Lawyer Independence in Context: Lessons from Four Practice Settings

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ABSTRACT

Independence is a core value of the legal profession. That value contains an internal tension, however: it can signify both loyalty to and distance from the client. In addition, as recent scholarship on lawyers has emphasized, professional values acquire concrete meaning only in the context of the particular practice settings in which lawyers work. This Article offers insights into how lawyers manage the tension inherent in independence, and the meanings that they attach to this value, that are drawn from hearings on independence in four practice settings conducted by the New York State Judicial Institute on Professionalism in the Law. The hearings featured discussions by lawyers involved in solo and small firm practice, law firm general counsel, in-house corporate counsel, and government lawyers. This Article describes how lawyers in each setting define independence and what features of practice can enhance or inhibit its exercise. It also discusses how the testimony compares to the relevant scholarship on some of these areas of practice. While lawyers in each of the hearings provide valuable commentary on the distinctiveness of independence in different practice settings, their testimony as a whole suggests that fulfilling the duty of independence need not require choosing between loyalty to or distance from the client. Rather, gaining trust by demonstrating a commitment to the client can be crucial in enabling the lawyer to satisfy the duty to provide independent advice.

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INTRODUCTION

The obligation of lawyers to act with independence is regarded as a hallmark of the legal profession. "The professional independence of the practicing lawyer is the single most important element in providing the legal profession with its

strength, character, and integrity."[1] The meaning of independence, however, can be ambiguous. As Bruce Green has noted:

> [T]he term is conventionally used in two seemingly conflicting ways. At times, "professional independence" means independence from clients. This can be either a state of mind, *e.g.*, detachment or objectivity, or something more tangible. At other times, "professional independence" implies independence from the pressures and influences of others who might compromise lawyers' loyalty to clients.[2]

The two conceptions of independence are in tension in that they emphasize both distance from and identification with the client. They express "the claims of the client to a lawyer's fiduciary obligation balanced against and sometimes conflicting with the lawyer's obligations to the legal system and to the lawyer's sense of justice."[3] Furthermore, both are conceived as rationales for the collective independence of the bar manifested in the authority of self-regulation.[4]

How do practicing lawyers navigate this tension? In what senses of the term do they see themselves as independent? Is independence even a condition to which they aspire? A growing body of research suggests that these questions cannot be answered in the abstract.[5] Instead, we need to understand the texture of the particular types of practice settings in which lawyers work; the demands and challenges that these settings present for lawyers; how professional ideals are implicated in practice; and the pragmatic ways in which practitioners balance their understandings of what it means to be a lawyer. One recent collection of studies on how lawyers in various practice settings resolve ethical issues suggests that we gain valuable insights by "situating lawyers in their everyday practices . . . to explore how organizational, economic, and client differences across the legal profession actually matter for the work that lawyers do and the

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1. Peter Megargee Brown, *The Decline of Lawyers' Professional Independence, in* THE LAWYER'S PROFESSIONAL INDEPENDENCE: PRESENT THREAT/FUTURE CHALLENGES 23, 24 (1984).

2. Bruce Green, *Lawyers' Professional Independence: Overrated or Undervalued?*, 46 AKRON L. REV. 599, 608 (2013).

3. Eleanor W. Myers, *Examining Independence and Loyalty*, 72 TEMP. L. REV. 857, 857–858 (1999). A lawyer also may believe that legitimate concern for his or her own interest may qualify duties to the client in some instances. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2015) [hereinafter MODEL RULES], for instance, authorizes the lawyer to reveal confidential information to the extent reasonably necessary

> 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.

4. Green, *supra* note 2, at 602.

5. *See, e.g.*, LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT (Leslie Levin & Lynn Mather, eds. 2012); David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye Scholer*, 66 S. CAL. L. REV. 1145 (1993).

decisions that they make."[6]

In this spirit, from 2009–2013 the New York State Judicial Institute on Professionalism in the Law conducted hearings in New York State that were designed to explore the meaning of lawyer independence in four different practice settings: solo and small-firm practice, law firm general counsel practice, in-house corporate counsel, and government service. As Susan Fortney observed, "A number of empirical works [over the last two decades] related to practice in large law firms. Researchers devoted less attention to studying the work, ethics, and concerns of lawyers who work in-house or in solo or small firm settings."[7] The Judicial Institute hearings thus focused on practice settings that, to varying degrees, have traditionally received less attention. Four sessions focused on each of these settings, while a fifth involved a general discussion reflecting on the previous four.

Most sessions began with American Bar Association Model Rule 2.1, which provides, "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation."[8] Hearings then typically featured one or more keynote speakers, followed by two or three discussion panels of practitioners with a moderator, and closed with questions and comments from the audience. The transcripts of all five sessions were published in the *Journal of the New York State Judicial Institute on Professionalism in the Law.*[9]

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6. LAWYERS IN PRACTICE, *supra* note 5, at 4.

7. Susan Saab Fortney, *Taking Empirical Research Seriously*, 22 GEO. J. LEGAL ETHICS 1473, 1475–1476 (2009). For examples of work on large firms, *see, e.g.*, ERWIN SMIGEL, THE WALL STREET LAWYER, PROFESSIONAL ORGANIZATION MAN? (1969); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); Robert W. Gordon, *The Ideal and the Actual in the Law: Fantasies and Practices of New York City Lawyers, 1870–1910, in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA (G.W. Gawalt ed., 1984); Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503 (1985). Robert Rosen has suggested, however, that research on large law firms should abandon the focus on independence. He argues that "[i]nstead of asking whether they are really independent, we should ask how they engage with their clients and their projects." Robert E. Rosen, *Rejecting the Culture of Independence: Corporate Lawyers as Committed to Their Clients*, 52 STUDIES IN LAW, POLITICS AND SOCIETY: LAW FIRMS, LEGAL CULTURE, AND LEGAL PRACTICE 33 (Austin Sarat ed., 2010).

8. MODEL RULES R. 2.1.

9. A Convocation on the Rise and Role of General/Inside Counsel to Large Law Firms, 6 J. OF THE N.Y. ST. JUDICIAL INST. ON PROFESSIONALISM IN THE L., no. 1, Fall 2009; *A Convocation on Independence and the Government Lawyer*, 6 J. OF THE N.Y. ST. JUDICIAL INST. ON PROFESSIONALISM IN THE L., no. 2, Fall 2010; *A Convocation on Lawyer Independence: Challenges and Best Practices for Solo and Small Firm Practitioners*, 6 J. OF THE N.Y. ST. JUDICIAL INST. ON PROFESSIONALISM IN THE L., no. 3, Fall 2011 [hereinafter *Solo and Small Firm Hearing*]; *A Convocation on Lawyer Independence and In-House Corporate Counsel*, 6 J. OF THE N.Y. ST. JUDICIAL INST. ON PROFESSIONALISM IN THE L., no. 4, Fall 2012 [hereinafter *In-House Corporate Counsel Hearing*]; *A Principled Discussion of Professionalism: Lawyer Independence in Practice*, 6 J. OF THE N.Y. ST. JUDICIAL INST. ON PROFESSIONALISM IN THE L., no. 5, Fall 2013 [hereinafter *Principled Discussion*].

This Article discusses the insights that emerged from the discussion at these proceedings. For each practice setting, we first describe the ways in which lawyers define independence and the factors that can erode or reinforce independence. The lawyers who participated provided rich, complex, and sometimes competing accounts of what independence means in their practices, what aspects of their practice potentially threaten and reinforce it, and how they attempt to fulfill their obligation of independence in the crucible of daily practice. This Article offers some observations regarding common themes that emerged, and how these stories might fit into the larger body of work on lawyer independence. For the most part, however, this Article lets the lawyers speak.

We recognize that there are limits to the ability to extrapolate from these hearings to all lawyers in these practice settings. First, of course, the hearings involved lawyers in only one state, in which practice could be distinctive for various reasons. Second, lawyers who testified were not selected or offered the opportunity to do so through a random sample, but through overtures by members of the Institute. Reliance on this network of lawyers could have led to some selection bias in favor of those lawyers who regard independence as an important professional value. Participants' definition of independence, the weight they attach to it, and their comments about features of practice that help reinforce or challenge the ability to act independently therefore may not be representative of all lawyers in these practice settings.

Finally, the fact that the lawyers' comments took the form of public testimony rather than anonymous responses in private interviews could have inclined participants to overstate the extent to which their behavior is consistent with professional ideals. In other words, there could be some gap between what lawyers publicly say and what they actually do.

While these caveats need to be kept in mind, we nonetheless believe that the testimony from these hearings offers rich and suggestive insights into how lawyers may conceptualize independence and attempt to put it into practice. Many of the comments deal not with whether a lawyer does or does not value independence, but what this quality means in specific circumstances, and how features of different practice settings can subtly affect the ability to exercise it. We thus regard the hearings not as a definite pronouncement on the concept of lawyer independence, but as one of several conversations that adds perspective on how lawyers grapple with its meaning in the course of daily practice.

I. SOLO AND SMALL-FIRM LAWYERS

The majority of lawyers in the United States work in solo practice or in firms with ten or fewer lawyers. The most recent data from the American Bar Association is as of 2005. In that year, forty-nine percent of lawyers were in solo

practice, and twenty percent were in firms of ten or fewer.[10] Such lawyers represent a very diverse group of practitioners who work in several different practice areas and office settings.[11] Many of these lawyers represent more individual clients than lawyers in larger firms.[12] In addition, many of them share offices with lawyers in other practices, rely on professional networks for advice and clients, and face similar office management and cash flow problems.[13] Most small-firm lawyers constantly seek to operate more efficiently and to reduce costs.[14] Some practitioners in specialized practices such as personal injury work advertise heavily and develop sophisticated high-volume case management systems,[15] while those who represent corporate clients tend to eschew such approaches.[16] In general, the extent to which solo and small-firm lawyers rely on advertising, advanced technology, and different forms of organization tends to depend on the types of clients a lawyer represents, access to capital, and the nature of the competition to which a lawyer is subject.[17] The next two sections will draw on the comments of lawyers at the hearings to illustrate how they define independence in the context of solo and small-firm practice, and what factors enhance or challenge their ability to exercise it.

A. DEFINING INDEPENDENCE

1. INDEPENDENCE AS PROVIDING CANDID ADVICE

Solo and small-firm practitioners spoke of independence mainly in terms of the need to provide candid advice about the full ramifications of what a client wants to do, even if the client might not want to hear it. As one lawyer summarized, independence sometimes requires telling a client: "Listen, you may think this and you may want this to happen, but I have a role here to explain to you that that's not what's going to happen."[18]

To draw out the lawyers' conception of independence, one hypothetical asked the group to consider a situation where "[t]he client really doesn't say anything about the purpose of [a] transaction other than basic details . . . [b]ut the lawyer observes certain conduct going on at the closing, or the meeting, that gives [her

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10. *Lawyer Demographics*, ABA, http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2014.authcheckdam.pdf [http://perma.cc/L6AS-UXKS] (last visited Dec. 19, 2015).

11. Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 310, 315 (2004).

12. *Id.* at 310–311.

13. *Id.* at 315.

