ETHICS IN GOVERNMENT: INVESTIGATION AND ENFORCEMENT

Adjunct Professors Ellen N. Biben and Linda A. Lacewell

Note on the Syllabus: Please note the syllabus may change depending on the availability of guest speakers and other developments.

Students will be graded based on class participation and their written or oral advocacy role as part of a team in a final reform debate that will take place during the last class.

About the Instructors:

Ellen N. Biben served as Executive Director of the New York State Joint Commission on Public Integrity http://www.jcope.ny.gov/about/commission.html and the New York State Inspector General http://ig.state.ny.us/. Before those positions, she served as Special Deputy Attorney General for Public Integrity under New York State Attorney General Andrew M. Cuomo http://www.ag.ny.gov/. She was Deputy Chief of the Rackets Bureau in the Manhattan District Attorney's Office under District Attorney Robert Morgenthau http://manhattanda.org/node/174/20#rackets_bureau.

Linda A. Lacewell is Special Counsel to New York Governor Andrew M. Cuomo http://www.governor.ny.gov/ and was Special Counsel to Attorney General Cuomo http://www.nytimes.com/2009/04/08/opinion/08wed4.html?_r=0. She spent nine years as an Assistant U.S. Attorney for the Eastern District of New York http://www.nytimes.com/2002/09/07/nyregion/mafia-turncoat-gets-20-years-for-running-ecstasy-ring.html, including two years on detail to the Enron Task Force http://www.nytimes.com/2003/12/23/business/canadian-bank-will-pay-fine-and-drop-unit-in-enron-accord.html.

The instructors investigated and prosecuted the pay-to-play public pension fund case at the New York Attorney General's Office http://www.villagevoice.com/2010-11-24/news/a-thanksgiving-honor-roll-for-2010/2/, culminating in the conviction of New York State Comptroller Alan Hevesi, his chief fundraiser Henry "Hank" Morris, his Chief Investment Officer David Loglisci, and others, and helping lead to nationwide reform of the public pension fund system http://www.governor.ny.gov/press/021711governorcuomostatement.

Class 1: Foundations for Regulating Professional Conduct of Lawyers
Defining the lawyer-client relationship. What is special about the relationship and what are seminal responsibilities of a lawyer that flow from this? Discuss concepts relating to diligence, communication with clients, zealous advocacy and avoiding

conflicts of interest. What are the historical and philosophical foundations for these seminal requirements?

Readings:
Gillers, Regulation of Lawyers: Problems of Law and Ethics (2012) Chapter 1
NY Rules

Class 2: Rules of Professional Responsibility Overview
What are the rules and how are they promulgated? To whom do they apply and how are they enforced? What is their purpose? ABA Model Rules vs. NY Rules. Analyze rules concerning honesty and candor and relationship/tension with rules to maintain confidentiality.

Readings:
Gillers, Regulation of Lawyers: Problems of Law and Ethics (2012) Chapter 2
NY Rules 3.3, 4.1, 1.6
Comparison of ABA Model and NY Rules
http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/newyork.authcheckdam.pdf

Class 3: Rules Relating to Conflicts of Interest
What is a conflict of interest, when and why is it prohibited? When /why are certain conflicts waivable or cured by consent, and who can waive or consent?

Readings:
Gillers, Regulation of Lawyers: Problems of Law and Ethics (2012) pages 185-235; 265-270; 281-314 (please be prepared to discuss Hausmann case, "Murder One , Murder Two", and "Did Officer Schwarz Get the Effective Assistance of Counsel")
PR Rules 1.7, 1.8, 1.9. 1.10

Class 4: Defining Public Integrity
What does it mean to be a public servant? What are the philosophical and historical foundations for the ethical standards to which they are held? What are the special duties applicable to public servants under common law and constitutional, state and federal law. How, if at all, do these compare to the standards underlying regulation of lawyers?

