even the different scope of the duty and the privilege produce the same results once a court is involved. For example, although the future crime/fraud exception to the ethical duty may be narrower than the crime-fraud exception to the privilege, the difference hardly matters once a court is involved. The court works with the broader exception relevant to the claim of privilege and when it is met and disclosure is commanded, the duty and its narrower exception yield based on the exception to the duty of confidentiality for court orders.

In the case of a government lawyer, the moral force toward revelation has an element not present for the private lawyer: the government lawyer works for a public-abiding client, one that would expect disclosure of internal government wrongdoing. The government has expressed this desire in statutes like 28 U.S.C. 535b and the Federal Whistle Blower Statute.[4] The former commands revelation of criminal wrongdoing and the latter encourages and protects revelation of a wide range of criminal and non-criminal government wrongdoing.

The lawyer-role force for protecting confidences in the first instance is about protecting the client. Having a client that wants revelation of certain information alters the confidentiality balance dramatically. The force favoring non-disclosure is reduced to nothing with respect to information covered by revelation statutes, and the force toward revelation is increased by the public abiding nature of the government. This difference in moral force toward revelation applies

[4] *See infra* section II.

with or without a court=s involvement. It exists in the day-to-day work of the government lawyer, in the nature of the government lawyer=s client, and in the revelation statutes.

To be sure, in some instances the force toward non-disclosure remains high even for the government lawyer: dealing with properly classified material, matters of criminal investigation that would be compromised by revelation, safety interests of clandestine government employees, and those instances in which the government lawyer plays a role analogous to a private lawyer. But when wrongdoing is implicated by the information, the government lawyer=s duty of confidentiality yields to the moral force pressing for revelation.

At times, a government lawyer=s duty of confidentiality and the associated attorney-client privilege approximate that of private counsel, but in most respects, federal lawyers do not have the same ethic of client protection as do private lawyers. Communications involving properly classified military, diplomatic or national security should be subject to protections equal to those that private lawyers owe their clients. Certain aspects of Freedom of Information Act litigation incorporate ordinary attorney-client privilege principles.[5] Information about ongoing criminal investigations requires protection when its premature release would disrupt legitimate law enforcement activities. When government lawyers represent agency personnel as if they

[5] *In re* Lindsey, 158 F.3d 1268 (D.C. Cir. 1998). (AWe have recognized that >Exemption 5 protects, as a general rule, materials which would be protected under the attorney-client privilege.=@); *See* 5 U.S.C. ' 552(b)(5) (1994)*; see also* S. REP. NO. 89-813, at 2 (1965); Coastal States Gas Corp. v. Department of Energy, 199 U.S. App. D.C. 272, 617 F.2d 854, 862 (D.C. Cir. 1980); Tax Analysts v. IRS, 326 U.S. App. D.C. 53, 117 F.3d 607, 618 (D.C. Cir. 1997); *see also* Brinton v. Department of State, 204 U.S. App. D.C. 328, 636 F.2d 600, 603-04 (D.C. Cir. 1980).

were private counsel, private attorney-client privilege and duties apply.[6] And in litigation, while special rules command disclosures from government lawyers, disclosure of favorable information may be delayed to the same extent as might a private lawyer in gaining appropriate litigation strategy advantages. Ordinary advantages in the litigation and regulation processes allow the government=s lawyers to behave as adversaries legitimately do. But government lawyers are not to remain quiet when their client has information that will aid a criminal defendant,[7] nor when the government has wrongfully behaved. Especially when agency wrongdoing is implicated, the government lawyer=s duty of confidentiality and ability to resist official demands for information are far more restricted than that of a private lawyer. AThe government lawyer has a responsibility to question the conduct of agency officials more extensively than a lawyer for a private organization would in similar circumstances.@[8] Government is not like a private client who has a right to expect her lawyer to maintain confidence about past wrongdoing.[9] Government, by contrast, owes revelation of its own wrongdoing to the public. The government itself, its mission properly conceived, ought to want such information revealed. The government has expressed this preference by enacting statutes that either command or encourage revelation of government wrongdoing.

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[6] Theodore B. Olsen, Assistant Attorney General, Office of Legal Counsel, Confidentiality of the Attorney General's Communications in Counseling the President, 6 Op. Off. Legal Counsel 481, 495 (1982). *See* Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, *Disclosure of Confidential Information Received by U.S. Attorney in the Course of Representing a Federal Employee* (Nov. 30, 1976); Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel, *Duty of Government Lawyer Upon Receipt of Incriminating Information in the Course of an Attorney-Client Relationship with Another Government Employee* (Mar. 29, 1985); *see also* 28 C.F.R. ' 50.15(a)(3) (1998).

[7] Brady v. Maryland, 373 U.S. 83 (1963).

[8] Fed. Bar Ass=n Rules of Prof=l Conduct R. 1.13 cmt. (year).

[9] *In re* Grand Jury Duces Tecum, 112 F.3d 910 (8th Cir. 1997).

Federal employees have a statutory obligation to report criminal wrongdoing by other employees to the Attorney General.[10] The statute applies to lawyers as well as other employees.[11] A private lawyer has no such obligation.[12] Even under the Enron-inspired August 2003 amendment to Model Rule 1.6, unless the lawyer=s services were used to commit the past criminal act of a client, the lawyer may not disclose. Even then, the disclosure is permissive rather than mandatory.[13] No rule requires a private lawyer to report criminal conduct of non-lawyer third parties.[14] For federal lawyers, however, the statute requires disclosure of certain client acts, even past acts with which the lawyer has had no involvement, much less those that have used or misused the lawyer=s services.[15] A[T]he general duty of public service calls upon government employees and agencies to favor disclosure over concealment.@[16] The statute, along with the Federal Whistle Blower Protection Act, is a positive indication of the reduced confidentiality that federal lawyers owe their client. The statute advances a salutary purpose, one desired by the government that enacted it: " [To] require the reporting by the departments and agencies of the executive branch to the Attorney General of information coming to their attention concerning any alleged irregularities on the part of officers and employees of the Government."[17]

Well before the enactment of the federal whistle blower statute,[18] official guidance provided to government lawyers followed a whistle blower theme. Federal Bar Association

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[10] 28 U.S.C. ' 535(b) (year).

[11] *In re* Lindsey, 158 F.3d 1263, 1274 (D.C. Cir. 1998).

[12] *In re* Grand Jury Duces Tecum, 112 F.3d 910, 920-21 (8th Cir.1997), *cert. denied*, 117 S. Ct. 2482 (1997).

[13] Model Rules of Prof=l Conduct R. 1.6 (as amended August 2003).

[14] The duty to report unprivileged information about the serious misconduct of a fellow lawyer stands in contrast to this general principle. Model Rules of Prof=l Conduct R. 8.3 (2002).

[15] *In re* Lindsey, 158 F.3d 1263; *In re* Grand Jury Duces Tecum, 112 F.3d at 220.

[16] *In re* Grand Jury Duces Tecum, 112 F.3d at 220.

[17] H.R. Rep. No. 83-2622, at 1 (1954).

[18] Discussed *infra* section IIB.

Opinion 73-1 instructed the government lawyer that her client is the agency, and the public interest. Further, the confidentiality owed the agency yielded when an official ceased to act in the public interest.[19] The Opinion authorizes a federal lawyer to disclose agency misconduct outside the agency as long as the agency is given a first opportunity to correct its own errors. A[T]he lawyer himself is to determine whether the [internal] remedial measures taken are sufficient.@[20]

The public interest is difficult to identify, of course, and each government lawyer cannot be charged with the responsibility of acting purely on his or her sense of it. Chaos would ensue within agencies if each lawyer could apply his or her own unfettered vision of the public interest. Rather, the government lawyer functions in a direct line from some legitimate articulater of the public interest. [21] But disclosing wrongful conduct is not reflective of a mere public interest dispute about the better course for government action to take. That judgment, that a colleague=s or superior=s conduct is wrongful or criminal, is the individual lawyer=s judgment to make.[22] The individual=s judgment is not final, of course, but it is determinative for purposes of defining the lawyer=s proper conduct when faced with acting on the wrongful conduct. That is what is expected by 28 U.S.C. 535b, and the whistle blower statute, by the general reduction in confidentiality owed, and if the lawyer engages in conduct that participates in the wrongdoing, by the law governing the lawyer=s own liability for the misconduct.