14. CARROL SERON, THE BUSINESS OF PRACTICING LAW 2 (1996).

15. Jerry Van Hoy, *The Practice Dynamics of Solo and Small Firms*, 31 L. & SOC'Y REV. 377, 385 (1997).

16. SERON; *supra* note 14 at 54–56.

17. Van Hoy, *supra* note 15, at 386.

18. *Solo and Small Firm Hearing*, *supra* note 9, at 24.

some] pause [about] the transaction."[19] One lawyer responded:

> I've been in that situation, and what the prevailing goal in my mind is—you are my client. My mission in life is to tell you that there are grenades in the room. You should know what the grenades are, how they are going to explode, when and where. There may not be grenades, but I want you to be aware of it . . . I go on the assumption my client is acting in good faith, but is just ignorant about the process that is going on. God help it if it turns out that I should discover that the client did know what was going on, was trying to pull something over on me and I discovered this in the midst of the transaction or while dealing with a judge, the client would know.[20]

The moderator followed-up by asking, "But at what point do you start asking the hard questions, or don't you? Do you keep the blinders on?"[21] The panelist replied:

> I don't keep the blinders on, no, because that's inconsistent. If I'm representing my client with respect to a matter, be it litigation or whatever, you are not just a mechanic; I'm [not] just going to put a sink in the kitchen and walk out. You notice other things with respect to what the client is doing in the environment that the client presents, so you cannot put blinders on . . . . And I go under the assumption that others are going to know about it. A judge, an astute judge is going to pick up on it, and who are we kidding? It's going to come out. You want to come forward with it now, and modify your conduct today in a legal fashion, in such a way that you accomplish your objectives legally.[22]

This exchange between the moderator and lawyer suggests that independence requires that the attorney not turn a blind eye to potentially troubling circumstances surrounding a matter that he or she is handling.[23] Moreover, the lawyer has a practical interest in diligently looking for potential misinformation or missing information that might affect a proceeding or give rise to liability for the client down the road.[24] From this perspective, the need to gather sufficient information is grounded in practicality—the lawyer wants to have all the facts so that she can spot potential liability or foresee the strength of the client's case in a future proceeding. In short, the lawyer wants the client to make a fully informed decision, even if the lawyer's assessment of the client's options may frustrate the client's immediate or perceived personal goals.[25] Another lawyer underscored this pragmatic focus, suggesting that:

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19. *Id.* at 50.
20. *Id.* at 51.
21. *Id.*
22. *Id.*
23. *Id.* at 35.
24. *Id.* at 51.
25. *Id.* at 54.

> [A] lawyer exercising independence to tell a client he shouldn't or couldn't or can't, would be well advised not to do something, does not involve preaching to him. It involves formulating some sort of prudential way of presenting to him the alternatives which make clear that the one he's seeking is disadvantageous, and it sometimes helps to have other heads with whom to discuss that.[26]

Nonetheless, independence does not preclude legitimate creativity on a client's behalf. A participant commented that lawyers retain the latitude to "massage" legal advice and "present the story . . . in a way that works to the best interest of the client" without running afoul of ethical provisions.[27]

Still, lawyers noted that maintaining independence also protects a lawyer's own interest:

> [T]here are two competing duties; you obviously have the duty to give your client the best advice you possibly can, and you also have the duty to yourself, to your self-interest in protecting your law license. And those can conflict, but . . . when you speak about morality in law and the lawyer's independence [as] . . . speaking truth to power, sometimes when you speak that truth to a client and they don't want to hear it, it's probably just good business. They may come around. You may lose them as a client, but you will gain reputation.
>
> But most often times, the clients appreciate that and they want that, and I don't think it's necessarily conflicting. I don't know what true independence means in terms of your ability to have a duty to a third party, but your independent judgment does serve the two duties that I know you have and should have, and that's the duty of self-interest, to yourself, and the duty to the client.[28]

However, there was some difference of opinion about the extent to which independence involves a duty to the public on the part of the lawyer. One panelist said, "I guess it goes back to the whole concept of it's a privilege to practice law; it's not a right . . . . [W]e're bound by certain obligations to do so, and I don't think it's unreasonable for people to expect that we are operating for the greater good."[29] Another, however, maintained that "public duty" is a vague term and:

> I don't know what that means, because one could make the argument that in 1898 after *Plessy v. Ferguson* the public duty was not to challenge race discrimination because the Supreme Court had spoken . . . . But you have a client, and what trumps, as long as you are acting within the law, the best public duty that the lawyer can do, I submit, is to be the best advocate for the client. The details in terms of the public goals will take care of themselves in the end.[30]

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26. *Id.* at 16.
27. *Id.* at 25.
28. *Id.* at 26.
29. *Id.* at 41.
30. *Id.*

A third lawyer added another perspective. In response to a question about helping a client transfer property to his wife in anticipation of the client's possible later need to declare bankruptcy, the lawyer said:

> I have a real difficulty with the concept of morality and the law. I believe myself to be moral . . . but the concern is how do you make that be accomplished in the profession at large? It seems that if you have the duty to be honest, and the law is the law . . . [Y]ou [can] advocate a change in the law, but I certainly have no problem with telling a client that they can transfer the house to the wife's name.[31]

He continued:

> I'll tell them what the debtor-creditor law says, that that can be transferred back, they can have penalties and these are the risks, and at the same time, people do it every day . . . And I think that's the regulation of the lawyer, of the morality, is through that advising the . . . client of what the law is . . . . And that's our role, to give the honest advice and to follow the law, but I don't think that we have to act for the public interest and towards a public morality; I think that's the result of our otherwise ethical obligation.[32]

This reflects the view that the provision of candid legal advice is intrinsically charged with moral significance. Others at the session echoed this theme. Judge Juanita Bing Newton, Dean of the New York State Judicial Institute, opened the session on solo and small-firm lawyers by remarking on the importance of "moral courage" in acting as a wise and candid advisor.[33] The moderator asked panelist Professor Susan Fortney whether Model Rule 2.1 is essentially a directive to exercise moral courage. Professor Fortney replied:

> Well, I think it's the courage to ask those hard questions, instead of just seeing yourself as the technician, to actually engage the client in a kind of discourse in terms of what the Court will see. And that's not you imposing your view as to the outcome, but to think through with the client what are the possible upsides, downsides, consequences.[34]

Panelists thus saw independence in advising clients mainly as based on the need to give the client practical advice to obtain the best outcome in light of all foreseeable consequences of their actions. Lawyers should inform clients of the potential problems that might result from their conduct and should advise clients how they should proceed in order to best meet their objectives within the demands of the law.

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31. *Id.* at 42.
32. *Id.* at 42–43.
33. *Id.* at 5.
34. *Id.* at 23.

2. INDEPENDENCE AS CONTROL OVER PRACTICE

Independence for solo and small-firm practitioners can also mean the ability to have control over the clients they represent and how they represent them. Robert Gordon describes this notion of independence as: "Ideally independent lawyers freely decide which clients and causes they will represent, how to divide their time between paying clients and other commitments, what strategies and tactics to follow in pursuit of the clients' ends, and so forth."[35] That ideal, one lawyer pointed out, rarely materializes:

> [A] lot of times during the day, your thoughts are, "Great, I'm busy. I'm working on" whatever case it may be, "but is the phone going to stop ringing today? Is tomorrow going to be the day where I have to go back and go to a firm or lose my independence," and sometimes I think, you know, do I have independence because I chose it, because I'm focused, or because no one wants to work with me?[36]

Another lawyer described independence in terms of the amount of discretion a lawyer can exercise with respect to the clients he accepts:

> I think it's a great balance between having enough to say "No." You know, that's the truth. Early on, you would say you don't have any control. Somebody wants to retain you, you have to write the rent check in a couple of days, and you have to go forward. Hopefully, as your practice develops and you do diversify a bit, and maybe have a partner or two to rely upon in order to average your cash flow issues, you do gain that control, but that is a constant battle.[37]

3. CONCLUSION

Overall, solo and small-firm lawyers' statements suggest that the two conceptions—independence from the client and from outside influences in representing the client—often can be reconciled in practice. Commitment to the client unimpeded by "outside" influences leads the lawyer to provide advice that is based on a clear-eyed objective assessment of the client's enlightened self-interest. Since clients often are individuals or small business owners, these conversations can draw on shared practical understandings of risk and reward. As one lawyer put it, "At the end of the day, the client needs independent advice . . . for the best interest of the client, because the client has to ultimately resolve the problem in the context of existing rules. And the client needs to be told what the rules are."[38]

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35. Gordon, *The Independence of Lawyers, supra* note 7, at 7–8.
36. *Solo and Small-Firm Hearing, supra* note 9, at 28.
37. *Id.* at 30.
38. *Id.* at 26.

B. EXERCISING INDEPENDENCE

This section discusses what features of practice can inhibit or enhance the ability of solo and small firm lawyer to act with independence. Lawyers noted that pressures to generate sufficient business can create challenges to accede to questionable client demands, as well as to take on matters in fields with which the lawyer may not have much familiarity. At the same time, some lawyers suggested that maintaining a strong reputation for independence will attract more clients in the long run, and can help create ongoing relationships with clients that create the trust that leads clients to place high value on independent advice from the lawyer. Practitioners also emphasize the importance of developing networks of other lawyers who can serve as sources of both advice and referrals. These can help sharpen a lawyer's ethical deliberations and also help with generating business.

Studies of solo and small-firm practice document the challenges that lawyers in these settings can face in ensuring that they have enough business.[39] Panelists confirmed that this can be a significant concern, and emphasized that practitioners must remain sensitive to the risk that such pressures may create temptations to surrender independence for the sake of pleasing the client.[40] Unlike in a large firm in which more senior partners manage client relations and provide work for associates and other partners, solo and small-firm lawyers must generate revenue from the start. Accordingly, the pressure to please the client can be especially great even for junior practitioners because they want to obtain clients and build their own businesses.

Relatedly, the panelists also discussed the pressures on newer small practices to operate outside of their specialty or areas of expertise. Doing so may allow the lawyer's own interest to interfere with the duty to provide competent service to the client and thus violate the lawyer's independence. Echoing Model Rule 1.1's exhortation on providing competent service,[41] panelists agreed that providing referrals was always preferable to taking on work well outside of your scope of expertise.[42] Beyond the ethical implications, the panelists noted that referring the work elsewhere has practical benefits. The attorney builds a network that helps the attorney get future business from reciprocal referrals, and the client is likely to get a better result and hold the referring attorney in higher regard.

Having a reasonably steady flow of business can reduce pressures to compromise professional obligations in order to keep clients happy at all costs. When asked whether obtaining new business is a challenge, one lawyer replied:

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39. *See generally,* JEROME CARLIN, LAWYERS' ETHICS: A SURVEY OF THE N.Y. CITY BAR (1966); CARROLL SERON, THE BUSINESS OF PRACTICING LAW (1996); Levin, *supra* note 11, at 310.

40. *See infra* notes 44–50 and accompanying text.

41. MODEL RULES OF PROF'L CONDUCT R. 1.1 (1983) ("A lawyer shall provide competent representation to a client.").

42. *Solo and Small Firm Hearing*, *supra* note 9, at 22.

"That's the beginning and end of my challenge . . . that's everything."[43] Another lawyer agreed:

> Cash flow is a challenge, and it is for everybody. But in a solo or small practitioner firm, it seems to me that's a real challenge, especially if you have that client that comes in with the [questionable request] . . . but yet you are going through a period of light cash flow. How do you deal with that?[44]

Considering the tension between ethics and business, one lawyer commented:

> I think it's a great lesson for the law students in the audience or the recent graduates, that you have to realize that you are the target for the unscrupulous client, that you are the sole buffer between their, sometimes, bad intentions and bad transactions, and that they will be targeting and looking for someone who may be just out of school, someone who is happy to cash that initial retainer check because they think you will not have the expertise or experience to spot a borderline improper practice . . . . I went on my own at 28 years old, three years out of school, and you are so happy when that phone rings initially. Initially it's telemarketers, and then eventually the client gets your name. So when you get a real client calling you, you really want to bend over backwards to get that client in and make that a client for life.[45]

In response, the moderator asked, "Is that bending over backwards compromising [Rule 2.1]?" The lawyer responded, "It can. And I think that's what the goal of 2.1 encourages; that there is more to the practice of this profession than just a client's singular goal or this singular client."[46] Another panelist noted, "[I]t's always difficult to locate new clients. You also have to pay attention to the client that you have, because the clients, you can ultimately lose, if they feel that you are not paying attention to their best interest and by giving the right advice."[47]

However, one lawyer suggested that preserving a reputation for independence was more valuable in the long run than succumbing to the temptation for short-term gain by helping a client engage in wrongful conduct. In responding to a hypothetical involving what he regarded as potentially illegal activity by a client, he said:

> In this matter, I think it's clear on the hypo that you have actual knowledge that there's something very wrong going on here, and for me, it's, "Get out of my office. It can't be done this way. I'm happy to do it the right way. If not, get somebody else."

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43. *Id.* at 29.
44. *Id.* at 30.
45. *Id.* at 24.
46. *Id.*
47. *Id.* at 29.