Readings:
Madison, Hamilton & Jay, The Federalist Papers, Nos. 10, 20, 27, 49, 51, 55, 47 & 63; excerpts from Talmud and King James Bible, Psalm 72;
Theodore Roosevelt, The Strenuous Life: Essays and Addresses (Cosimo Classics, May 1, 2006).
Robert G. Natelson, The Constitution and the Public Trust, 52 Buffalo L. Rev. 1077 (Fall 2004) (religious and philosophical origins of public integrity principles)

The U.S. and New York Constitutions (excerpts)

Class 5: Rules Affecting Government/Public Lawyers

What are the rules affecting lawyers in public service, including prosecutors and lawyers who work for federal, state or local governments or elected officials? For lawyers working for government agencies or officials, who is their client? For lawyers employed by NYS, how do these rules compare to the Public Officers Laws that apply to them as well?

Readings:
Gillers, Regulation of Lawyers: Problems of Law and Ethics, pages 111-118, 235-240, 314-322, 445-458 (please be prepared to discuss "Investigating Landlords on pages 314-315, "Contributions to Justice", and "A Reasonable Doubt?" on pages 456-458).
PR Rules 1.7-1.11, 1.13, and 3.8
NYS Public Officers Law Sections 73 and 74

Class 6: Mechanisms to Uphold and Enforce Legal Ethics

Jurisdiction, scope of authority, and relief available through enforcement of PR and related rules and civil liability.

Readings:
Gillers, Regulation of Lawyers: Problems of Law and Ethics, pages 649-671, 700-741

Class 7: **Mechanisms to Uphold and Enforce Ethics in Government**
Jurisdiction, scope of authority, and relief available through civil actions by individuals; ethics commissions including the NYS Joint Commission on Public Integrity (including its history) and state and federal legislative ethics commissions; federal and state boards of election including the Federal Election Commission; state and federal inspectors general; the NYS Attorney General's Office (civil, criminal and administrative authority) local and federal law enforcement authorities

Readings:
NYS Public Integrity Reform Act of 2011
NYS Executive Law Sections 51-55, 63 & 94
NYS Public Officers Law Sections 73 and 74 (Code of Ethics)
Inspector General Act of 1978
Michael R. Bromwich, "Symposium: Running Special Investigations: The Inspector General Model," 86 Geo. L.J. 2027 (July 1998) (optional)

Class 8: State Prosecutions - Official Misconduct, Schemes to Defraud, Bribery, and Relevant Case Studies

Compare state penal laws with applicable PR Rules including Rule 3.5 (maintaining and preserving impartiality of tribunals and jurors). What if any additional issues arise when lawyers/law firms are witnesses or defendants? (See PR Rules 1.6 (confidentiality), 3.7 (lawyer as witness), 5.4 (professional independence of a lawyer), 5.7 (lawyer providing nonlegal services), and 8.3 (duty to report professional misconduct)).

Readings:
PR Rules 1.6, 3.7, 5.4, 5.7, and 8.3
Gillers, Regulation of Lawyers: Problems of Law and Ethics, pages 276-279, 523-530 (be prepared to discuss "The Clients of My Daughter Mean Nothing to Me" on page 529-530)
NYS Penal Law §§ 190, 195 & 220-27
People v. Garson and People v. Ohrenstein
People v. Alan Hevesi (former NYS Comptroller); People v. Henry "Hank" Morris and David Loglisci (pension fraud "pay to play").

Classes 9: Federal Offenses - Deprivation of Honest Services and Relevant Case Studies
The duty of honest services: history and current state of the law, from early mail and wire fraud and the amended statutes through Skilling and its progeny.

Readings:
Federal Bribery and Gratuities under 18 U.S.C. §201
US v. Sun-Diamond Growers of California, 526 U.S. 398 (1999)
Program Fraud 18 U.S.C. 666
Extortion Under Color of Official Right § 1951 (Hobbs Act)
Evans v. United States, 504 U.S. 255 (1992)
Skilling v. United States, 130 S. Ct. 2896 (2010); United States v. Bruno, 661 F.3d 733 (2d Cir. 2011); United States v. Blagojevich; United States v. Edwards.
Honest Services Fraud: Hearing Before the S. Comm. on the Judiciary, 111th Cong. (Lanny A. Breuer, Assistant Attorney General, Criminal Division, U.S. DOJ) (optional)

Class 10: Punishment and Other Consequences
The punishments and sanctions available in the state and federal systems, including civil and criminal penalties, forfeiture of office and pensions, censure, remediation, disbarment and professional discipline.