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[19] Lawry, *supra* note 2. *See also,* ABA, The Survey of the Legal Profession, quoted in Seasongood, 2 Syracuse L. Rev. 210, 222 (1951)(ATo inspire confidence, . . .public legal positions shall be conducted and opinions rendered according to law and not to please politicians@).

[20] Lawry, *supra* note 2, at 65.

[21] Geoffrey P. Miller, *Government Lawyers= Ethics in a System of Checks and Balances,* 54 U. Chi. L. Rev. 1293 (1987); Steven K. Berenson, *Public Lawyers, Private Values: Can, Should and Will Government Lawyers Serve the Public Interest?,* 41 B.C. L. Rev. 789 (2000).

[22] *See, e.g.*, William Josephson and Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?,* 29 How. L.J. 539, 556 (1986).

Consider the unusual confluence of cases that surrounded Vince Foster=s death and information sought regarding Foster=s knowledge of White House activities. Vincent Foster was Bill Clinton=s White House Counsel. Before his tragic death, he had met with private counsel, likely about matters occurring in the White House. After his death, a meeting occurred among Hillary Clinton, White House lawyers, and her private lawyers.[23] The Office of Independent Counsel (OIC) wanted to know about Mr. Foster=s knowledge of various activities of the Clintons=. An OIC-led grand jury issued subpoenas to Foster=s private lawyers, demanding their notes of meetings with Mr. Foster,[24] and to the White House and its lawyers, demanding notes of White House conversations regarding Mrs. Clinton=s activities following Mr. Foster=s death.[25] In a stark juxtaposition that illustrated the contrasting extent of the attorney-client privilege for private and public lawyers, the Supreme Court protected Foster=s private counsel=s notes[26] as the Eighth Circuit and the D.C. Circuit ordered revelation of the White House lawyers= notes of meetings likely regarding substantially the same subject matter.[27]

[23] *In re* Grand Jury Duces Tecum, 112 F.3d 910, 920-22 (8th Cir. 1997).
[24] Swidler & Berlin v. United States, 524 U.S. 399 (1998).
[25] *In re* Grand Jury Duces Tecum, 112 F.3d at 920-22.
[26] Swidler & Berlin v. United States, 524 U.S. 399.
[27] *In re* Grand Jury Duces Tecum, 112 F.3d at 920-22; *In re* Lindsey, 158 F.3d 1263 (D.C. Cir. 1998).

Writing in praise of government lawyers, Roger Cramton suggested that the Attorney General ought to be an independent advisor to the President, willing to demand that the President comply with legal authority and execute the laws without favor, and if the President refuses, Aresign and *publicly explain the circumstances* that led to his resignation . . ..@ (Emphasis added).[28] In a variety of critical moments, government lawyers have behaved just this way, or affected events by announcing their intentions to do so. When then Solicitor General Robert Bork was asked to join President Nixon's legal defense team, he captured the difference: "A government attorney is sworn to uphold the Constitution. If I come across evidence that is bad for the President, I'll have to turn it over. I won't be able to sit on it like a private defense attorney."[29] Peter Wallison, White House Counsel under President Reagan, produced his diary for the Iran-Contra investigation.[30]

> The obligation of a government lawyer to uphold the public trust reposed in him or her strongly militates against allowing the client agency to invoke a privilege to prevent the lawyer from providing evidence of the possible commission of criminal offenses within the government. As Judge Weinstein put it, "if there is wrongdoing in government, it must be exposed... [The government lawyer's] duty to the people, the law, and his own conscience requires disclosure...."[31]

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[28] Roger C. Cramton, *On the Courage and Steadfastness of Government Lawyers*, 23 J. Marshall L. Rev. 165, 173-174 (1990).

[29] *A Conversation with Robert Bork*, D.C. BAR REP., Dec. 1997-Jan. 1998, at 9.

[30] 1 Lawrence E. Walsh, Final Report of the Independent Counsel for Iran/Contra Matters at 44, 470 n.137, 517, 520 (1993).

[31] *In re* Lindsey, 158 F.3d at 1273, quoting Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 Me. L. Rev. 155, 160 (1966).

Other government lawyers have been bitten by the justifiably less generous attorney-client privilege possessed by the government. Richard Kleindienst was working on the ITT antitrust matter when President Nixon called to insist he terminate the appeal. Cooler heads prevailed and Nixon withdrew his instruction. When later asked at Senate hearings whether he had spoken to anyone at the White House regarding the ITT case, Kleindienst said, Ano,@ mentally applying an unreasonably narrow interpretation of the question to include only White House staff but not the President. He was later charged with a felony and pleaded guilty to a misdemeanor for failing to fully answer committee questions.[32] A private lawyer might have successfully invoked the attorney client privilege regarding that conversation with his client, but a government lawyer? Surely not.[33]

Government lawyers have not always functioned as they should. Many government lawyers remained quiet in the face of government fraud and wrongdoing (and some actively dissembled) during litigation of the Hirabayashi and Korematsu cases.[34] They should not have. John J. McCloy, Assistant Secretary of War, and Assistant Attorney General Herbert Wechsler, in particular, knowingly allowed the Supreme Court to be misled regarding the record in the

[32] Cramton, *supra* note 28, at 170-171.

[33] *See In re* Grand Jury Duces Tecum, 112 F.3d 910, 920-22 (8th Cir. 1997) (explaining the different treatment of government and private counsel for attorney-client privilege treatment)(ANo one, the White House argues, would suppose that the special prosecutor could compel the production of notes made by a private lawyer concerning a conversation with a client about even the most routine traffic ticket.@); *compare* Swidler & Berlin v. United States, 524 U.S. 399 (1998) (holding that private counsel=s notes of interview with White House counsel, as a private client, were privileged as against the same Independent Counsel=s grand jury subpoenas even beyond the client=s death).

[34] United States v. Korematsu, 323 U.S. 214 (1944); Korematsu v. United States, 384 F. Supp. 140 (N.D. Cal. 1984) (granting coram nobis to petitioner, reciting circumstances of Department of Justice failures to make court aware of true state of facts and internal DOJ opinions expressed); For a brief story of the Korematsu and Habayashi cases and a collection of relevant document excerpts, see NEAL DEVINS & LOUIS FISHER, POLITICAL DYNAMICS IN CONSTITUTIONAL LAW 229-241 (2d ed. 1996).

case.[35] Wechsler=s client was the government. The government is not entitled to a lawyer who will conceal material facts or even fail to reveal that his client has done so. Courts expect that when dealing with a government lawyer, they get a more candid picture of the facts and the legal principles governing the case.[36] In doing so, the government lawyer is doing nothing more or less than following the wishes of her client.

War Department lawyers found themselves in a pressurized situation. General DeWitt=s report on the military need for evacuation of Japanese-Americans was unacceptable to Assistant Secretary of War McCloy for critical reasons; DeWitt steadfastly refused to authorize changes. Ten copies of the report had been printed and bound. Intermediaries worked out amended language to solve the dispute between DeWitt and McCloy. Justice, through an Edward Ennis request,[37] already had asked to see any Apublished material@ on the evacuation. War Department lawyers did not want the Justice Department to see the bound, flawed report. They eliminated their problem by destroying the ten copies of the original, offending report along with the Agalley proofs, galley pages, drafts and memorandums [of it]@.[38] The resulting brief filed by Justice in the Hirabayashi case reflected only discussions of the report but not the actual report, including claims and factual assertions that were flatly contradicted in the now-destroyed report.[39] Even lacking the report, some material contradictions between the War Department position and the government=s briefs were clear. Ennis lost his effort to persuade Solicitor

[35] PETER H. IRONS, JUSTICE AT WAR 195-218, 287-302 (1983). McCloy continued to believe that his conduct was justified by his view of the need for the internment, *see id.* at 348, 351-54, and he has won praise from other important commentators. ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 11 (1993).