> MODERATOR: Yeah, but I'm forty percent of your revenue. You want to kick me out of your office for this? You don't have to see the cash. In fact, I'll draft the contract; I just need you to be the Notary there.

This suggestion can create an even greater temptation to act in accordance with the client's wishes rather than exercise ethical independence:

> LAWYER: It's a brutal balance, and obviously the temptation is there. The desire to keep the client happy and keep your cash flow current are very highly pressured influences. At the end of the day, when you have time to reflect on that, for me, it's still "Listen, I can't help you out with it that way."
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> MODERATOR: Okay, so I'm now taking my 40 percent revenues, and I'm going down the block to [someone else], because I hear he might do it.
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> LAWYER: And that goes back to what we were talking about earlier about losing the client and gaining the reputation. If you've got your eye on the long term perspective of your career, of your occupation, you are going to have to take that hit. It's terrible, but that's the risk of small firm practice.[48]

Panelists thus emphasized that the smart attorney plays the long game. The need to provide clients with accurate information and the benefit of the lawyer's best analysis should trump empty assurances of legality or active participation in an illegal scheme.

Practitioners did note that solo and small-firm lawyers potentially could alleviate some business pressures by obtaining more work from corporate clients that insist on more cost-effective service. As one lawyer explained, "With the financial meltdown, a Teutonic shift has occurred in the practice of law and the old model that included hefty staffing of the most junior associates where they learned as apprentices may be gone forever."[49]

In addition, evolving legal technology, particularly in the field of electronic discovery, is leveling the playing field between small and large firms.[50] One lawyer observed,

> [T]he time is here when even a solo practitioner sitting at home with an iPad can cruise through millions of documents and prepare for trial. Yes, the technology is expensive, but it's also indispensable and as great minds work on the problem, it will become available and affordable for every practitioner.[51]

Another lawyer provided an example of the benefits of technology. He had recently completed a trial in which twenty-two million documents were produced by the other side.[52] A larger part of the market for legal services therefore may

48. *Id.* at 36–37.
49. *Id.* at 58.
50. *Id.* at 63.
51. *Id.* at 61.
52. *Id.* at 62.

become open to small practices that are "nimble when business models for the practice of law are in flux."[53] The ability to work efficiently within budget constraints and to draw on technology thus has the potential to reduce threats to independence based on financial concerns.

Establishing an ongoing relationship with a client can provide another means to enhance the ability to act with independence. Both regular and one-time clients may pose a risk to independence, but there may be an opportunity to build trust with a regular client that reduces the danger. One lawyer was asked, "[D]o you find that it's more difficult exercising this lawyer independence with long-standing existing clients than brand new ones that walk in and you don't like what they are saying?"[54] He responded:

> I think it's easier in some ways because you develop trust over time . . . . But in talking general terms, with a long-standing client, it's not so much pressure that this client is responsible for X percentage of my business, therefore I'm going to need to do what he or she wants. Really, over time, if you exercise good judgment and tell them, "Listen, you may think this is the way, but the law is this, and at the end of the day, you are going to get into trouble and it's not going to benefit you," and over time if you helped them escape a jam or two, they tend to rely on it.[55]

Another challenge to independence that solo practitioners and small-firm lawyers identified was solitude. Larger firms provide its attorneys with colleagues who the lawyer can turn to for advice. Solo lawyers do not have this luxury within their practice organizations, and even small-firm lawyers may not have colleagues with expertise on certain subjects who can advise them about ethical concerns. Such lawyers therefore may be at risk of acting improperly on behalf of clients with requests. As one lawyer put it:

> One of the problems that small firms have, that solo practitioners certainly have, apart from the thinner margins, apart from the vulnerability to client pressures that are perhaps more acute than large firms which can cushion those pressures by the diversity of their clientele, it is their solitude. There are fewer colleagues in small firms than there are in big ones with whom to discuss the problems that clients present and to formulate the advice that might be given.[56]

Another lawyer described this solitude as "a struggle"[57] and "one of the biggest downsides to solo practice or small firm practice."[58]

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53. *Id.* at 57.
54. *Id.* at 29.
55. *Id.*
56. *Id.* at 16.
57. *Id.*
58. *Id.* at 32.

Panelists noted that solo practitioners can work with other solo lawyers for specific cases to build up expertise while still officially representing the client who came to them.[59] In addition to assisting on immediate matters, networking provides the small firm attorney or solo practitioner with long-term channels for advice and future collaboration.[60] This keeps the solo lawyer from having to reinvent the wheel and further bolsters the lawyer's referral network. Ultimately, panelists indicated that experience and networks were the two keys to allowing an attorney to maintain independent judgment even when the need to obtain business is pressing. One lawyer said, "I don't share office space with another attorney, but you build a network of other attorneys to tap on their expertise if you are going to handle something that might be at the outer limits of your experience."[61] Another noted, "There are many attorneys, all of us—I think anyone several years out in practice knows colleagues they can trust and bounce ideas off back and forth. They do not have to work for the same firm."[62]

Solo and small-firm lawyers in the beginning stages of their career are especially likely to feel isolated at times. One lawyer commented, "The real problem is, if you do not have these [networks]—you are just not out there that many years, you are alone—and you do not know where the grenades are, and you do not have the network. And that's where the danger, to me, really is."[63] Another lawyer suggested a solution:

> Something that was told to me a long time ago is pick out your best friend who practices law and make a deal with that friend that no matter what, you can call that person, ask them the stupidest, craziest question that you're embarrassed, you don't know the answer to and let that friend do the same thing to do you. At least in my experience, I find that very easy and it's a good first sounding board before you have to take it to the next level.[64]

Potential solitude also can create the risk of not fully considering the consequences of taking on a particular client. As one lawyer noted, "[I]n the example of a solo guy who has to make rent, has to make his secretarial payroll next week, [he takes on] the client who walks in who may not be as desirable as you wish[.]"[65] In assessing the desirability of a potential client, the solo practitioner may have to contend with "the burden of wondering if we're going to make payroll this week,"[66]

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59. *Id.*
60. *Id.* at 33.
61. *Id.* at 32.
62. *Id.* at 33.
63. *Id.*
64. *Id.* at 101.
65. *Id.* at 32.
66. *Id.*

The significance of advice networks illuminates that solo and small-firm lawyers can build professional communities in what otherwise might be a relatively solitary practice setting. As Leslie Levin observed, these networks "are significant not only because they can help improve the competence of individual lawyers, but also because in many cases, they are an important part of the communities of practice in which these lawyers operate and from which they learn professional norms."[67] Research has illuminated, for instance, how divorce lawyers interpret and act on the basis of professional ideals according to the lawyers with whom they regularly interact.[68] Lawyers look to members of such groups for common expectations and standards, and define themselves as professionals according to these norms.[69] Similarly, research has described how networks of personal injury lawyers can serve to establish the boundary between acceptable and unacceptable practice in an area of practice characterized by intense competition for clients.[70]

C. CONCLUSION

Solo and small-firm lawyers regard maintaining their independence as requiring them to provide clients with an assessment of how best to pursue goals within the framework of the law and to resist pressures to cut ethical corners.[71] This includes bringing to clients' attention any risks that they might face in pursuing different courses of action. To the extent that lawyers in this practice setting see themselves as having a duty to further the public interest, most regard representing their clients in this way as fulfilling this obligation. Such conduct can provide long-term benefits in the form of a respected professional reputation that outweighs any short-term gains that might occur from cutting corners on behalf of clients.[72] Such a reputation enables solo and small-firm lawyers to achieve independence in another sense of the term, which is maintaining control over the work that they do and the clients whom they agree to represent.[73]

Lawyers who practice in this setting acknowledge that the persistent need to obtain clients can place pressure on their exercise of independence. This is true especially when a solo or small-firm practitioner is starting out in practice and needs work to pay the bills.

Such practitioners also may be particularly likely to encounter another potential risk to their ability to provide fully independent service to clients—the

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67. Levin, *supra* note 11, at 331.

68. LYNN MATHER & CRAIG A. MCEWEN, DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE (2001).

69. *Id.* at 6.

70. *See* Stephen Daniels & Joanne Martin, *Plaintiffs' Lawyers and the Tension between Professional Norms and the Need to Generate Business, in* LAWYERS IN PRACTICE, *supra* note 5, at 110.

71. *See supra* notes 18–25 and accompanying text.

72. *See supra* note 50 and accompanying text.

73. *See supra* notes 36–37 and accompanying text.

absence of colleagues with whom to discuss issues. Lawyers described the importance of developing a network of colleagues to whom they can turn for advice. This can ensure that they consider all aspects of an ongoing or potential representation and that they obtain the benefit of perspectives that can help them resist any pressure they might feel to compromise their independence on any given matter.[74]

Therefore, the hearings suggest that the existence of local communities of practice in which reputation is an important asset and contributes in important ways to maintaining independence for solo and small-firm lawyers in a practice setting often marked by concern about having enough business.

One issue to consider in the future is the impact of technology on such practitioners. As some panelists observed, technological advances may enhance the ability of solo and small-firm practitioners to gain clients by taking on more sophisticated and complex work than these lawyers have been able to do in the past. At the same time, technology is increasing access to legal information to individuals, who now have access to software and other tools that can perform some of the functions that traditionally have been the province of solo and small-firm lawyers. As Stephen Gillers has noted, a computer program "[c]an respond to a consumer's selections with simple questions . . . for estate plans, divorce documents, separation agreements, contracts for the sale of a home, and simple bankruptcies."[75] These programs can also

> generate forms to incorporate a small business, to apply for not-for-profit status, to create a partnership, to register a trademark or a copyright, and to change a name . . . It can help a user write a persuasive demand letter in a dispute with a business, with citations to applicable law.[76]

This is of particular relevance to many solo and small-firm lawyers, since such tools "can offer products that are part of many lawyers' inventory of routine services."[77] Technology thus may be a double-edged sword, creating one set of opportunities while eliminating another. The extent to which it ultimately reduces anxiety about obtaining clients may be unclear.

An additional issue is whether the increasing ability of lawyers to practice from anywhere, including solo and small-firm lawyers' use of technology to engage in more complex national and international practice, might loosen these lawyers' ties to particular local communities of practice in which reputations are important and face-to-face interaction helps reinforce common norms. As Gillers observes:

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74. *See supra* notes 62–67 and accompanying text.

75. Stephen Gillers, *A Profession, If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It*, 63 HASTINGS L. J. 953, 980 (2012).

76. *Id.*

77. *Id.*

> [M]any practices should be able to fit in a virtual world. Meetings if necessary can occur in physical space . . . but often meetings will not be necessary or desirable . . . . The only addresses on [a lawyer's business] card will be for her website and email and the only number will be for her cell phone. [78]

If this occurs, will other types of practice communities emerge for these lawyers that are not based on geographical location? Can technology address the potential isolation of lawyers who practice by themselves or with a small group of others by creating virtual communities that perform the functions of traditional communities of practice? Certainly technology can enable lawyers in disparate locations to share information, while companies such as Practical Law and others furnish document templates and other resources. Can technology also enable the creation of communities of practice that generate professional norms as well? Or, does that depend more on physical proximity and at least some face-to-face contact? Solo and small-firm practitioners may be in the vanguard of those for whom these questions will be relevant in the years to come.

II. LAW FIRM GENERAL COUNSEL

The role of law firm general counsel is a relatively recent development prompted by the growth of many firms into substantial business enterprises. Such counsel act as lawyers for the firm. While the scope of their responsibilities varies across firms, most deal with ethics issues and matters that pose the risk of liability for the firm. As Elizabeth Chambliss noted, "[T]he in-house position has begun to be institutionalized in large law firms, with a seeming coalescence around the title 'general counsel.' More firms are creating formal, compensated in-house positions, and firm counsel are becoming more specialized, devoting an increasing percentage of their time to the in-house role."[79] Chambliss suggests that firm general counsel, who are compensated explicitly for playing this role, tend to be "more thorough and proactive than those who are not."[80] This is especially true of those who give up client representation to focus on representing the firm.[81] While many counsel are partners, some firms believe that having the general counsel not be a partner nor sit on the management committee is best for the counsel's independence.[82] The next two sections draw on testimony of law firm general counsel to describe how they define independence and what factors affect their ability to exercise it.