Readings:
Gillers, Regulation of Lawyers: Problems of Law and Ethics, pages 743-745
Excerpts from McKinneys Criminal Procedure Law, Executive Law, Penal Law, and Public Officers Law
Excerpts from U.S. Sentencing Guidelines

Class 11: Role of the Media and Social Media
What is the role of the media and social media and what problems and opportunities do they bring? Investigative journalism, editorial boards and other opinion leaders. PR Rule 3.6 (Trial Publicity), and comments to the press, or to the public through social media, by the public official. the prosecutor, or regulator. Open government and transparency in the media age.

Readings
Gillers, Regulation of Lawyers: Problems of Law and Ethics, pages 793-827 (be prepared to discuss Matter of Holtzman and questions following case on pages 826-827)
ABA Fair Trial and Free Press Guidelines
Change of Venue Motion papers in trial of US v Skilling (S.D. Tex.)
5 U.S.C. § 552

Class 12: Regulating "Pay-to-Play": Campaign Finance and Lobbying Laws and ABA Model Rule 7.6

The role of money in politics and official decision-making, including legal and illegal uses of campaign and other funds and the significance of disclosure requirements. State and federal regulation of lobbying and political activity. Citizens United, superpacs, and campaign contribution limits. ABA Model Rule 7.6 debate – does it effectively address "pay to play", and why wasn't it adopted in NY?

Readings:
Richard Briffault, "Symposium: The Law of Lobbying: Lobbying and Campaign Finance: Separate and Together," 19 Stanford L. & Pol. R. 105 (2008)
Richard Briffault, "Symposium: Citizens United v. Federal Election Commission," 20 Cornell J. L. & Pol. R. 643 (Spring 2011)
Michael Kang, The End of Campaign Finance Law, 98 U. Va. Law R. 1 (Mar. 2012)
NYS Lobbying Act and Regulations
The Lobbying Disclosure Act and the Honest Leadership Act, 2 U.S.C. § 1605
ABA Model Rule 7.6
http://68.234.80.80/newsroom/whats_new/GeorgetownJournalofEthicsArticle.pdf
McCutcheon v. Federal Election Commission (Supreme Court 2014)

Class 13: Reform

Is reform needed or just greater enforcement? What kinds of changes, if any, are needed? How does change happen? Does scandal pave the way for reform? What are the examples of that? What are the necessary conditions for change and who are the change actors? What is the role of the people in a democratic society in bringing about change?

Readings:
Philip M. Nichols, "The Perverse Effect of Campaign Contribution Limits: Reducing the Allowable Amounts Increases the Likelihood of Corruption in the Federal Legislature," , 48 Am. Bus. L.J. 77 (Spring, 2011)
Nadeea Zakaria, "Outdated Provisions: How the Hatch Act Should Be Applied to Social Media Activity," 25 Geo. J. Legal Ethics 841 (Summer 2012)

Class 14: Reform Debate

Final project: Students debate proposed reforms.

Optional Background Materials

J. Patrick Dobel, Public Integrity (Johns Hopkins Univ. Press 2001).
Raymond Cox, Ethics and Integrity in Public Administration (M.E. Sharpe 2009).
Stuart Green, Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime, (Oxford Univ Press 2006).
G. Calvin MacKenzie, Scandal Proof: Do Ethics Laws Make Government Ethical (The Brookings Inst. 2002).
Donald C. Menzel, Ethics Management for Public Administrators: Leading and Building Organizations of Public Integrity (M.E. Sharpe, 2d. ed. 2012).
Obermaier & Morvillo, White Collar Crime: Business and Regulatory Offenses (Law Journal Seminars Press Hardcover 1999 as updated).
John A. Rohr, Public Service, Ethics, and Constitutional Practice (Studies in Government & Public Policy) (Univ. Press of Kansas 1999).
American Society for Public Administration, Public Integrity (M.E. Sharpe).