[36] *See, e.g.*, Harold Leventhal, *What the Court Expects of the Federal Lawyer*, 27 Fed.. Bar J. 1 (1967).

[37] Ennis was Director of the Department of Justice=s Alien Enemy Control Unit.

[38] Irons, *supra* note 35, at 210-11.

[39] *Id.* at 211-12.

General Fahy to reveal that intelligence agency advice to the War Department (actually General DeWitt) was directly contrary to the statements regarding the issue relied on in the government brief.[40] These government lawyers owed no duty of confidentiality to their client to protect the War Department=s frauds from disclosure to the Court. No legitimate picture of the desires of their client dictate that their client would demand such confidentiality. Nor could it legitimately do so. Irons wrote, AAs a loyal government lawyer, Ennis swallowed his doubts and added his name to the Hirabayashi brief . . ..@[41] In reality, Ennis swallowed his inclination to reveal fraud by the government. In fairness to Ennis, he never learned of the destruction of the original report and did not receive the substituted report until long after the Hirabayashi opinion had been rendered. Frauds by War Department lawyers had kept Justice lawyers ignorant of many of the most critical contradictions between the War Department positions and the positions taken in the government=s briefs to the Court.

[40] *Id.* at 204.
[41] *Id.* at 206.

By the time the Korematsu brief was being drafted, the substituted War Department Report had been published, the first publication of it as far as Ennis and other Justice lawyers knew.[42] The Report claimed that Japanese Americans had engaged in espionage activities after Pearl Harbor, maintaining radio contact to Japanese submarines and passing information that led to the sinking of American ships. At Justice lawyers=s request, the FBI and FCC reported back regarding these War Department claims, flatly refuting them.[43] Further, the FCC chairman assured the Justice lawyers that General DeWitt and his staff had been made aware of the FCC=s and FBI=s intensive investigation that had determined that these radio reports were false.[44] Nonetheless, the War Department report, on which Justice=s Sepreme Court brief would rely, made the false radio report claims.

In the first draft of the Justice brief in Korematsu, a footnote was inserted that clearly communicated to the Court the factual conflicts with the War Department Report, particularly on the Japanese American espionage claims.[45] First, Solicitor General Fahy toned down the footnote, removing language that would alert the Court to the sources of the conflicting facts: the FCC and FBI investigations and their reports.[46] The conflict

[42] *Id.* at 278.
[43] *Id.* at 280-82.
[44] *Id.* at 284-85.
[45] *Id.* at 286.

AThe Final Report of General DeWitt is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. The recital of the circumstances justifying the evacuation as a matter of military necessity, however, is in several respects, particularly with reference to the use of illegal radio transmitters and shore-to-ship signaling by persons of Japanese ancestry, in conflict with information in the possession of the Department of Justice. In view of the contrariety of the reports on this matter, we do not ask the Court to take judicial notice of the recital of those facts contained in the Report.@

[46] *Id.* at 286.

then shifted to Ennis and McCloy who found themselves opposed yet again.[47] McCloy demanded first of Ennis, then Fahy, that the footnote be removed entirely. Ennis and the brief=s initial drafter, John L. Burling, argued to Assistant Attorney General Wechsler that their lawyer obligations required they not rely on the War Department Report that they knew to be based on key falsehoods. As the negotiations ensued, they threatened to refuse to sign the brief if the footnote was deleted.[48] Armed with a more complete version of the conflict, brought to his attention by Wechsler, Fahy decided to argue for Burling=s original footnote. After a meeting attended by Fahy, Wechsler and War Department lawyer, Captain Fisher, the footnote debate changed. When finally submitted to the Court, the footnote gave no notice of contrary views at Justice, contrary facts to those in the Report, or the FCC and FBI reports.[49] Ennis=s and Burling=s names both appeared on the brief=s signature page.[50]

A loyal government lawyer should swallow doubts about differences in legal and policy arguments, but not about government frauds regarding critical underlying facts. A single courageous lawyer who disclosed the government=s fraud might have changed the course of the internment.

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[47] *Id.* at 287.
[48] *Id.* at 290.
[49] *Id.* at 290-91.

AWe have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice; and we rely upon the [War Department] Final Report only to the extent that it relates to such facts.@

[50] *Id.* at 292.

Outside of discrete areas of protection and always when wrongdoing has occurred, information about a client that a private lawyer should protect, a government lawyer should reveal.

II. AOther Law@

The bar ethics rules account for the government lawyer difference in the duty of confidentiality. The D.C. Bar, with its great experience dealing with government lawyer issues, provides an exception to the duty of confidentiality that expresses this difference of role between government and private lawyers. Its bar rules allow revelation by government lawyers whenever law permits revelation.

In general, lawyers are permitted to reveal client confidences when *required* by other law.[51] Government lawyers in the District of Columbia are permitted to reveal client confidences when *permitted* by other law.[52] Other jurisdictions should consider following the District=s lead on this issue, with which the District obviously has substantial experience and expertise.

A. 28 U.S.C. 535b

As discussed in section I, 28 U.S.C. 535b demands that federal employees, lawyers included, report criminal misconduct of other federal employees. This obligation

[51] Model Rules of Prof=l Conduct R. 1.6(b)(6) (as amended August 2003). The rule=s permission to reveal what is required by law to be revealed is internally misleading. The permission relieves the lawyer of disciplinary liability when she does what other law requires. Thus, a lawyer is not merely permitted to make such revelations; she is required to do so.

[52] DC Bar Rule 1.6(d)(2)(B) (year).

to report and reveal information represents Aother law@ that requires disclosures of otherwise confidential government-client information.[53]

B. The Federal Whistle Blower Statute

The Whistle Blower Protection Act[54] occupies a middle status between other law that requires and other law that permits disclosure of otherwise confidential information. While it may not require disclosure, it does more than merely permit it. The statute=s very purpose is to *encourage* disclosure of information regarding violations of law, rules, or regulations, and other abuses of authority.[55] Whistle blowers have permission to reveal information within the scope of the statute, but they need more than mere permission to make disclosures. The personal and professional disadvantages of whistle blowing are substantial.[56] Without substantial encouragement to disclose, in the form of protection and, when appropriate, causes of action, few whistles will be blown.[57] The statute occupies a legislative place analogous to a common law tort claim for wrongful discharge on the private employment side, the purpose of which is to encourage disclosures that

[53] *In re* Lindsey, 158 F.3d 1263, 1274 (D.C. Cir. 1998); *In re* Grand Jury Duces Tecum, 112 F.3d 910, 920-21 (8th Cir.1997), *cert. denied*, 117 S. Ct. 2482 (1997).

[54] Pub. L. No. 101-12, 103 Stat. 16 (1989).

[55] 5 U.S.C. ' 112 F.3d 2302(b)(8) (year).

[56] CHARLES PETERS & TAYLOR BRANCH, BLOWING THE WHISTLE: DISSENT IN THE PUBLIC INTEREST (Praeger Publishers 1972) (collecting government whistle blower stories).

[57] Deborah L. Rhode, *Symposium: The Future of the Legal Profession: Institutionalizing Ethics*, 44 Case W. Res. L. Rev. 665, 702-03 (1994).

advance certain important public policies.[58] Conduct protected by a whistle blower statute should not produce lawyer discipline. Especially when that conduct is engaged in by a government lawyer, exposing government misconduct, bar discipline is a highly inappropriate, unproductive response.[59]

The Whistle Blower Protection Act encourages federal employees to Aserve the public interest by assisting in the elimination of fraud [and other enumerated wrongs]. . ..@[60] The encouragement comes in the form of protection from retaliation for disclosures that the employee reasonably believes will expose the fraud or violation of law.[61] More than mere permission to disclose certain facts, the Act serves the interests of the United States (the government lawyer=s client) by empowering those most likely to know of such frauds to reveal and remedy them.