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78. *Id.* at 977.

79. Elizabeth Chambliss, *The Professionalization of Law Firm In-House Counsel,* 84 N.C. L. REV. 1515, 1519 (2006). *See also* Susan Saab Fortney, *Law Firm General Counsel as Sherpa: Challenges Facing the In-Firm Lawyer's Lawyer,* 53 U. KAN. L. REV. 835, 835–36 (2005).

80. Chambliss, *supra* note 79, at 1520.

81. *See id.*

82. *See id.* at 1521.

A. DEFINING INDEPENDENCE

Law firm general counsel must deal with the complexity of representing the firm while remaining working colleagues of the lawyers within it whom they advise. Firms are vicariously liable for the misconduct of their lawyers.[83] As a practical matter, therefore, ensuring that the firm abides by ethical and legal provisions involves advising individual lawyers on the risks of proposed courses of action. This can be a source of tension in light of the fact that partner compensation and continued tenure increasingly depends on the ability of partners to generate consistent streams of revenue. As a result, independence tends to be a more significant issue in dealing with partners rather than with associates.

At times, independence may require firm counsel to engage in the unpleasant task of telling a colleague that he or she must forgo pursing a potential client because of a conflict of interest with another client of the firm or that ethics rules foreclose a certain course of action advantageous to a client. As one panelist noted:

> I am guessing that everyone . . . here would acknowledge that there are days where you feel beaten down because there is constant pressure and you know when people are coming to you that they are thinking, "Oh great. I have to talk to that person. I may get a no." They want to do something and are pushing to do something, they want to help their client or they want to get some new business for the firm.[84]

Another said, "I am constantly in the position of telling people things that they wish I had said somewhat differently. And it has to be done with an appropriate tone and appropriate self-confidence."[85]

Independence for general counsel may be enhanced by the way in which they interact with lawyers at the firm. One general counsel underscored how his role in providing independent advice ideally involves informal consultation with partners on a regular basis rather than serving as a source of formal legal analysis. Rather than have lawyers write emails seeking advise, he tells them, "Don't write these. Wait until the morning and then call me."[86]

Ideally, a partner appreciates that firm counsel is in a position to provide a more objective and dispassionate perspective than the partner may be able to take in a given set of circumstances. As one counsel put it, "I feel that when partners come to me, they come to me because they want an independent viewpoint, they

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83. *See* RONALD E. MALLEN WITH ALLISON MARTIN RHODES, 1 LEGAL MALPRACTICE § 5 (2015 ed.).

84. *A Convocation on the Rise and Role of General/Inside Counsel to Large Law Firms*, 6 J. N.Y. ST. JUD. INST. PROF. L., 26 (2009) [hereinafter *Law Firm GC Hearing*].

85. *Id.* at 27.

86. *Id.* at 28.

want to hear the truth."[87] The counsel continued that the partner's objective in consulting with the counsel is because, "They know that they may not always enjoy hearing it, but they want to get objective advice so that they can avoid problems for themselves and also for the firm."[88]

Independence may also require firm counsel to advise management in a way that emphasizes the firm's long-term welfare. A certain course of action, for instance, may provide short-term benefits for the firm but damage its reputation with clients, client regulators, or the legal community. Independence also may require counsel to advise the firm about the legal and reputational risks of treating its lawyers harshly for the sake of enhancing profitability. In addition, it may lead counsel to resist measures that may constrain her ability to act independently, such as restricting direct access to management or permitting frequent successful appeals of firm counsel decisions to the managing partner.

B. EXERCISING INDEPENDENCE

Law firm general counsel often deal directly with fellow partners in providing advice, yet must do so with the interests of the larger firm in mind. Counsel also work closely with management, but the firm is their client, not individual managers. This section discusses what factors can affect the ability of firm counsel to exercise both forms of independence.

Panelists emphasized that the effectiveness of firm counsel depends upon the ability to build relationships of trust with colleagues so that they are willing to approach the counsel when issues arise and to accept the counsel's advice even when they might not like it. One counsel said, "What worries me the most is the knowledge that people do not always come to you when they should come to you."[89] Another acknowledged that a challenge is,

> [G]etting people to come to you. One of the reasons I handle some litigation against the firm in-house is the hope that by getting a good result, without anybody having any serious consequences, it creates in the partners the sense, "I can go to them and if I go early, this can be fixed."[90]

One panelist described how he responds to this challenge:

> One of my approaches has been to really stay in touch with my partners. I try to get to partnership meetings early and go around the room during the lunch segment. I tend to stay after the meeting for sidebars. I attend every function I can in order to be highly visible. So, in short, I worry about what I do not know, and my way of overcoming that is various subjective means and also the fact

87. *Id.* at 26.
88. *Id.*
89. *Id.* at 27.
90. *Id.* at 28.

> that I have been at the firm a long time and I know these people, and I think they have confidence that they can call me with reliance on the notion that I will only try to do the right thing or find the right result or right solution for the firm.[91]

Counsel who have been at the firm a long time can have an advantage in building the credibility necessary to encourage people to approach them with issues. As one panelist said, "I am very fortunate because my history has given me credibility and—if you want to use this term, gravitas—which allow me to be independent and also encourage people to come to me."[92] Another said, "[I]t really comes down to, as it seems to be for this generation of general counsel, my longevity at the firm."[93] One partner suggested:

> [I]n order to be listened to in an appropriate way, it makes a lot of sense for the person delivering the conservative news to be someone who has been a person's partner or colleague for a long period of time. So, if I were asked by our management whether I thought it made sense to hire someone from the outside, I might say you can hire . . . someone from another large comparable firm, but I would not suggest hiring someone whose skills were great in professional responsibility but who did not spend a lot of time being a partner in a firm like ours.[94]

Being at the firm for an extended period also enables counsel to understand the kind of work the firm does, since "the conversations . . . require a great amount of fluency in the business of the particular institution . . . . It doesn't work if you know a lot about ethics but you don't know much about the business."[95]

Another partner pointed out how longevity at the firm might enhance a firm counsel's independence apart from the relationships that he or she has been able to build:

> [M]y whole life has been at [the firm], and I can't imagine giving different advice because of how much it would affect the value per point or what my partner's share would be. I just don't think that is a realistic concern. The independence of advice has to do with the personality and character of the person giving the advice. It doesn't have to do with the amount of financial leverage.[96]

One panelist had not spent several years at his firm but had worked at another similar firm. He admitted that coming in from the outside "was a challenge."[97] He spent considerable time visiting different offices to get to know people, and felt

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91. *Id.* at 27.
92. *Id.* at 20.
93. *Id.* at 21.
94. *Id.* at 29.
95. *Id.*
96. *Id.* at 15.
97. *Id.* at 25.

that "[i]t is important for someone in my situation to be humble and gentle when I am consulting with someone on an issue, especially when it is a sensitive issue."[98] He did say that it was helpful to have been involved on several bar ethics committees, which gave him credibility with respect to his professional expertise that may have compensated at the outset for his lack of relationships within the firm.[99]

The effectiveness of firm counsel to act independently also depends on the clear support of firm management. One counsel noted that another aspect of independence is, "the commitment of the firm's management to independence. The two chairs whom I have recently served under have been very good at conflicts resolution with a keen eye to the interests of the firm and doing the right thing. They have the respect of our partners."[100] Another counsel said, "The partners understand that I have the support of the presiding partner and the deputy presiding partner."[101] Having such support can make it less likely that partners will attempt to circumvent firm counsel or that they will engage in "internal forum shopping—in other words, if people might choose to go to the person who they think will give them the answer that will enable them to move forward even if that person is not me."[102]

Counsel noted that their effectiveness in providing independent advice to lawyers also is bolstered by the ability to refer to ethics rules, other types of regulation, and potential liability as a source of risk for their colleagues. One partner said, "[W]e have these external constraints known as the rules of professional conduct and professional liability lawsuits, which if you need any reminders are there as an omnipresence to promote independence in terms of doing the right thing."[103] Another commented that such formal provisions can help in dealing with colleagues and in reinforcing to counsel the importance of remaining independent. In referring to Securities and Exchange Commission rules regulating attorneys and providing for sanctions under Sarbanes-Oxley legislation, the counsel said, "I really like Sarbanes-Oxley's rules. For the in-house general counsel or indeed, for any counselor in the securities or governance area, if you are ethical, if you are diligent, this is like giving you a two-by-four. But I also like Sarbanes-Oxley because it gives spine to the spineless."[104]

Bringing in outside counsel can also provide a form of external constraint that reinforces counsel's independent advice. One panelist stated, "When I do get into areas . . . where I think there will be a significant difference of opinion on my

98. *Id.* at 26.
99. *See id.* at 24.
100. *Id.* at 20.
101. *Id.* at 21.
102. *Id.* at 28.
103. *Id.* at 20.
104. *Id.* at 57.

advice, I . . . hire outside counsel to provide a second opinion . . . ."[105] Another said, "Sometimes you need a totally outside view of the world and somebody who can say what we are used to saying to our clients: 'I know why you want to do that, but I am not going to let you while I am your lawyer.'"[106]

Firm counsel also are involved in efforts to embed considerations of ethics and liability in day-to-day work at the firm. This can limit the extent to which counsel needs to constantly remind colleagues about how to behave. One form this takes is technological systems. As one counsel described, "I spend a fair amount of time on systems to make sure that the risk management aspects of systems promote the goal of risk management, so I work closely with our IT manager and with our conflicts department to constantly know what they are doing . . . ."[107]

Another form it takes is emphasizing to lawyers to involve others in the firm if they encounter certain scenarios. One panelist described this process:

> One of the examples we give is where it appears that the primary purpose of a transaction is to affect accounting or financial reporting treatment and there is no meaningful economic purpose to what is going on. It is not that lawyers always need to do an internal investigation on a transaction that otherwise appears perfectly good. But if an attorney is looking at a transaction and there is no particular reason to do this other than to affect the accounting or financial statements, he is supposed to go to the senior review committee and find out what exactly is going on.
>
> If your firm is working on a disclosure document, a useful process depending on the nature of the document and client might be to have somebody who is not on the deal, or not regularly doing work for that client, look at it. It would not hurt to have a second pair of eyes looking at it from a different perspective.[108]

Another panelist emphasized:

> Train your lawyers to understand the context in which their services are being used and the purposes of the relevant transactions. Know the client's objectives. Examine whether the legal advice sought comes well within the scope of the lawyer-client relationship. Find out whether the matter will involve deceit or a fraud on another party . . . . Where court orders are involved, look closely. Where possible sham transactions are implicated, talk to the client about the economic substance of the deal. Certainly, know the client.[109]

105. *Id.* at 21.
106. *Id.* at 22.
107. *Id.* at 18.
108. *Id.* at 72–73.
109. *Id.* at 72.

Firm counsel's client is the firm, so individual attorneys generally do not have an attorney-client privilege in their communications with counsel.[110] This is important in light of the fact that firm counsel often advises colleagues regarding their representation of clients. The absence of the privilege for individual lawyers underscores how crucial it is for firm counsel to build relationships of trust with colleagues. In addition, to enhance the ability of the firm to assert the privilege, counsel who are also engaged in practice representing clients must make clear when they are acting on behalf of the firm rather than their own clients or colleagues who turn to them for advice about their practice specialty. One counsel emphasized the importance of this:

> [M]ake sure that there is a clear delineation of roles. When I started doing what I do, I said, if I'm going to do this, I think I better be called the general counsel. And I am not into titles. Until recently, I did not even have that on the website. It is important to have someone who has a title so that you can say, "Yes, I am now seeking legal advice, as opposed to, I am walking next door to talk to Joe about this issue."[111]

One additional challenge is uncertainty about the extent to which conversations between counsel and colleagues are privileged if they deal with possible problems with the firm's representation of a client. As a panelist describing the law on this topic indicated, "The question that gets asked in these cases is whether the firm's interest in seeking legal advice relative to the conduct of its lawyers conflicts with its obligations to its client, and it has led some courts to create a fiduciary duty exception to the privilege."[112] If there is a possibility that the firm's conduct might result in liability to a current client, some decisions effectively impute the representation of the client to firm counsel.[113] This means that counsel has a conflict in acting to protect the interest of the firm with respect to that representation. The result is that, if the client brings a claim, the firm cannot assert the privilege against it with respect to communications between

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110. "[A] lawyer who represents a partnership represents the entity rather than the individual partners," and "[b]oth case authority and commentary support the treatment of partnerships as entities separate from their owners" for purposes of the attorney-client relationship. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 91-361 (1991). *See also* Uniform Partnership Act, Art. II, § 201 ("A partnership is an entity distinct from its partners."). The question at least potentially may be unsettled in jurisdictions that subscribe to an "aggregate" rather than "entity" theory of the partnership. *See* John Villa, Charles Davant & Ben Vaughn, *Partners and Privilege: Do Partners Have the Right to Privileged Communications with the Firm's Counsel?* (unpublished manuscript) (copy on file with authors and journal).

