Lawyers as Advocate in Public Health Practice

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Lawyers as Advocates in Public Health Practice

Joan McNamara, Janice Carson, Stephen Bundy, and Marice Ashe (Moderator)

This session describes issues surrounding the changing roles for legal counsel to public health agencies, outlines ethics standards for the roles of government attorneys, and touches upon new opportunities for public health agency attorneys to engage in policy making.

Marice Ashe

As a deputy city attorney for the City of San Diego, the public is my client and my duty is to protect the public’s health and safety. Proactive prosecution is necessary to protect our quality of life. The means for achieving improvement in the public’s health through law includes “doing the right thing at the right time.” The right thing to do is to put a proactive focus on quality of life issues and cases.

As a deputy city attorney, it is important to keep in mind that the City Attorney is an elected official, and many times must stay focused on a particular agenda and work within certain guidelines. In San Diego, there is a proactive city attorney who maintains a strong focus on early intervention and quality of life issues. In solving public problems and contributing to that agenda, our office uses criminal misdemeanor prosecutions, civil advisory counsel functions, and civil litigation.

A highlight in San Diego has been the San Diego Partnership for Smoke-free Workplace Enforcement (SWE). Organizations involved include the County Department of Health Services, the San Diego Police Department, the Tobacco-free Communities Coalition, and the City and County Prosecutors’ Offices. The San Diego SWE model includes a hotline for complaints, health department and police compliance checks, business owner prosecutions, notices to businesses regarding cited or sanctioned activities, referrals to police and sheriff departments, and smoker citations.

Moreover, complementing the direct enforcement measures are other efforts, e.g., community and judicial education, enforcement training, creative sentencing guidelines, and advocacy efforts involving multiple community groups, advisory boards, and tobacco control task forces. There are also opportunities for public health improvement with the use of model ordinances and targeted media campaigns to increase public awareness. The public is my client and there is great satisfaction serving as a proactive prosecutor, prosecuting business owners who violate the laws which protect the public’s health and safety, and using preventative measures for enforcement.

Janice Carson

From my local health officer’s perspective, no one really represents public health. Within my jurisdiction, there are three attorneys who assist the public health department: an attorney for the Board of Health who receives a retainer of less than $15,000 per year and whose time for public health-related issues is quite limited; a County Commissioners’ attorney whose work product includes such items as memoranda of understanding that commit county resources; and finally, a County Council’s attorney who advises council members on local community public health and social issues. There is generally little interaction between and among these attorneys and health department personnel. The county attorneys serve elected officials whose agendas for maintaining the public health and safety of the citizens do not always coincide with that of the public health department. As a local health officer with the St. Joseph County
Health Department in South Bend, Indiana, it has been my experience that the public health department is not well-served by any of these attorneys. The department certainly does not serve as a priority client for these attorneys. An example of this was demonstrated with respect to The Health Insurance Portability and Accountability Act of 1996 (HIPAA) preparedness for the local health department. As the local public health officer seeking legal assistance, I was required to consult with all three attorneys and facilitate communication among all three of them. The attorneys did not attend relevant HIPAA trainings and the bulk of the work of preparing and disseminating HIPAA-related information was completed by the public health department staff members. Each of the attorneys admitted they had little HIPAA knowledge and experience. This was only one of many situations in which the local health department is faced with defending its own legal positions and maintaining legal operations without the benefit of designated legal counsel.

With the workload inherent in delivering public health services increasing, additional support and resources are needed in the form of dedicated funding and manpower, particularly with more attorney representation for Boards of Health and local health departments. This will be required if these institutions are to remain viable during community controversies or pending public health-related legal matters that are decided through settlement and litigation venues. Local public health departments lack the ability to enforce certain standards when there are few or no attorneys taking up their cause to fight on behalf of an institution which generally maintains a position that is in the best interest of the community as a whole. The bottom line is that local public health departments need more available and dedicated legal support.

**Stephen Bundy**

The government is a complex client. Attorney loyalty and ethics take on new meaning when attorneys represent governmental clients. There exists an ethical framework for legal representation in the public health field and the traditional ethical framework can be mapped onto two situations: one is under the Lawyer's Code of Ethics and the other under the American Bar Association's Model Rules of Professional Conduct ("Model Rules"). There are core ethical duties by which all lawyers must abide. These include maintaining competence, serving with loyalty, and upholding confidentiality. Being competent includes having an open dialog with the client, investigating facts and law, and recommending a course of action. Loyalty involves maintaining diligence to the plight of the client who has chosen a representative as an advocate, and acting on the basis of the client's interest without harboring similar loyalties to interests that may conflict with those of the client. The confidentiality component focuses on keeping the client's trust and privacy without assisting in the perpetration of any criminal conduct.

There is a slight difference in the roles and responsibilities of government lawyers under these core duties. There is sometimes difficulty in attempting to identify the actual client and in determining the scope of representation. There may be competing definitions of the client, whether an agency, a government official, or the public at large. In addition, the roles of the attorney may vary. For example, county counsel is usually a general practitioner, reactive to certain issues that arise particular to the community. A city prosecutor may be a specialist and one who takes on a more proactive role in preventing public health law violations.

The question of who the client is can be answered by the Model Rules, Rule 1.13, which describes the special role of a government lawyer. It details that the lawyer for an organization must determine the interests of the organization and identify the "duly authorized constituents" of that organization. For example, in a county abatement proceeding, the client may be the county. When identifying the duly authorized constituent, a lawyer must look to the foremost advocate or representative for the organization. A county can recognize such authority in a local public health official; it need not be an attorney acting as a primary representative. This is an internal rearrangement, but may be the most efficient and logical choice for certain organizations.

This also relates to the scope of representation, or the scope of an attorney's authority and the extent to which a lawyer or a client makes specific decisions. County lawyers are usually on a more restrictive set of operational protocols, and technical advice on the nature of decisions may come from public health officials. In contrast, a city attorney may have quite broad discretion to act on behalf of the city. Both situations are completely ethical, but represent different choices by different clients. What is important is that the scope of representation differs with respect to the authority granted to the attorney and with the identity of the client. These differing styles can be compared as that of a passive, reactive view, to that of a more aggressive, proactive view. Regardless, both frameworks are attempts to advance public health values and offer special roles for government attorneys.