The Act affords its protection to applicants, employees, and former employees.[62] Nothing less would serve the statutory purpose. Applicants might learn of government frauds and be deprived job opportunities because of disclosure. As a former employer of a covered employee, the government retains significant power to punish harmful or

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[58] Balla v. Gambro, 584 N.E.2d 104 (Ill. 1991) (rejecting common law retaliatory discharge action in favor of in-house corporate lawyer because ethical requirements to make the same disclosure obviated need for tort action encouragement to report); Fingerhut v. Children=s National Medical Center, 738 A.2d 799 (D.C. 1999) (director of hospital security stated wrongful discharge claim where he was fired because he reported bribe to FBI officials and cooperated in subsequent investigation); Liberatore v. Melville Corporation, 168 F.3d 1326 (D.C. Cir. 1999) (pharmacist stated wrongful discharge claim where he was fired because he intended to report violations to the FDA).

[59] The statute supplies its own protection from retaliation for protected revelations. That protection likely extends to prohibit the employer from making a bar ethics complaint, but that issue, the statute=s explicit protection, is largely outside the scope of this article. For the issues discussed in the this article, the statute occupies the place of other law that permits disclosure of client confidences.

[60] Whistleblower Protection Act of 1989, Pub. L. No. 101-12 ' 2(a)(1); 5 U.S.C. ' 1201 (year) (AThe Congress finds that --

(1) Federal employees who make disclosures described in section 2302(b)(8) of title 5, United States Code, serve the public interest. . . .@

[61] 5 U.S.C. ' 2302(b)(8)(A) (year).

[62] 5 U.S.C. ' 1221 and others (year).

embarrassing revelations by alumni whistle blowers. Former employees have substantial, continuing exposure to retaliatory conduct by the government: negative references, government threats of disclosures to current employers, criminal charges, even bar discipline complaints.

The Act does not afford protection for disclosures merely within the chain of command.[63] Disclosures to anyone else (Aincluding, for example, a reporter, a congressional staffer, or an interest group representative@)[64] are protected and therefore encouraged.[65]

The Act itself would not protect a government lawyer from a bar association imposition of discipline.[66] The bar association is not the government employer; the Act does not explicitly restrict the bar. Nonetheless, some have asserted that bar discipline is prohibited by inference from the Act.[67] The Act=s coverage prohibits the government employer from taking the retaliatory action of filing a bar complaint. The Act=s real protection against bar discipline comes from its status as other law that permits

[63] Huffman v. Office of Personnel Management, 263 F.3d 1344, 1351 (Fed. Cir. 2001) (disclosures to a supervisor are not protected but disclosures to press are).

[64] Cramton, *supra* note 1, at 308.

[65] Horton v. Dep=t of the Navy, 66 F.3d 279, 282 (Fed. Cir. 1995) (noting that disclosures to the press are protected disclosures); H.R. Rep. No. 100-413 at 12-13 (1988); (listing the media as an independent entity, such as Congress, to which disclosures may be made).

[66] Project on Government Oversight (POGP); Government Accountability Project (GAP); Public Employees for Environmental Responsibility (PEER); The Art of Anonymous Activism: Serving the Public While Surviving Public Service 58 (Nov. 2002). Other government Whistle blowers have been subjected to bar complaints based on their conduct. Cindy Ossias, who disclosed frauds in the California Department of Insurance was the subject of a bar complaint. The bar committee concluded that she had not engaged in disciplinable conduct. Nancy McCarthy, Rule Change Proposed to Protect Government Whistle Blowers, Cal. Bar J. March 2002; Editorial, A Gadfly Wins at Last, Washington Post Aug 16, 2000.

[67] Cramton, *supra* note 1, at 320 (AAlthough the whistle blower protections deal expressly only with retaliatory actions of the employing agency, the application of professional discipline by a state disciplinary board is likely to be precluded.@).

disclosure, taking the material revealed outside the protection of the duty of confidentiality.[68]

III. Client Waiver

Considered another way, the government lawyer=s client has consented to the revelation of certain kinds of otherwise confidential information. The government-client, by enacting statutes such as 28 USC 535b and the whistle blower protection act, has instructed its lawyers to behave in a way that allows, encourages, and sometimes requires categories of information to be revealed. No agency head, let alone lesser government official, has the power to speak for the government-client in a way that controverts what the law enacted by that client have said in more forceful, public, and binding ways.

These statutory provisions amount to more than an Aother law@ exception to confidentiality. For the federal government lawyer, they represent the best statement of what the lawyer=s client wants the lawyer to do with the client=s confidences. Private clients may, of course, give informed consent to disclosures of confidences.[69] Federal government lawyers ought to look to their superiors and the articulaters of government policy for guidance regarding consent to disclosure of confidences. But those murky indicators cannot trump the clear, positive law statement of the legislature, signed by the President in the form of statutory pronouncements. Statutes such as 28 U.S.C. 536b and the whistleblower statute are express waivers of confidentiality with respect to the

[68] Model Rules of Prof=l Conduct R. 1.6(b)(6) (as amended August 2003); DC Bar Rule 1.6d2B (year).

[69] Model Rules of Prof=l Conduct R. 1.6(a) (as amended August 2003).

information covered by the statutes by the government lawyer=s client, whatever might be the preference of current policymakers and superiors.

IV. ANoisy Withdrawal@ and the New Scope of Confidentiality

In general, the balance between revealing a client=s frauds and protecting legitimate confidences is moving toward disclosure and away from protection of confidentiality. Even with private sector clients, the August 2003 amendment to Model Rule 1.6 has moved the balance away from confidentiality and toward revelation by inserting exceptions that have been proposed and re-proposed on several occasions.[70] While confidentiality is a core lawyer duty to be protected at great cost, ultimately confidences are either legitimate or illegitimate. In effect, the rules identify which nuggets of client information are illegitimate confidences and permits or requires their revelation. Without question, the balance=s movement has been in reaction to public frauds that lawyers have claimed an inability to rectify because of their confidentiality duty.[71]

The federal government lawyer=s client has an even less legitimate expectation that its lawyers will remain silent when it uses their work in a fraud. An example of such

[70] Model Rules of Prof=l Conduct R. 1.6(b)(2)(3) (as amended August 2003); The Legislative History of the Model Rules of Professional Conduct at 47-51 (Center for Professional Responsibility ABA 1987); Margaret Love, The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000, 15 Geo. J. Legal Ethics 1, 11-12 (2002).

[71] *E.g.*, Watergate; the S&L debacle; Enron. Dan Ackman, It=s the Lawyers= Turn to Answer for Enron, Forbes, Mar. 14, 2002 (quoting Vinson & Elkins partner, A[A]s lawyers they have no obligations to blow the whistle on client wrongdoing. Indeed, they have the opposite obligation to maintain client secrets.@).

an instance occurred in 2002, following the capture of John Walker Lindh. John Walker Lindh had been captured a couple of weeks earlier, on November 21, 2001, in Afghanistan. On December 7, John DePue, a Terrorism and Violent Crime Section DOJ lawyer asked Jesselyn Radack what the law of professional responsibility said about whether Lindh could be directly interviewed in a custodial, overt way: specifically whether he should be made aware that his father had retained counsel to represent him.[72] A 1995 Yale Law graduate, Radack had spent the six-plus years since graduation in government, an Attorney General=s Honors Program lawyer, representing the United States of America first at DOJ=s Civil Division, and then in the Professional Responsibility Advisory Office (PRAO).[73] In this capacity, Radack gave advice to inquiring DOJ lawyers about a wide range of ethics issues. She was good at her work.[74] She had never herself been the subject of a bar discipline complaint. According to DOJ, she was good at her work until that day.[75]

She gave her opinion in a series of at least 14 exchanged emails with Mr. DePue. In part, she said, AI consulted with a Senior Legal Advisor here at PRAO and we don=t think you can have the FBI agent question Walker. It would be a pre-indictment,

[72] Examining the E-mail, www.MSNBC.msn.com/id/3067190/ June 15, 2002; Motion to Inspect and Copy, Exhibit 15; The lawyer to whom Mr. DePue referred, James Brosnahan, eventually did meet with Lindh more than a month later, on January 24, 2002. Brosnahan, among other things having served with the Special Prosecutor for the Iran/Contra matters investigating the first President Bush=s pardon of Caspar Weinberger, represented Lindh as lead counsel in negotiating his later plea agreement. Brosnahan complained fervently about his many faxes to Justice asserting his representation of Lindh during December 2001. Byron York, American Tali- lawyer: Defending John Walker Lindh, The National Review (February 25, 2002); Washington File, John Walker Lindh Was Denied Legal Representation, Defense Says, U.S. Dep=t of State, http://usinfo.state.gov/topical/pol/terror/02012417.htm

[73] Motion to Inspect and Copy, United States v. Lindh, case no. 02-37-A, 227 F. Supp. 2d 565 (2002), filed December 31, 2003, Exhibit 15, Jesselyn Radack affidavit.