111. *Law Firm GC Hearing*, *supra* note 83, at 45.

112. *Id.* at 34.

113. *See, e.g.*, In re SonicBlue, Inc., No. 07–5082, 2008 WL 170562 (Bkrtcy. N.D. Cal. 2008); Asset Funding Group v. Adams & Reese, *LLP*, 2008 US Dist. LEXIS 96505 (E.D. La. 2008); Burns ex rel. Office of Public Guardian v. Hale and Dorr LLP, 242 F.R.D. 170 (D. Mass. 2007); In re Sunrise Securities Litigation, 130 F.R.D 560 (E.D. Pa. 1989); Bank Brussels Lambert v. Credit Suisse, S.A., 220 F. Supp. 2d 283 (S.D.N.Y 2002); Koen Book Distributors v. Powell, Trachtman, Logan, Carrle, Bowman, & Lombardo, PC, 212 F.R.D. 283 (E.D. Pa. 2002).

inside firm counsel and lawyers working on the matter in question. Other courts, however, have recognized a privilege on behalf of the firm in these circumstances.[114]

Counsel must still take care, however, to make clear that she is representing the firm, and not advising the lawyers with respect to their representation of the client. As a panelist put it, "We are still not at the point where the concept of a law firm in-house counsel is accepted as a given by the courts, and the case law is really kind of a roller coaster in terms of how courts address this issue."[115] The only way to ensure that discussions about potential client claims will be protected by the privilege is to bring in outside counsel. The logic of this measure is that this firm has no conflict by virtue of a fiduciary duty to the client asserting a claim. Ideally, the outside and inside counsel will work closely together so that lawyers in the firm appreciate the role of the latter as a primary lawyer for the firm.

C. CONCLUSION

Law firm general counsel regard independence as requiring them to serve the best interest of their firms by advising lawyers and the firm about the risks of various courses of action with regard to both ethics rules and relevant legal provisions. This means appreciating that lawyers, especially partners, may have incentives to pursue goals that would be individually beneficial, but would be too risky from the perspective of the firm.[116] Playing this role effectively requires that counsel build trust among lawyers, prompting them to approach her for advice when confronting issues that could have ethical or legal implications.

Counsel who have been with the firm as partners for a lengthy period of time tend to have an advantage in building such trust, even if they may no longer have the status of partner. Having worked as a colleague with other lawyers gives them credibility. It enhances confidence that they understand the firm, that they have the firm's interests at heart, and that they understand the practice demands and business pressures to which lawyers in the firm are subject.[117] Having the support of management also is crucial in gaining such credibility, since colleagues realize that they are unlikely to prevail in any appeal of counsel's decisions with which they disagree.

Counsel also can help establish internal processes within the firm that institutionalize compliance with relevant provisions. This can include the use of technology for tasks such as conflicts checks and reliance on a second opinion of

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114. *See, e.g.*, Garvy v. Seyfarth Shaw LLP, 966 N.E.2d 523, 359 (Ill. App. 2012); Tattletale Alarm Systems, Inc. v. Calfee, Halter & Griswold, LLP, 276 F.R.D. 573 (S.D. Ohio 2010).

115. *Law Firm GC Hearing*, *supra* note 84, at 33.

116. *See supra* notes 85–86 and accompanying text.

117. *See supra* notes 93–97 and accompanying text.

a lawyer who is not working on a matter as a form of peer review.[118] In addition, counsel can draw on outside sources of authority to bolster their position. Most prominently, their familiarity with the ethical rules and other relevant forms of regulation enables them if need be to take a strong position in the face of lawyer resistance.[119] Bringing in outside counsel to confirm the inside counsel's position also can reinforce the sense that a colleague is subject to a hard constraint.[120]

A feature of practice that potentially limits the ability of firm counsel to provide comprehensive advice is uncertainty about the applicability of the attorney-client privilege to communications between counsel and lawyers working on matters with respect to which a client claim against the firm may arise. Some courts have refused to recognize a privilege in such circumstances, while more recent decisions have tended to be more protective.[121] Counsel believe that the inability to invoke the privilege can reduce the willingness of colleagues to approach them when potential problems arise and limit counsel's ability to provide comprehensive advice. While calling in outside counsel should preserve the privilege for communications between such counsel and lawyers in the firm, this needs to be done in a way that does not subtly affect the stature of inside counsel as the main legal representative of the firm.

How the scope of counsel's responsibilities is defined has implications for both the effectiveness and independence of firm counsel. Many counsel traditionally have focused on questions involving ethical rules, while eschewing involvement in matters ostensibly within the prerogative of management, such as compensation, lateral hiring, mergers, and practice area development.[122] The terms on which a lateral partner joins the firm, however, or the incentives created by particular compensation arrangements, can have a profound impact on ethical and legal risks within the firm. This suggests that it might be wise for firm counsel to have a seat at the table in discussing such issues. This development could move firm counsel closer to the role of in-house counsel, with the attendant benefits and risks of playing a more involved role in management that the next section discusses.

Furthermore, as firms expand, the range of risks can grow with them. This is one reason, for instance, that global law firm DLA Piper has hired a chief risk officer in addition to having firm counsel.[123] The chief risk officer is not a lawyer,

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118. *See supra* notes 108–110 and accompanying text.

119. *See supra* notes 104–105 and accompanying text.

120. *See supra* notes 106–107 and accompanying text.

121. *See supra* notes 114–115 and accompanying text.

122. The discussion that follows is based on Professor Regan's regular involvement in a roundtable program for law firm ethics and general counsel over the last ten years, as well as participation on numerous panels during that period relating to issues involving ethics, liability, and risk management in law firms.

123. Michael Bradford, *DLA Piper is a Pioneer of Enterprise Risk Management,* BUS. INS. (May 17, 2009), http://www.businessinsurance.com/article/20090517/ISSUE03/100027652 [http://perma.cc/BZ4B-XRWE].

and it will be interesting to see how this firm and others that follow it structure the relationship between firm counsel and the risk officer.

III. IN-HOUSE CORPORATE COUNSEL

Perhaps the most significant development in the legal profession over the past three or four decades has been the rise in responsibility, influence, and prestige of in-house corporate counsel or chief legal officer.[124] Inside counsel now tend to be the first lawyers to whom corporate managers turn to address important legal issues, and they assume ongoing responsibility for monitoring the legal risks associated with corporate operations.[125] At the same time, outside law firms tend less to serve in a general advisory role, and focus more on providing specialized service on discrete matters.[126] The result is, as E. Norman Veasey and Christine DiGuglielmo describe:

> As business, legal, and ethical advisor, the chief legal officer is a key part of the senior management team that develops a business strategy for consideration by the board of directors. As a persuasive counselor to that team, the chief legal officer should have the business acumen, independence, inquisitiveness, leadership skills, and courage to help shape and lead senior management's business decisions. And the CLO should be a pivotal part of the senior management team in presenting issues to the board so that the directors will *understand* the issues as thoroughly as possible.[127]

The next two sections will draw on inside counsels' words at the hearings to describe how they define independence and what aspects of practice influence how they are able to exercise it.

A. DEFINING INDEPENDENCE

Panelists[128] drew on the breadth of inside counsel functions in discussing the meaning of independence for corporate counsel. The executive director and counsel described independence as benefitting both the client and the larger society:

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124. The literature on this trend is voluminous. For representative examples, see E. NORMAN VASEY & CHRISTINE T. DIGUGLIELMO, INDISPENSABLE COUNSEL: THE CHIEF LEGAL OFFICE IN THE NEW REALITY (2013); *Symposium: The Changing Role and Nature of In-House and General Counsel,* 2012 WISC. L. REV. 237; Constance E. Bagley & Mark D. Roellig, *The Transformation of General Counsel: Setting the Strategic Legal Agenda* (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2201246 [http://perma.cc/J26G-8K4G] (last visited December 22, 2015).

125. Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations,* 34 LAW & SOC'Y REV. 457, 457–8 (2000).

126. *Id.* at 458.

127. VEASEY & DIGUGLIELMO, *supra* note 124, at 8 (emphasis in original).

128. Of the nine panelists, seven were general counsel of their companies, one was associate general counsel, and one was executive director and counsel. Quotations are from general counsel unless otherwise indicated.

> [W]hen [Rule 2.1] talks about independent professional judgment and candid advice, there are . . . probably two beneficiaries to that. One is, our direct client that knows they're going to get advice that's not going to be tainted by our personal biases. We can transcend personal biases or other external influences, but I think, frankly, there is probably a greater public benefit to that. And that in doing that, in rendering that kind of independent professional judgment and candid advice . . . you're decreasing the risk of wrongful behavior. And in general, therefore, you've got another beneficiary, and that is the public. When you're fulfilling that obligation to render that advice, the public benefits from it. I think that, in part, helps define what that special role is.[129]

This lawyer continued:

> But just beyond the rules there is something, I think, in particular that, an obligation we have to fulfill. We tell our clients what the rules of law are, how they apply them to their business, how to do so in an expert way, help them be profitable, but at the same time, there's that question, "Is it legal versus is it right?" That question of, "Is it right?" benefits clients, and I think, a greater good.[130]

Another panelist concurred with the desirability of looking beyond strict legal concerns, "I think the lawyer's special role is to have a little more of a lens on what's right and wrong, other than purely legal or illegal or profitable or not profitable."[131]

One counsel noted that there is a temptation to say:

> "I'm just the guy doing legal." That's not how I feel about it. I feel that society has already imposed that on us. When things go bad, when balances are mis-struck, when bad judgments are made, society looks to the lawyers . . . We are the people who are experts in law, in rules, in certainty, in navigation, in general judgment.[132]

At the same time, panelists agreed with the notion that counsel should not regard themselves as "the conscience of the company."[133] One speaker elaborated on the problems with this idea:

> There is nothing in my training as a lawyer that makes me better or more suited in matters of conscience than any other senior leader at my company and for me to claim that position or better put, to pretend to take that role, would give rise to a pretty well founded resentment and criticism from my peers. [Senior

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129. *In-House Corporate Counsel Hearing*, *supra* note 9, at 68.
130. *Id.*
131. *Id.* at 77–78.
132. *Id.* at 66.
133. *Id.* at 18; *see, e.g.*, *id.* at 69.

> management] may need me to be many things for many reasons, but serving as their conscience is definitely not one of them.[134]

Furthermore, "To say that the law department or the general counsel is the conscience of the company, allows the rest of the company to think that those issues are primarily the responsibility of other people."[135] This has the effect of "obscuring what should otherwise be a thoroughly pellucid governing principle of institutional life: Everyone is part of the institution's moral construct and everyone is responsible for the observance and execution of the company's values, not only or even especially, the lawyers."[136] Supervisory employees are much closer to the daily working of the organization; the legal department has a more difficult time observing and catching potential sources of liability until they have been elevated to the legal department's attention. Panelists noted that a culture in which all actors within the organization foster and participate in ethical practices is more effective in ensuring compliance than one in which employees look solely to counsel for ethical guidance.[137]

Another counsel put it this way: "I agree there's a special role here, but I think the trick is not creating an environment where colleagues push until you tell them they can't."[138] Counsel does not want to be "thought of as the sole guardian."[139] One lawyer explained, "I've been in situations where . . . somebody is just waiting to see how far they can go before I wake up and say, 'Whoa, wait a minute, you can't do that.' And then the response is, yeah, I was wondering if, how soon you'd pull me back.'"[140] But, "[t]hat is not a healthy environment," and "[counsel] can't let others think that it's not their job too."[141]

Independence involves the lawyer being clear about the extent she is speaking as a legal expert on behalf of the company. One counsel emphasized the need for the inside lawyer to differentiate between providing legal advice and giving broader guidance:

> I think one of the most difficult issues to wrestle with in this role is really what is a legal risk and what is a business risk. You can identify that there is a legal risk, but the business may want to take that risk and think that it's appropriate to move forward, and there are times when, when I think that's fine, as long as the business knows that something negative may result in litigation . . . At other times it's an unacceptable risk from a legal perspective, and drawing the line and making it clear to folks when, in fact, this isn't just a decision for the

134. *Id.* at 17–18.
135. *Id.* at 18.
136. *Id.*
137. *Id.* at 18.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*

> business people to make; that, in fact, it's a legal decision that has to be adopted or respected, can sometimes be, again, a pretty challenging way to have to explain or deal with your constituents.[142]

Another panelist agreed:

> When [legal and other advice] become intermixed, the legal advice moves from where it must be listened to, to another realm where your voice is robbed of its uniqueness and you are just one of many. Again, our clients deserve our advice on these questions of "Is it legal, is it right?" but they deserve those answers in a way which makes it clear which question we are answering.[143]

Still another panelist observed in the final session:

> There are lawyers who believe that it impairs the strength of their legal advice if they also give advice on moral issues. And, you know, during the period where I was a general counsel, I was always very, very careful to make it clear to my clients when I was giving legal advice and when I was giving advice about what the right thing to do is. I think blurring that area is extremely dangerous because clients know when you're just expressing an opinion about the right thing to do. And if that merges over into the giving of legal advice, it tends to take away a lot of the moral force of that legal advice.[144]

One of the ways that inside counsel can frame moral concerns is in the language of risk. A former general counsel who spoke in the closing session suggested that asking counsel to advise on moral issues "assumes there is a strict code of moral principles that is perfectly clear and your questions about a lawyer intent on giving advice, assumes that most of what lawyers do is give advice about issues that are perfectly clear." He continued:

> My own experience as a lawyer was that I spent very little time in the perfectly clear area . . . I often thought of my role as communicating risk. And as a general counsel, of managing risk. And so part of the way I thought of my role was arriving at a consensus with the management of the company about the level of risk the company was prepared to assume and that I was prepared to participate in . . . A lot of what I said to clients is look, this is not clear, but it's really dumb of you to do this. Because you're assuming a risk that's unreasonable for the company and unreasonable for the board.[145]

In addition, counsel may want to be selective about the matters on which she weighs in. Speaking up on every matter may water down the import of particular issues and cause counsel to spend excessive amounts of political capital. One co-author of a book on inside counsel said,

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142. *Id.* at 64.
143. *Id.* at 15–6.
144. *Principled Discussion, supra* note 9, at 8.
145. *Id.* at 9.

> The strong, independent general counsel also knows when to speak up and when to listen, and doesn't feel it's necessary to say something about everything . . . . [T]aking this approach means that when she does speak up, people will recognize it must be important and will more likely listen and heed the advice.[146]

Independence involves not simply providing advice, but helping establish organizational processes that enhance the quality of decision-making in the corporation. As one speaker familiar with general counsel suggested, "[B]eing able to impact the channels of information and flow allows the general counsel to play an important role in shaping the information flow to the board. This is a critical part of helping the board fulfill its oversight function properly."[147] This also enables inside counsel to "impact the information that flows to the legal department to make sure that all relevant information is being given in order to appropriately define and answer legal questions."[148]

In this way, "[t]he general counsel who's creative and proactive . . . can play a strong, independent role in looking out for and addressing unidentified problems and in making sure that . . . the issues that are presented for legal review are properly and not overly narrowly defined."[149] Independence also involves "knowing when to put on the brakes; don't necessarily say no, but say, let's sleep on it . . . Taking a little extra time often goes far in keeping the company on course."[150]

In addition, counsel who believes that decision-making should not be confined to considerations of legality can attempt to educate others in the company about the importance of a more expansive perspective. Thus, as an executive director and counsel said,

> [Y]ou can have conversations with folks when you're building those relationships of trust that . . . make them sensitive and alive to the issue. Whether or not they should be asking that question. So, they get the answer to 'Is it legal?' and they, themselves, have to be asking, 'Is it right?[151]

One counsel echoed:

> I think at this point with all the missionary work we've done, there is not a lawyer in my group that doesn't understand that they represent this corporation . . . . And I would say more importantly, this is where I would recommend missionary work to everyone who's in this organization. What they're also

146. *In-House Corporate Counsel Hearing*, *supra* note 9, at 52.
147. *Id.* at 50.
148. *Id.* at 50–1.
149. *Id.* at 51.
150. *Id.* at 52.
151. *Id.* at 72.

> coming to understand is that they represent the legal department first. They're a lawyer first, and the vice president second.[152]

This reflects the fact that independence may be encouraged by certain organizational structures. As Eleanor Myers observed, for instance, "lawyers located at the headquarters of the client who have specialized subject-matter expertise may be better positioned to carry unpleasant messages than field lawyers who have more routine day-to-day contact with operations personnel."[153] Furthermore:

> In companies with both field and headquarters legal staff, special attention should be given to assure that field staff have access to information that offers a broad perspective of the client's overall direction. This can be accomplished through attendance at board or committee meetings of the entity or other groups charged with setting overall policy and direction for the client.[154]

The result ideally is the combination of deep knowledge of operational needs and appreciation of their relationship to the company's broader objectives and values.

B. EXERCISING INDEPENDENCE

This section discusses those features of practice that inside counsel describe as affecting their exercise of independence. Counsel acknowledged the commonly expressed concern that inside counsel may find it difficult to be independent because she is an employee in the organization that she is advising. One panelist described his approach to this potential challenge:

> I was taught that lawyers always needed to be prepared to be fired. I was told that in any long legal career there would inevitably be times when a client would fire me and I should always be prepared to give my best advice and bear whatever the consequences would be.[155]

He went on to suggest, however, that lawyers in outside law firms also face economic pressures that have the potential to compromise their independence:

> [The] financial future of many of these lawyers depends upon their ability to retain that book of business for that client. That book of business directly affects their compensation in the firm, their significance and power within the firm and it's their vehicle for driving off from one firm to another in search of a higher pay out or in the euphemism adopted by so many, as they search for "a better platform for my practice." So at least for these lawyers, and they are far

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152. *Id.* at 75.
153. Myers, *supra* note 3, at 864.
154. *Id.*
155. *In-House Corporate Counsel Hearing*, *supra* note 9, at 12.

> more common than one might think, their employment risk is not at all diversified. It's highly contingent on their ability to retain the work of a core group of clients.[156]

He concluded, "[T]he notion that we in-house lawyers face a greater threat to independence over this issue of client diversification is both anachronistic and unrealistic."[157]

Another panelist commented that advice from an in-house counsel may not be as aggressive as that of an outside counsel, saying that:

> Frankly, I think there are many situations where outside counsel is prepared to give more aggressive advice than inside counsel because the outside counsel doesn't have to live with it. You give the advice, they are gone. With in-house counsel, the transaction blows up and six months later they blow up along with it.[158]

One speaker who has studied general counsel also suggested that working inside the corporation can provide counsel with sources of information that enhance the ability to exercise independent judgment:

> They hear the murmurs and water cooler talk. They are well versed in the culture, politics and relationships . . . So for example, hearing the rumors and water cooler talk enables her to assess when something is going on within the company that could be problematic but hasn't blown up into a crisis yet, look into it further, and take corrective or preventive measures, if necessary. That is, it empowers and perhaps even obligates her to be more proactive than an outsider.[159]

Another maintained that inside counsel is in a better position than an outside lawyer to understand the company's business operations: "The reason that the in-house lawyer would point to as to why he or she could especially deliver additional value revolves around two things, both of them fundamentally fact based."[160] The first is:

> I'll call it, translation. When you live in a company and you get the e-mail, you go to the meetings and you hear this and you hear that, you understand that language. You understand the grammar of how they construct arguments and how they do analyses of various business propositions. If you are outside, you are missing that. An important way of building communications in a company is understanding their grammar and how they build these arguments.[161]

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156. *Id.* at 10.
157. *Id.* at 10–11.
158. *Id.* at 47.
159. *Id.* at 50.
160. *Id.* at 19.
161. *Id.* at 19.

The second is:

> [L]iving in that ethos, understanding the language better than the outsiders do, you, by nature, have access to a lot more facts than they do . . . . You know more about what the business plans are out in the future and that helps you formulate advice to get there and the outside counsel wouldn't have it.[162]

Counsel's ability to get outside legal assistance and her knowledge of when to employ it also enhances the provision of independent advice. Panelists cautioned against an over-reliance on outside help, since outside firms generally do not know the company's business as well as the legal department.[163] Panelists warned that a tendency to call in outside counsel immediately may lead the legal department to believe it has no duty of independent oversight of its own.[164] As the keynote speaker stated, "[T]here are times I worry that referral to an outside lawyer is less because independent counsel is needed and more because someone in-house doesn't want to bear the heat of making tough and controversial decisions."[165]

Nonetheless, outside counsel can be very effective when used carefully. The key, panelists noted, lies in moderation—the lawyer can maintain trust with management by referring particularly difficult issues outside,[166] but should not be too quick to pass off all tough tasks and preclude any courageous legal leadership from within.[167] For instance, initial investigations or routine compliance programs can generally be run more cost-effectively in-house, but once potential liability surfaces that might create personal liability for a corporate officer, or allegations have attracted considerable public attention, it is advisable for the legal department to recommend the involvement of outside counsel to continue the investigation.[168] Ultimately, as with most aspects of independence, employing outside counsel involves a balance of considerations. Doing so can communicate the independence of an investigation, but it also can relegate important inquiry to an outsider who is less familiar with the company than inside counsel.

Finally, the keynote speaker suggested:

> [W]e who are in-house are in no way immune from threats to independence and I hope I've made that clear but these threats come not from who employs us. The real threat to independence, whether we are speaking of independence on the advice we render, independence to tell the CEO she is wrong, independence

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162. *Id.* at 20.
163. *Id.* at 19.
164. *Id.* at 13.
165. *Id.* at 8.
166. *Id.* at 52.
167. *Id.* at 8.
168. *See* Gary G. Lynch, *Internal Investigations, in* PRACTISING LAW INSTITUTE, 30TH ANNUAL INSTITUTE ON SECURITIES REGULATION 369, 376–377 (Nov. 1998).

> to mediate disputes in the executive ranks or independence to halt the wrongdoing, whatever the context of the exercise of independence, the real threat comes from within the lawyer herself.
>
> Is our in-house lawyer so concerned about her position, her executive status or her compensation that she dare not even venture a contrary opinion and she becomes in Justice Frankfurter's vivid term, a "subservient creature?"[169]

C. CONCLUSION

There was striking agreement among in-house counsel that acting with independence involves focusing not strictly on the legality of possible courses of action but on their desirability from a broader ethical perspective.[170] Their sense was that society has come to expect companies and their in-house lawyers to be attentive to this concern. This means that if improper conduct occurs, the public inevitably will question what role the lawyers played in providing guidance to the company. A common way in which inside counsel frame discussion of the moral desirability of various courses of action is to lay out the legal and non-legal risks of each alternative.[171] In this way, a counsel who acts with independence can benefit both the corporate client and the larger public.