[74] *Id.* at para. 5, 6, and 8.

[75] *Id.*

custodial overt interview, which is not authorized by law.@[76] She was asked her advice, the sort of advice given regularly to DOJ lawyers for the nearly three years since her transfer to PRAO. She gave it. It seems not to have been the advice her client, The United States of America, wanted to hear. Her advice was not taken. Instead, her client, through FBI agents on the ground in Afghanistan, decided to question Lindh without informing him that his family had retained counsel to represent him.[77]

Radack=s advice was reflected in a series of at least a dozen emails. When the Lindh court ordered the production of internal DOJ communications regarding Lindh=s right to counsel, Radack discovered the hard copies of her emails had been purged from the file. She had placed the hard copies in the file. They were gone. Only three of them had been delivered to AUSA Bellows for submission the court. Initially, the government=s response to the court=s order was resultantly incomplete. Radack=s advice regarding Lindh=s right to counsel had been ignored. Radack was simultaneously threatened with a sudden change in job performance evaluation by her superiors. She had good reason to believe that DOJ would not reveal her advice to the court, and that DOJ=s submission of some but not all of her emails was a fraud on the court. A fraud on a court accomplished by misusing the lawyer=s services requires the lawyer to undertake Areasonable remedial measures,@ including revelation of the fraud.[78] Under principles of noisy withdrawal, even as a private lawyer and even had the fraud not been perpetrated on a court, she would have been entitled to withdraw and give notice identifying the fraudulent submissions from which she was disassociating herself. While the notion of

[76] www.MSNBC.msn.com/3067190/
[77] *Id.* Radack e-mail to Depue, 12/10/01, 11:29 am.
[78] Model Rules of Prof=l Conduct R. 3.3(a)(3) (2002).

noisy withdrawal did not explicitly permit revelation of client confidences, careful commentators recognized that the permitted notice effectively revealed confidences and operated as a hidden exception to the confidentiality rule, [79] and the most recent amendments to Model Rule 1.6 explicitly allow the disclosure without the need to the noisy withdrawal subterfuge.

The August 2003 amendment to ABA Model Rule 1.6 and even former notions of noisy withdrawal both suggest that even if she had been private counsel, Ms. Radack=s conduct was permissible, if not required. Under Model Rule 1.16, when a client, even a private client, misuses the lawyer=s work as part of a fraud, a lawyer may reveal the client=s confidences to rectify the fraud or wrongdoing.[80]

Further general erosion of the duty of confidentiality is indicated by the new obligations to report on client misconduct such as Sarbanes-Oxley[81] which have joined old obligations to report such as 28 U.S.C. 535b, permitting and in some instances requiring lawyers to reveal what would otherwise be confidential client information. On the pages of the DC Bar=s official magazine, addressing D.C. lawyers concerned that reporting under Sarbanes-Oxley could subject them to discipline for revealing confidences, SEC Chairman Harvey Goldscmid offered reassurance:

> Federal law is supreme. Any lawyer in D.C. who finds material, ongoing financial fraud, reports it up, and sees that the wrongful conduct has not stopped, is in a position to go outside, pursuant to the Sarbanes-Oxley section 307 and the SECs rulemaking. *No one* may discipline that lawyer for properly reporting out.=Eric

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[79] Geoffrey C. Hazard, Rectification of Client Fraud: Death and Revival of a Professional Norm, 33 Emory L. J. 271, 306 (1984) (Asome fools may not understand that Rule 1.6 does not mean what it seems to mean@); Monroe Freedman, Ethical Ends and Ethical Means, 41 J. Legal Educ. 55, 61 (1991).

[80] Model Rules of Prof=l Conduct R. 1.16 cmt. (2002); Hazard & Hodes; Hazard, *supra* note 79, at 306.

[81] Pub. L. No. 107-204, 116 Stat. 745 (2002).

> Hirschhorn [chair of the D.C. Bars Legal Ethics Committee] affirms Goldschmid, adding reassuringly, AOne of the exceptions to keeping client confidences in the D.C. Rules is where its required by law or court order. So if there=s a federal law, such as Sarbanes-Oxley, that says you must make disclosures, my guess, without having litigated it, is that the federal law trumps a D.C. law that prohibits disclosure.=@[82]

Supremacy clause argument or not, Sarbanes-Oxley and other law requiring disclosure, or for government lawyers, permitting disclosure, fit the other law exception to the duty of confidentiality.

The crime-fraud exception to the privilege provides yet another useful analogy: consider cases like United States v. Jacobs.[83] In *Jacobs*, a lawyer=s advice was unheeded, and further, the client told third parties that the lawyer had approved of the transaction the client was proposing.[84] Here, Radack gave advice to her client; the advice was unheeded; the client was later asked about advice it had been given and responded that it had not been advised in the manner Radack had. This sort of fraudulent use of a lawyer=s advice both waives the privilege and permits the lawyer to rectify the fraud. To be sure, the *Jacobs* defendant had formed an intent to misuse his lawyer=s advice before asking for it; that fact removed the communication from the privilege based on the crime-fraud exception in the first instance. But even without the planned misuse fact in *Jacobs*, Jacobs=s lawyer would have been permitted to reveal Jacobs=s confidences upon learning that Jacobs was misusing the lawyer=s advice.

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[82] Robert Pack, Dilemmas in Attorney Client Confidentiality, Washington Lawyer (Jan. 2004), also available at http://www.dcbar.org/for_lawyers/washington_lawyer/january_2004/privilege.cfm

[83] United States v. Jacobs, 117 F.3d 82 (2d Cir. 1997).

[84] *Id.*

Conclusion

Whether analyzed as a matter of general principles of the lawyer-client relationship or as a matter of ethics rule application, federal government lawyers occupy a unique position. Confidentiality is not a lawyer responsibility that is unaffected by the identity of the lawyer=s client. By its nature as a public-abiding entity, the federal government commands reduced expectations of its lawyers= confidential maintenance of information. The ethics rules of the District recognize as much. Statutes represent both Aother law@ exceptions to the duty of confidentiality and unequivocal, binding statements of client consent to the revelation of certain classes of information. Their encouragement of and in some instances command of information disclosure represent more than mere permission to reveal the information. They represent the federal government lawyer=s duty to reveal information, or conceived of in a different way, the federal government lawyer=s duty to breach confidentiality.

III. A Few Developments in Lawyer Ethics Law, Generally

A. Model Rule 1.6 and Confidentiality

Rule 1.6 Confidentiality Of Information

(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 relating to the representation of a client to the extent the 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 the 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 a court order.

B. Model Rule 1.13 and Corporate Representation

Rule 1.13 Organization As Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
>
> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the

provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

C. Are “Non-Equity” Partners Partners or Employees?

EEOC v. Sidley, Austin Brown & Wood, 315 F.3d 696 (7th Cir. 2002)

IV. A Few Recent Cases of Government Lawyer Discipline

A. IRS Case

The following is summary of a tax shelter case where the court of appeals, 316 F.3d 1041, reversed and remanded with instructions to grant judgment, as sanction for IRS attorneys' misconduct, in favor of all taxpayers on terms equivalent to those of secret settlement

Patricia A. DIXON, et al.,[FN1] Petitioners
v.
COMMISSIONER OF INTERNAL REVENUE, Respondent.
Nos. 9382-83, 10588-83, 17642-83, 17646-83, 27053-83, 4201-84, 10931-84, 15907-84, 20119-84, 28723-84, 38757-84, 38965-84, 40159-84, 22783-85, 30010-85, 30979-85, 29643-86, 35608-86, 13477-87, 479-89, 8070-90, 19464-92, 621-94, 7205-94, 9532-94, 17992-95, 17993-95.
May 2, 2006.

Background: Taxpayers who had participated in tax-shelter investment program petitioned for redetermination of deficiencies arising from disallowance of deductions arising out of program. The Tax Court, 1999 WL 171398, entered judgment in favor of the IRS, upholding deficiencies, and imposing additional penalties. Following discovery of secret settlement agreement between IRS counsel and certain petitioners, Tax Court denied taxpayers' motion to vacate. The Court of Appeals, 26 F.3d 105, reversed and remanded for evidentiary hearing. On remand, the Tax Court reinstated prior judgment in part. The Court of Appeals, 316 F.3d 1041, reversed and remanded with instructions to grant judgment, as sanction for IRS attorneys' misconduct, in favor of all taxpayers on terms equivalent to those of secret settlement.

BEGHE, J.
***1** In *Dixon v. Commissioner*, 316 F.3d 1041 (9th Cir.2003), revg. and remanding T.C. Memo.1999-101, the Court of Appeals held that the misconduct of R's trial attorney and his supervisor in the trial of the test cases for the Kersting tax shelter project, in agreeing with counsel for T, one of the test case Ps, to a secret settlement of T's deficiencies (not disclosed to IRS management, to this Court, or to counsel for other test case Ps), was a fraud on the Court. The Court of Appeals ordered this Court to sanction R by entering judgment in favor of the remaining test case Ps and other Ps in the Kersting tax shelter group before the Court on “terms equivalent to those provided in the [final] settlement agreement with [T] and the IRS”, leaving to this Court's discretion “the fashioning of such judgments, which to the extent possible and practicable, should put these taxpayers in the same position as provided in the [T] settlement”.

R argues that the substance of the T settlement was a 20-percent reduction of T's 1979-1981 deficiencies, plus the payment of T's attorney's fees. Ps argue that the T settlement was, in form and substance, a 62.17-percent reduction of T's 1979-1981 deficiencies, plus

other benefits that bring the T settlement to a 79.92-percent reduction in the deficiencies. The parties agree that the T settlement also included cancellation of all additions and penalties, including nonshelter-related additions and penalties, and the use of a "burnout" to reduce the accrual of interest on the remaining deficiencies. Ps argue that interest on the deficiencies should not be charged beyond Dec. 31, 1986, which, in their view, marks the inception of the fraud on the court. R has conceded that no interest will be charged on the deficiencies for the period of the appeals to the Ninth Circuit commencing in 1992.

MEMORANDUM FINDINGS OF FACT AND OPINION [FN2]

BEGHE, J.

***2** With this opinion, the Court hopes to provide a template for resolution of the more than 1,300 [FN3] remaining cases of petitioner participants in the second generation [FN4] of tax shelter programs (the Kersting project) promoted by Henry F.K. Kersting (Kersting).[FN5] During the trial on the merits of the test cases used to try to resolve the vast majority of the pending cases in the Kersting project,[FN6] respondent's trial counsel Kenneth W. McWade (McWade) (with the knowledge and connivance of his supervisor, Honolulu District Counsel William A. Sims (Sims)), entered into secret settlements with Luis DeCastro (DeCastro), counsel for test case petitioners John R. and Maydee Thompson (the Thompsons). The financial terms of the final settlement were much more advantageous to the Thompsons than the settlements generally made available to other petitioner participants in the Kersting project.[FN7] The final settlement with the Thompsons was intended to provide refunds of tax and interest paid by the Thompsons under a prior settlement, plus interest thereon, that were to be used-and the bulk of the refunds was used-to pay DeCastro's fees for providing the appearance of his independent representation of the Thompsons at the trial of the test cases. After this Court upheld respondent's determinations and entered decisions in favor of respondent in all the test cases, see *Dixon v. Commissioner*, T.C. Memo.1991-614 (Dixon II), respondent's senior management discovered the settlements, moved this Court to vacate the decisions (including the decisions in the Thompsons' cases) that had not already been appealed to the Court of Appeals for the Ninth Circuit, and requested an evidentiary hearing. After vacating the decisions, the Court denied the motion for evidentiary hearing, entered decisions for the Thompsons in accordance with their final settlement, and reentered or allowed to stand its decisions in the other test cases. The Court thereafter denied motions by test case and nontest case petitioners to intervene in the Thompsons' cases shortly before the new decisions in those cases became final. In *DuFresne v. Commissioner*, 26 F.3d 105 (9th Cir.1994) (hereafter *DuFresne*), the Court of Appeals for the Ninth Circuit vacated the decisions against the other test case petitioners on the ground that the misconduct of Sims and McWade required further inquiry. The Court of Appeals directed this Court to hold an evidentiary hearing to determine: "whether the extent of misconduct rises to the level of a structural defect voiding the judgment as fundamentally unfair, or whether, despite the government's misconduct, the judgment can be upheld as harmless error." *Id.* at 108.

This Court conducted the evidentiary hearing directed by the Court of Appeals and held that the misconduct of the Government attorneys did not create a structural defect but rather resulted in harmless error. See *Dixon v. Commissioner*, T.C. Memo.1999-101 (Dixon III). We imposed sanctions against respondent in the form of relief from the accrual of interest on additions to tax for negligence as well as relief from additional interest under section 6621(d)/(c) (hereafter, section 6621(c)).[FN8]

***3** The other test case petitioners again appealed. The Court of Appeals for the Ninth Circuit reversed and remanded our decisions in those test cases in *Dixon v. Commissioner*, 316 F.3d 1041 (9th Cir.2003), as amended on March 18, 2003 (Dixon V). The Court of Appeals held that the misconduct of respondent's counsel constituted a fraud on the court and directed this Court to enter decisions "in favor of Appellants and all other taxpayers properly before this Court on terms equivalent to those provided in the settlement agreement with Thompson and the IRS." *Id.* at 1047. In this opinion, we determine the terms of the Thompson settlement and their application to the Kersting project participants before the Court.

FINDINGS OF FACT

The parties have filed a stipulation of facts for evidentiary hearing on September 20, 2004; a first supplemental stipulation of facts for evidentiary hearing on September 20, 2004; a second supplemental stipulation of facts for evidentiary hearing on November 22, 2004; a third supplemental stipulation of facts for evidentiary hearing on March 29, 2005; a fourth supplemental stipulation of facts, filed on June 17, 2005, and a stipulation of settled issues, filed on June 22, 2005. The facts stipulated therein are so found. The stipulation of facts and the attached exhibits are incorporated herein by this reference. The parties have further stipulated that, for purposes of the present opinion, the Court may incorporate its findings of fact as stated in earlier proceedings unless such facts are inconsistent with the opinion of the Court of Appeals in Dixon V or are inconsistent with facts stipulated or proven in proceedings held after the issuance of Dixon V.

J. *Respondent's Disciplinary Action Against Sims and McWade*

***21** On July 29, 1993, Sanchez sent notices of proposed disciplinary action to Sims and McWade. The notices asserted that Sims and McWade had violated: (1) Department of the Treasury Minimum Standards of Conduct, section 0.735-30(a)(2) (an employee shall avoid any action which might result in or create the appearance of giving preferential treatment to any person); (2) Department of the Treasury Minimum Standards of Conduct, section 0.735-30(a)(6) (an employee shall avoid any action that might adversely affect the confidence of the public in the integrity of the Government); and (3) IRS Rule of Conduct 214.5 (an employee will not intentionally make false or misleading verbal or written statements in matters of official interest). The notices proposed to suspend both Sims and McWade for 14 calendar days without pay.

McWade retired from the IRS effective October 2, 1993. On November 2, 1993, Acting

Chief Counsel Jordan approved Sanchez's proposed disciplinary action. Sims was suspended from duty without pay for 14 days and was transferred to the San Francisco Regional Counsel's Office, where he was assigned nonsupervisory duties as a Special Litigation Assistant in the General Litigation area.