Panelists cautioned that counsel must clearly differentiate between legal advice, with respect to which the lawyer has distinctive expertise, and advice based on other considerations, in regard to which she is but one voice among many. This enables the client to attach the appropriate weight to counsel's opinions. In addition, panelists agreed with a speaker's insistence that counsel should not regard herself as the conscience, or ethical compass, for the company. This conception of counsel's role assumes the superiority of the lawyer's moral judgment over that of other members of the company. More significant, it can create a dynamic in which managers and employees believe that they can safely disregard ethical concerns because that is a specialized task that has been delegated to lawyers. This limits the extent to which ethical values are a pervasive influence within the company where every person internalizes and acts upon them.[172]

Aside from providing advice, an important responsibility of in-house counsel is ensuring that there is an adequate flow of information to the appropriate decision-makers. This furthers the goal of ensuring that alternatives are weighed with full information about their potential risk and consequences.[173]

Counsel acknowledge concerns that their status as employees could imperil independence, but they believe that this potential is not markedly different from

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169. *In-House Corporate Counsel Hearing*, *supra* note 9, at 11.
170. *See supra* notes 129–133 and accompanying text.
171. *See supra* note 146 and accompanying text.
172. *See supra* notes 134–142 and accompanying text.
173. *See supra* notes 148–151 and accompanying text.

many law firm partners whose compensation and tenure tends to be dependent on service to a small number of clients. While they use outside counsel, in-house counsel see themselves as having advantages over them in that in-house counsel have access to a greater amount of information from more diverse sources and that in-house counsel have a deep understanding of the company's business and its culture.[174]

The claim that there is not a substantial difference between the ability of inside and outside counsel to act independently finds support in work by Sung Hui Kim, who analyzes various features of both roles and concludes that "it is no longer the case that outside market gatekeeping firms are the self-evident choice for the company's gatekeeping function."[175] One important consideration in reaching this conclusion is, as panelists suggested, access to informal sources of information. As Kim observes, "In terms of quality of information, the outside firm typically does not have access to the raw, unfiltered stream of first-hand reports from employees, managers, or witnesses."[176]

At the same time, Donald Langevoort raises questions about the more subtle issue of inside counsel's cognitive independence in light of the tendency of organizations to generate common ways of interpreting events.[177] He points to research that indicates that "an above-average tolerance for legal risk and a 'flexible' cognitive style in evaluating such risks are survival traits in settings where corporate strategy and its surrounding culture are strongly attuned to competitive success."[178] Langevoort speculates whether lawyers who rise in organizations subject to intense competitive pressures might "tend to become evangelists for an entrepreneurial style of professional behavior on compliance matters that emphasizes flexibility: the willingness to 'get comfortable' as an in-house virtue."[179] Research could be valuable in determining the extent to which inside counsel recognize this risk and what kinds of strategies they adopt to minimize them.

Finally, it is worth considering the light that the hearings shed on Robert Nelson and Laura Beth Nielsen's suggestion that inside counsel play the roles of "cops, counsel, and entrepreneurs" and may assume each of these roles in various circumstances.[180] Nelson and Nielsen describe cops as primarily concerned with

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174. *See supra* notes 157–163 and accompanying text.

175. Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411, 462 (2008).

176. *Id.* at 451.

177. Donald Langevoort, *Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Financial Crisis*, 2012 WIS. L. REV. 495 (2012). For an excellent discussion of the powerful influence of collective "scripts" in constructing the meaning of events, see Dennis A. Gioia, *Pinto Fires and Personal Ethics: A Script Analysis of Missed Opportunities*, 11 J. BUS. ETHICS 379 (1992).

178. Langevoort, *supra* note 177, at 505.

179. *Id.* at 504.

180. Nelson & Nielsen, *supra* note 125.

monitoring the conduct of managers and employees.[181] They focus on gatekeeping and tend not to provide non-legal advice.[182] Counsel most often confine their advice to legal issues but also, at times, seize the opportunity to "make suggestions based on business, ethical, and situational concerns."[183] Finally, entrepreneurs emphasize business values at work and see law as an instrument that can be used to enhance the company's financial performance. They suggest that "[c]ounsel attempt to minimize conflicts with business people . . . . [M]arket-[ing] the law to non-lawyers."[184] Nelson and Nielsen observe that this marketing activity is in response to the perceived threat that managers may regard the legal department as expendable. As one lawyer entrepreneur put it, "We need to make [the business executives] feel as though, by and large, our overall outlook is to help them accomplish the things they are trying to do[.]"[185] As a result:

> A sizeable minority of inside counsel are engaged in attempting to use the law to generate new sources of revenue for the corporation, by taking advantage of loopholes in regulations to enter new fields of business, by creating new forms of intellectual property, by creating new business entities. Others "market" the law to business executives, attempting to portray the law as adding value to the business, rather than only cost.[186]

Nelson and Nielsen argue that this is in contrast to a generation ago, when inside counsel predominantly served as cops. They suggest that the shift reflects a loosening of corporate regulation with a corresponding reduction in management concern with regulatory compliance.[187]

One implicit suggestion in Nelson's and Nielsen's account is that inside counsel have surrendered some of their independence by seeking to become more closely involved in helping managers achieve their business goals. The entrepreneurial activities that Nelson and Nielsen describe, however, hardly seem suspect; indeed, they reflect the typical garden-variety work of inside counsel. Furthermore, the hearings paint a more complex portrait of inside counsel's activities than the typology of roles suggests. Panelists maintain that the ability to serve as an independent advisor requires that management trust that the lawyer has the best interests of the company at heart. Someone who is regarded as a team member is likely to have more influence than someone who is focused simply on policing boundaries.

In this respect, credibility as a counselor is contingent on success as an entrepreneur. Effective inside counsel need to market legal services so that

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181. *Id.* at 463.
182. *Id.*
183. *Id.* at 464.
184. *Id.* at 474.
185. *Id.*
186. *Id.* at 487.
187. *Id.* at 488.

managers will approach them at an early stage in discussions, not simply when it's necessary to opine on the legality of a course of action. Accomplishing this in turn requires that people believe that the counsel is committed to help them find the best way to advance the company's mission. In this respect, acting as an entrepreneur is not simply attempting to mimic a businessperson. Rather, it can be a crucial strategy for effectively meeting the professional duty of independence. Langevoort reminds us, of course, that counsel engaged in this process need to be attentive to the risk of losing cognitive independence.[188]

The importance of being regarded as a team player while simultaneously maintaining independence underscores the complex terrain that inside counsel must navigate once she eschews the role of acting simply as a cop. This role may become even less salient as more companies consider separating the legal department from the corporate compliance function with the latter often staffed by non-lawyer compliance professionals.[189] As a result, inside counsel will need increasingly on an ongoing basis to strike an appropriate balance between being both an insider and outsider.

IV. GOVERNMENT LAWYERS

Many lawyers are employed in government at the local, state, and federal level in the United States. They perform a variety of functions, which can include litigation, regulatory review, and counseling. They also work for a wide range of organizations such as executive agencies, legislative bodies, courts, and prosecutors. Because the entities for which they work have as their mission to serve the public in some way, there has been some difference of opinion about who is the client of such lawyers. The *Model Rules* provide that a prosecutor "has the responsibility of a minister of justice and not simply an advocate."[190]

With respect to lawyers who play other roles, however, there is less of a consensus about who is the government lawyer's client, at least among scholars. Roger Cramton notes that various proposals have suggested that the client is "the public," "the government as a whole," "the branch of government in which the lawyer is employed," "the particular agency or department in which the lawyer works," or "the responsible officers who make decisions for the agency."[191] An especially salient question for government counsel with respect to independence therefore is: "Independence from whom?" Complicating this question is the issue

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188. *See generally* Langevoort, *supra* note 177.

189. For a discussion of the debate over who should be responsible for compliance, see Varun Mehta, *GC v. CCO: The Big Debate,* CORP. COUNSEL (Mar. 26, 2014), https://medium.com/@varunmehta/gc-vs-cco-the-big-debate-858d1c3c91b9#.uuln0n77i [https://perma.cc/KG9G-XDS2].

190. MODEL RULES R. 3.8, cmt 1.

191. Roger Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer,* 5 GEO. J. LEGAL ETHICS 291, 296 (1991).

of how much lawyers should defer to elected heads of their departments on the ground that the latter are more democratically accountable than the lawyer.

The independence of the government lawyer has been an especially visible issue in recent years in the discussion surrounding the preparation of memos by the Department of Justice Office of Legal Counsel (OLC) advising the Central Intelligence Agency of whether certain proposed interrogation techniques violated the U.S. statute implementing the Convention against Torture.[192] The hearings included a reference to the memos in connection with the moderator's question whether a political leader, in Thomas Jefferson's words, should "protect the country . . . not follow the law," but then put himself at the mercy of Congress to judge his behavior. The Executive Director of the New York State Commission on Integrity disagreed with this proposition. He said, "But what does it mean to protect the country? I guess what I'm saying is that we have to stand for certain principles. One of the principles is the rule of law."[193] The lawyer's independence is meant to ensure that political leaders honor this principle.

The OLC memos provoked criticism in many quarters as an example of a failure of lawyer independence. In general terms, they were denounced as instances of technically poor legal reasoning that presented controversial positions as settled law in order to arrive at legal conclusions that the authors knew that administration officials desired.[194] In this respect, the lawyers did not fulfill their duty to ensure that officials were fully aware of the state of the law as they contemplated courses of action. More broadly, the authors of the memos appeared to approach their task as advocates, despite at least some measure of tradition in the OLC that the role of lawyers in that office is to provide the best impartial interpretation of the law.[195] The memos also have been criticized as overly reliant on the authors' personal views without regard to their legal defensibility,[196] and a reflection of the likelihood that "the authors were simply blind to how the rest of the world would view their analysis, and that they never

192. Memorandum from Jay S. Bybee, Assistant A.G., to John Rizzo, Acting A.G. for the CIA (Aug. 1, 2002), http://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-bybee2002.pdf [perma.cc/J62Q-YE9W]; Memorandum from John C. Yoo, Deputy Assistant A.G., to Judge Alberto Gonzales (Aug. 1, 2002), http://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug1.pdf [perma.cc/7UEN-HH2G].

193. *In-House Corporate Counsel Hearing*, *supra* note 9, at 56.

194. *See, e.g.*, DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 157 (2014); W. Bradley Wendel, *The Torture Memo and the Demands of Legality*, 12 LEGAL ETHICS 107 (2009); Jesselyn Raddack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 U. COLO. L. REV. 1 (2006); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memo*, 1 J. NAT'L SEC. L. & POL'Y 455 (2005).

195. *See, e.g.*, Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005); Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 L. & CONTEMP. PROB. 105 (2004); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303 (2000).

196. *See generally* Wendel, *supra* note 193.

thought to question the accuracy or reliability of the CIA's assessment."[197] This suggests that the problem was not simply failure to achieve sufficient independence from the client, but failure to distinguish between personal commitments and professional obligations. In this respect, the problem may have been insufficient independence from personal values, as lawyers proceeded without regard to the demands of the legal system and the lawyer's role within it.[198]

The OLC memos thus provide a vivid concrete example of the high stakes that can arise regarding questions about the role of the government lawyer and the meaning of independence in that practice setting. The next two sections draw on comments from government lawyers at the hearings that describe how they define independence and what aspects of practice can reinforce or challenge its exercise.

A. DEFINING INDEPENDENCE

The discussion of the independence of government lawyers focused primarily on lawyers who are not prosecutors. Because prosecutors' exercises of discretion can have profound consequences for life and liberty, panelists agreed that a prosecutor should rely on a broad understanding of the public interest when making decisions such as whether to bring charges or what types of terms to demand and accept in plea bargaining.

After addressing prosecutors' "obligation to do justice," citing Model Rule 3.8, the moderator then asked panelists, "Do other lawyers in government service, not prosecutors, have a similar obligation to do justice?"[199] Panelists differed to some degree in their views on this issue, particularly with respect to the extent to which independence requires government lawyers to consider as broad a conception of the public interest as must prosecutors. One lawyer serving as municipal corporation counsel said, "I'm sworn to uphold the law. I'm sworn to give the best advice possible to my client which I think is the entity I represent, so I have trouble distinguishing why then I have a different obligation from someone in private practice."[200] One trial court judge suggested, "I think by and large the obligation of lawyers who work for government are not very different at the end of the day from the obligations that lawyers have who represent private clients."[201]

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197. Cassandra Burke Robertson, *Beyond the Torture Memos: Perceptual Filters, Cultural Commitments, and Partisan Identity*, 42 CASE WEST. RES. J. INT'L L. 389, 392–393 (2009).

198. For an extended discussion of the demands of legality on the lawyer, see W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO THE LAW (2010).