IV. *Ninth Circuit Remand and Subsequent Proceedings*

A. *Ninth Circuit Orders in the DuFresne Case*

On June 14, 1994, the Court of Appeals for the Ninth Circuit filed a per curiam opinion, vacating and remanding this Court's decisions in the remaining test cases, on the ground that the misconduct of Sims and McWade required further inquiry. *DuFresne v. Commissioner*, 26 F.3d at 107. Citing *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), the Court of Appeals observed:

We cannot determine from this record whether the extent of misconduct rises to the level of a structural defect voiding the judgment as fundamentally unfair, or whether, despite the government's misconduct, the judgment can be upheld as harmless error. * * *

B. EEOC Case

2005 EEOPUB LEXIS 2860
Attorney for the EEOC was charged with ethics violation for representing an employee in a suit in which the EEOC or federal government was a party.

Brenda J. Hester, Complainant, v. Cari M. Dominguez, Chair, Equal Employment Opportunity Commission, Agency

Hearing No. 0-0200057-PA Appeal No. 01A43843 Agency No. 200200057

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

2005 EEOPUB LEXIS 2860

June 10, 2005

For the Commission by Stephen Llewellyn, Acting Executive Officer, Executive Secretariat

OPINION:

The complainant timely initiated an appeal with this Commission from the agency's final order concerning her equal employment opportunity (EEO) complaint of unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title

VII), as amended, 42 U.S.C. § 2000e *et seq.* and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 *et seq.* n1 The appeal is accepted pursuant to 29 C.F.R. § 1614.405.

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n1 In the instant matter, the Equal Employment Opportunity Commission (EEOC) is both the respondent agency and the adjudicatory authority. The Commission's adjudicatory function is separate and independent from those offices charged with the in-house processing and resolution of discrimination complaints. For the purposes of this decision, the term "Commission" is used when referring to the adjudicatory authority and the term "agency" is used when referring to the respondent party in this action. The Chair has recused herself from participation in this decision.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*2]** The record reveals that the complainant, an Investigator, GS-12 at the agency's Philadelphia District Office, filed a formal EEO complaint claiming that she was retaliated against for prior EEO activity when she received letters of warning and reprimand, dated respectively June 13, 2002 and August 8, 2002. Following an investigation, an Administrative Judge (AJ) made a decision without a hearing finding no discrimination, which the agency implemented. n2

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n2 The AJ was not a Commission or agency employee.

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[*3] The AJ found that there were no genuine issues of material fact in dispute, and hence issued a decision without a hearing. The AJ found that the "facts" which the complainant argued were in dispute, such as the agency's legal authority to charge her with an **ethics** violation when she was serving as a duly designated EEO representative, were not facts but in the nature of argument and conclusions.

The AJ further found that the complainant established a *prima facie* case of reprisal discrimination because she was the representative of an employee in an EEO case, the Administrative Judge in that case (hereinafter referred to as presiding official) recognized the complainant as the representative under 29 C.F.R. § 1614.605(a), and the complainant was disciplined for refusing to withdraw her representation.

EEOC Regulation 29 C.F.R. § 1614.605 applied to the EEO administrative process in the case where the complainant was serving as a representative. At the time of the activity covered by the **discipline** it read, and still reads:
At any stage in the processing of a complaint, including the counseling stage § 1614.105, the complainant shall have the right to be accompanied, represented, **[*4]** and advised by a representative of complainant's choice. n3

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n3 This is limited by 29 C.F.R. § 1614.605(c), which stated and still states that where the representation of a complainant or agency would conflict with the duties of the representative, the Commission or the agency may, after giving the representative an opportunity to respond, disqualify the representative.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -The AJ found that the agency articulated a legitimate, nondiscriminatory reason for issuing the letters of warning and reprimand to the complainant. Specifically, the agency repeatedly counseled the complainant that her representation of an EEOC employee in an EEO case violated **ethics** regulations, but the complainant continued her representation, and therefore was disciplined.

The letters of warning and reprimand, as well as the AJ's decision referred to **ethics** regulation 5 C.F.R. § 7201.102(c), which at the time of the activity covered by the **discipline** read:
No employee of the Equal Employment Opportunity Commission, other than a special Government **[*5]** employee, may engage in outside employment involving a particular matter pending at EEOC or an equal employment opportunity matter in which EEOC or the Federal Government is a party. An employee may, however, provide behind-the-scenes assistance to immediate family members in matters pending at EEOC or equal employment opportunity matters in which EEOC or the Federal government is a party. n4

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n4 In 2003, the regulation was amended, permitting an employee, with prior approval, to represent without compensation another EEOC employee in an administrative equal employment opportunity complaint against the EEOC.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -A related part of the regulation, at 5 C.F.R. § 7201.103(b)(3) required and still requires that an EEOC employee must obtain prior written approval from the designated agency **ethics** official or designee to engage in "uncompensated outside employment that involves representation or the rendering of advice or analysis regarding any equal employment law...." Employment was defined and is still defined in 5 C.F.R. **[*6]** § 7201.103(d), in relevant part, as "any form of non-Federal employment or business relationship involving the provision of personal services by the employee. It includes, but is not limited to personal services as an...agent...[or] consultant...." The complainant does not contend that she got advanced written approval to represent the EEOC employee in her EEO case against the EEOC.

Regulations 5 C.F.R. § 7201.102 and .103 were adopted to supplement Office of Government **Ethics** (OGE) regulations 5 C.F.R. Part 2635, with the concurrence of OGE. 61 FR 7065, 62 FR 36447, and 5 C.F.R. § 7201.101. The regulations at 5 C.F.R. Part 2635 set forth the standards of ethical conduct for employees in the executive branch of the **federal government.**

The agency official who counseled the complainant was an **attorney** with the agency's Office of Legal Counsel. The attorney was the opposing agency counsel in the EEO matter in which the complainant was representing the agency employee. The attorney explained that he advised the complainant as soon as he learned she was not a union representative. In the past, she had served as one. Under the Collective Bargaining **[*7]** Agreement, union representatives were exempt from the general **ethics** prohibition of representing EEOC bargaining unit members in personnel actions against the EEOC. Part of the duties of attorneys in the Office of Legal Counsel is to ensure that employees are aware of their ethical obligations, and to inform appropriate officials when they do not comply. This is what the attorney did.

The AJ found that the complainant failed to prove that the agency's reasons for its actions against her were pretext to mask reprisal discrimination. The complainant pointed to the June 19, 2002 order by the presiding official. In response to the agency's notice that the complainant was in violation of **ethics** regulations, the presiding official ruled that under 29 C.F.R. § 1614.605(a) the complainant was recognized as the EEOC employee's representative. The AJ found the complainant's argument regarding this ruling was unpersuasive because the presiding official's order specifically declined to rule on whether there was a violation of **ethics** regulations. In fact, the presiding official later

affirmed that he did not have the authority to rule on the application of 5 C.F.R. § 7201 to EEOC employees.

[*8] Next, the AJ found the complainant's argument that she was permitted to represent two agency employees in 1989 and 1990 was of little probative value because this pre-dated the promulgation of the **ethics** regulation. Also, the complainant does not contend that she was not a union representative in those cases. Moreover, the complainant in no way disputes previous argument by the agency that there was no record in OLC's computer database that these cases were referred to OLC to defend and that none of the OLC attorneys involved in the instant case were aware of them. It was an OLC attorney that advised agency management to **discipline** the complainant for violating an **ethics** regulation.

Finally, the AJ found that the complainant's contention that the **ethics** regulation was misinterpreted to cover pretext was unpersuasive. The AJ found that the issue of whether the **ethics** regulation was violated was not before him and could not be adjudicated. The AJ found, however, that mere disagreement with the interpretation was insufficient to raise a genuine issue of material fact, and the complainant failed to show she was disciplined for any reason other than non-compliance with the regulation.

[*9] On appeal, the complainant argues that the AJ should not have made a decision without a hearing because there are genuine issues of material fact in dispute. The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. *Id.* at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. *Id.* at 255. An issue of fact **[*10]** is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. *Celotex v. Catrett*, 477 U.S. 317, 322-23 (1986); *Oliver v. Digital Equip. Corp.*, 846 F.2D 103,105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case. If a case can only be resolved by weighing conflicting evidence, summary judgment is not appropriate. In the context of an administrative proceeding, an AJ may properly consider summary judgment only upon a determination that the record has been adequately developed for summary disposition.

The complainant does not identify any of the genuine issues of material fact in dispute, and our review of the record found none. There was an opportunity to engage in discovery before the AJ issued the decision without a hearing, and the record was adequately developed for summary disposition. After a careful review of the record, the Commission finds that the grant of summary judgment was appropriate, as no genuine

dispute of material fact exists.

To prevail in a disparate treatment claim such as this, the complainant must satisfy **[*11]** the three-part evidentiary scheme fashioned by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The complainant must initially establish a *prima facie* case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. *Furnco Construction Co. v. Waters*, 438 U.S. 567, 576 (1978). Proof of a *prima facie* case will vary depending on the facts of the particular case. *McDonnell Douglas*, 411 U.S. at 804 n. 14. The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). To ultimately prevail, the complainant must prove, by a preponderance of the evidence, that the agency's explanation is pretextual. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519 (1993); *Pavelka v. Department* **[*12]** *of the Navy*, EEOC Request No. 05950351 (December 14, 1995).

The complainant can establish a *prima facie* case of reprisal discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. *Shapiro v. Social Security Admin.*, EEOC Request No. 05960403 (Dec. 6, 1996) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). Specifically, in a reprisal claim, and in accordance with the burdens set forth in *McDonnell Douglas, Hochstadt v. Worcester Foundation for Experimental Biology*, 425 F. Supp. 318, 324 (D. Mass.), *aff'd*, 545 F.2d 222 (1st Cir. 1976), and *Coffman v. Department of Veteran Affairs*, EEOC Request No. 05960473 (November 20, 1997), a complainant may establish a *prima facie* case of reprisal by showing that: (1) she engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, she was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. *Whitmire v. Department of the Air Force*, EEOC Appeal No. **[*13]** 01A00340 (September 25, 2000).

As found in the AJ's decision, the complainant established a *prima facie* case of reprisal discrimination because she was the representative of an employee in an EEO case, which constitutes EEO activity, and she was disciplined for refusing to withdraw her representation. All the elements of a *prima facie* case were met.

As found in the AJ's decision, the agency articulated a legitimate, nondiscriminatory reason for its actions, *i.e.*, the agency repeatedly advised and counseled the complainant that her representation of an EEOC employee in an EEO case violated **ethics** regulations, but the complainant continued her representation, and therefore was disciplined.

Finally, for the same reasons set forth in the AJ's decision, the Commission finds that the complainant failed to prove that the agency's reason for its actions was pretext to mask reprisal discrimination. We also find that the complainant did not show that the situations where she represented employees in 1989 and 1990 without being disciplined are similar to the instant case for the additional reasons outlined above.

The AJ's decision finding no discrimination was supported by a **[*14]** preponderance of the evidence. Accordingly, the agency's decision implementing the AJ's decision is affirmed.

C. A Somewhat More Celebrated Example

The following article discusses the California Bar's consideration of whether a senior Pentagon official violated legal ethics by suggesting it was dishonorable for attorneys to defend Guantanamo captives.

Miami Herald (FL)

January 27, 2007

San Francisco

BY CAROL ROSENBERG, crosenberg@MiamiHerald.com

Bar wants probe of Pentagon lawyer

The San Francisco Bar Association is asking its state bar to conduct a formal disciplinary investigation of a senior Pentagon official who cast fellow lawyers as dishonorable for offering free-of-charge legal service to U.S.-held captives at Guant00C3,A00A1,!namo Bay, Cuba.

It's the latest twist in an uproar roiling national legal circles over a deputy assistant secretary of defense's broadcast call Jan. 11 for corporate America to boycott law firms that defend GuantÃ¡namo captives.

Since then, the Pentagon has renounced the remarks of the deputy, attorney Charles "Cully" Stimson, who has in turn released a brief apology.

But the board of directors of the 8,000-attorney San Francisco bar voted Wednesday night to ask the California Bar to conduct an investigation into whether Stimson, an inactive member, acted unethically. It asks that, if conclusive, he "be disciplined appropriately, up to and including disbarment."

A spokeswoman for the California Bar said all complaints are investigated; discipline is rare.

In 2005, according to a bar report, it conducted 9,962 inquiries, which resulted in 283

resignations and 30 individuals being disbarred.

Still, Miami defense lawyer Neal Sonnett said, the San Francisco action illustrates that anger over Stimson's remarks has not abated.

His remarks and GuantÃ¡namo will be the subjects of multiple resolutions at the Feb. 8-10 national meeting of the American Bar Association, in downtown Miami, Sonnett said.

"What Stimson has done, perhaps to his everlasting regret, is focus attention on all the problems surrounding the GuantÃ¡namo legal issues," said Sonnett, who was an ABA observer at an earlier GuantÃ¡namo war court.

Sonnett listed attorney access, habeas corpus, the coming Military Commissions among the issues -- saying "all of these now are being talked about now a lot more on The Hill and elsewhere as a result of the anger over Stimson's remarks, particularly because he's in charge of detainee affairs."

At issue is whether Stimson was unethical in using a radio interview aimed at federal employees to recite a list of leading law firms who let lawyers defend detainees -- and said corporate executives "are going to make those law firms choose between representing terrorists or representing reputable firms."

Legal groups and some newspaper editorials swiftly condemned the comments as at odds with the bedrock American principle of free or pro-bono representation.

Six days later, Stimson apologized in a three-paragraph letter to The Washington Post, renouncing his own remarks as at odds with his "core values."

He never explained the first statement, or why the retreat -- and some newspaper editorials and legal groups have rejected the apology.

Friday, Navy Cmdr. Jeffrey Gordon said the Pentagon had nothing more to say on the episode -- and offered no response to the California Bar challenge.

San Francisco Bar President Nanci Clarence said Friday that the board asked for the disciplinary investigation by "an overwhelming majority."

The board includes attorneys whose firms offer pro-bono business at GuantÃ¡namo, and were singled out by Stimson in his Federal News Radio broadcast.

"By essentially calling for an economic embargo of the lawyers involved in the cases," said Clarence, "we think an official in his position is coercing lawyers to either avoid or not participate in the defense of the powerless and the poor."

"And that's absolutely antithetical to the ethical rules that govern this profession."

Legal circles don't agree on whether the remark constituted an ethical breach.

Harvard law professor Alan Dershowitz, for example, wrote to The New York Times after Stimson's apology that, as a lawyer, Stimson was free to articulate an unpopular opinion "without fear of bar discipline."

But, Dershowitz continued, "as a senior Pentagon official, a purported representative of the United States government, he should be fired if his views do not reflect that of the government, as I surely hope they do not."

Yale law professor Judith Resnik countered that the issue had to be analyzed through a constellation that includes Stimson's powerful position, overseeing detainee affairs; his remarks and his status as an attorney.

"The bedrock principle is everybody gets a lawyer by their side when the state is about to take their liberty, life, property," she said. "I believe that in this context it is fair to describe what he did as unethical."

Stimson, a former federal prosecutor, has active membership, in good standing, in the Maryland Bar. He joined Sept. 17, 1992, and has never been disciplined there, according to the Maryland Bar's public information phone service.

The Attorney Grievance Commission there said it does not disclose ongoing investigations; so it was not possible to know whether fellow Maryland attorneys had sought a similar inquiry on the East Coast.

In his Jan. 17 apology, Stimson said he has been a defense lawyer and had in the past "zealously represented unpopular clients" and "I support pro bono work."

The Pentagon has consistently declined to elaborate.

And the apology has stirred even more anger in some circles.

** The New York Times said he failed in his bid "to spin his way out of his loathsome attempt to punish lawyers who represent inmates of the GuantÃ¡namo Bay internment camp."

** The Daily News of New York ran a column under the headline, "FLUNKY'S APOLOGY IS A SORRY EXCUSE."

** Chicago Rep. Jan Schakowsky, D-Ill., wrote President Bush, asking that he fire him; The White House has not yet responded, her office said.

** Eugene Fidell, president of the National Institute of Military Justice, called the apology "deeply inadequate" and his radio remarks a possible violation of the Military Commissions Act's provision protecting defense lawyers' independence.