199. *A Convocation on Independence and the Government Lawyer*, 6 J. OF THE N.Y. ST. JUDICIAL INST. ON PROFESSIONALISM IN THE L., no. 2, Fall 2010, at 33 [hereinafter *Government Counsel Hearing*].

200. *Id.* at 19.

201. *Id.* at 20.

One municipal corporation counsel commented on the claim that the government lawyer has a higher duty of independence than a private lawyer by positing a hypothetical in which a government lawyer knows that the statute of limitations on a potential claim by the other side is going to run in three days. Assuming the other side was unaware of the deadline, the moderator asked:

> What's your obligation as a lawyer, as the government lawyer? Should you say all right, we'll talk to you—I have to talk to my client, we'll get back to you next week, knowing that you got a slam dunk then because the statute has run? I don't . . . think it is the government lawyer's obligation to say "Hey, you damn well better sue in the next two days or the statute is going to run." And if you take that attitude, what is your client going to start to do? You know, he's going to say, "Why the heck should I go consult with [that lawyer], he's going to give away the ship."[202]

Government counsel also may need to determine how to proceed in the face of unclear or inconsistent signals from their agencies. One lawyer was asked about an instance in which his regulatory agency was among several during the recent financial crisis that were pursuing policies that to some degree were inconsistent and even conflicting. "In that case," the moderator asked, "should you determine your own personal view of what the public interest requires and [pursue that course]?"[203] The lawyer replied, "I think it is your job to figure out what the agency's mission is and to define that. I guess I'm doing that on sight."[204]

The moderator then said, "You have discretion in your job, you can, in fact, determine whether to go one way or another. Does your own personal view of what the public interest requires inform that judgment?"[205] The lawyer replied,

> [O]f course. In a general sense, I think if you're talking about public interest I think you have to divide it and look at it short range, long range . . . . You have to look long range or lawful [and] constitutional, and desirable results in the long run.[206]

By contrast, one judge declared:

> I have difficulty with the concept of government lawyers having responsibility to "do justice." This phrase is far too rebellious and elastic for me and should be for all lawyers who are in government service . . . Among the obligations that all lawyers have, including government lawyers, is the responsibility to counsel the client and it is not unique to government lawyers. Certainly, you are going to give advice to your client with respect to policy underlying legislation. But

202. *Principled Discussion*, *supra* note 9, at 17.
203. *Government Counsel Hearing*, *supra* note 199, at 31.
204. *Id.* at 31.
205. *Id.* at 31.
206. *Id.* at 32.

> once you have given that advice then the executive makes the decision based on a range of possible options.[207]

He continued:

> When I worked for the state government, I was one employee in a government of 200,000 plus individuals—a huge bureaucracy headed by the Governor. As a government lawyer, who was I to decide what was in the public interest? . . . Isn't there a certain arrogance in saying that on the part of any individual government lawyer, whoever she or he may be?[208]

If the lawyer regards the client as the public and believes that the public's best interests are contrary to those of the office-holder's directives, then the lawyer is displaying a " certain arrogance" in putting herself in the position of the elected or appointed official.[209] Some panelists thus suggested that resolving the issue of client identity involved blending a duty to the public and to the organization speaking through the office-holder.[210] Rather than treating the public interest as the client, it may be more advisable to regard a duty to the public as a more general constraint on the power of the government lawyer.[211]

Related to this issue is whether a government lawyer who learns of wrongdoing within her agency has any obligation that is different from a lawyer who learns about wrongdoing by her private client. Lawyers for private organizations who learn of past wrongdoing are permitted to disclose it only under certain circumstances that include use of the lawyer's services to commit the wrongdoing.[212] Lawyers for such organizations who learn of imminent or ongoing wrongdoing are required to report this information to higher authority within the organization in many instances.[213] They are permitted, but not required, to disclose this information outside the organization if its highest authority is unresponsive to the wrongdoing.[214]

By contrast, does the government lawyer have an obligation to the public that requires, rather than permits, her to disclose any past, ongoing, or imminent wrongdoing?[215] The moderator framed the issue in this way:

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207. *Id.* at 35.

208. *Id.* at 50.

209. *Id.* at 50.

210. *See infra* notes 240–256 for participants' discussion of the complexities of determining the identity of the client and its goals in government practice.

211. *Id.* at 42.

212. MODEL RULES R. 1.6(b)(3).

213. MODEL RULES R. 1.13(b).

214. MODEL RULES R. 1.6(b).

215. For a thoughtful analysis of government lawyers' confidentiality obligations and the disclosure of wrongdoing, see Kathleen Clark, *Government Lawyers and Confidentiality Norms,* 85 WASH. U. L. REV. 1033 (2007).

> The confidentiality rules are deliberately designed to allow the client to disclose certain bad acts to his lawyer without fear of disclosure . . . [If the government has acted improperly] we want those mistakes rectified so that justice can be done. [Some say] that is the basis for suggesting that there is a different obligation for government lawyers precisely because of the nature of government than there is for lawyers in private practice. Let me put that question to the panel and see what they say.[216]

One county attorney responded, "I disagree because you still have a client. The obligation I have to do justice goes into how I give my legal opinions and advice to my client that is always a part of it because that is part of being in the government."[217] She elaborated:

> I do think that if one of my clients was doing a criminal act, yes there's a duty to stop that criminal act, but there's no duty on my part to violate the attorney-client privilege to, as I think the quote was to "Do justice." [sic] I would not violate their confidence. To do justice is not part of the job in the private sector realm of giving advice.[218]

One judge, however, suggested that there might be a duty of reporting:

> One of the things that government lawyers have a responsibility to do which is different, and this I guess spills over to the area of doing justice, is that . . . as distinguished from what a lawyer in private practice might have a responsibility for, is if the government lawyer believes that someone in the government is engaged in fraud, corruption or collusion, those kind of things, I think you do have the obligation to act and act independently of your "client." That decision, though, is made the highest level of the government law office as to how you act with respect to evidence of fraud, corruption and so on.[219]

What if, the moderator asked, "The Mayor tells you that she was bribed to make a particular appointment to a particular city agency?"[220] "In that circumstance," a judge replied, "it seems to me I've got some responsibility and problems."[221] "But are they the same or different from [a lawyer in private practice]?" the moderator asked.[222] "I think they are different. I think as a government official, I probably in that circumstance have a responsibility to do a referral, advise the prosecutor. If I were in private practice I'm not so sure I have the responsibility to take that additional step."[223]

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216. *Government Counsel Hearing*, *supra* note 199, at 34.
217. *Id.* at 30.
218. *Id.* at 34.
219. *Id.* at 30.
220. *Id.* at 35.
221. *Id.*
222. *Id.* at 36.
223. *Id.* at 36.

Additionally, one panelist asked another,

> [I]f you became aware of an agency hell bent on a particular course of conduct that in your judgment is illegal, not necessarily criminal but illegal, I would imagine . . . . you would advise the agency and, certainly if I were in that role, I would talk to the Mayor.[224]

"Absolutely," was the reply from the lawyer.[225] The moderator then stated:

> But certainly we can talk about prior conduct; for example, last year's financial reporting was false. I have already received a bribe from the Commissioner of Sanitation, that's a statement of past conduct. I thought I heard [others] saying that under that circumstance there might be an obligation for the government lawyer to do what [they] called "referral," which the SEC would have called a "noisy withdrawal," for some reporting out, which is an obligation that may not exist for lawyers in private practice.[226]

The lawyer responded: "But I think even if the Mayor says to you I committed a crime yesterday, you may well have an obligation under an existing law to report it to the I[nspector] G[eneral] or D[istrict] A[ttorney], so I think as a practical matter you can get out of it."[227]

Another lawyer who previously served as counsel to the governor suggested the importance of attempting in the first instance to inform appropriate people within the chain of command:

> I think it's the obligation of the lawyer to keep his or her principals informed. It is the obligation of the principal to act on the information. Now, if it were to be a serious crime and that principal refuses to act upon it, the lawyer has a dilemma. I suppose—and basically, believe—that I would not be going to third parties. There are so many people that run so frequently to the press to air grievances and to cause changes in bureaucratic action or government decision making, and I think that would be a very clumsy way to solve your problem. Your first obligation is to solve your problem and you have to pick the most efficient means, not the most exciting or one that draws attention to yourself. I guess . . . the general notion is that you decide within the apparatus you're serving.[228]

This formulation is consistent with the obligation of lawyers for private clients to report wrongdoing to higher authority in the organization under certain circumstances.[229] Where some counsel seem to go beyond this is in suggesting

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224. *Id.* at 37.
225. *Id.* at 37.
226. *Id.* at 39.
227. *Id.*
228. *Id.* at 49.
229. MODEL RULES R.1.13(b).

that past conduct in all instances must be reported to appropriate authorities in order to hold public officials to account. As Kathleen Clark has suggested, however, the authority to do so is not entirely clear, and depends in part upon the interpretation of statutes such as the Freedom of Information Act, whistleblower protection laws, and internal agency regulations.[230]

B. EXERCISING INDEPENDENCE

This section discusses how government lawyers on the local, state, and federal levels describe the features of practice that can influence the exercise of independence. First, panelists expressed some concern that uncertainty about the confidentiality of communications between a government lawyer and her client could limit the ability of the lawyer to provide full and independent advice. Former White House counsel Bernard Nussbaum noted in prepared keynote remarks:

> Several federal appeal courts (the DC Circuit, the 7th Circuit, the 8th Circuit) have ruled that when a grand jury issues a subpoena for documents or testimony, the privilege does not shield a *government* attorney's confidential legal advice to his client, the public official. It must be disclosed. That means there is no privilege protecting the advice, for example, a White House Counsel gives to the President, at least in connection with a possible criminal investigation. No such exception has ever been recognized for lawyers outside government.[231]

The rationale for this is that government lawyers are deemed to have a "higher, competing duty to act in the public interest."[232] This means that, "[u]nlike a private practitioner, the loyalties of a government lawyer . . . cannot and must not lie solely with his or her client agency."[233] Government lawyers therefore "do not have the same ethic of client protection as do private lawyers."[234] For courts that accept this view, no privilege attaches for criminal proceedings because "'the government lawyer works for a public-abiding client, one that would expect disclosure of internal government wrongdoing.'"[235]

In effect, Nussbaum said, "these court decisions rest upon a view that in government, 'the proper allegiance' of lawyers is different, their clients are different—and so, too, should their attorney-client privilege be different. This is a view—the 'higher calling' view—with which I strongly disagree."[236] This view

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230. Clark, *supra* note 215, at 1073-91.

231. *Government Counsel Hearing*, *supra* note 199, at 9–10 (footnote omitted).

232. *Id.* at 11 (citing In re A Witness before the Special Grand Jury 2000-2, 288 F.3d 289 (7th Cir. 2002)).

233. *Id.* at 12 (citing In re Bruce R. Lindsey (Grand Jury Testimony), 158 F.3d 1263 (D.C. Cir. 1998)).

234. *Id.* at 17.

235. *Id.* at 14 (quoting James E. Moliterno, *The Federal Government Lawyer's Duty to Breach Confidentiality*, 14 TEMP. POL. & CIV. RTS. L. REV. 633, 634 (2005)).

236. *Id.* at 10 (footnote omitted).

has been rejected by the Second Circuit, which declared that there is particular need in government for the privilege so that public officials will seek out advice that enables them to be fully informed when conducting the public's business.[237]

One panelist who has served as municipal corporation counsel expressed his concern about depriving government lawyers of the privilege in this way:

> I think one of the most important roles of a government lawyer . . . is to give advice to the agency . . . to advise the agency don't do it, or don't do it that way, do it this way . . . [If] you erod[e] your attorney-client privilege, you're eroding your own role as a lawyer trying to keep your client on the straight and narrow.[238]

The requirement that many government proceedings be conducted in public can also affect the way in which the government lawyer exercises independence. As the moderator asked one panelist who has represented local government, "[It] [s]ounds to me as if most, if not all, of your legal advice as the counsel to the legislature was in public. Can you really act as a true professional when your legal advice is public?"[239] The panelist replied:

> That is quite right and it is very difficult to give legal advice. Usually you have to be very careful because you could be saying something that will be quoted in a lawsuit that comes six months after your legislative body passes that particular resolution . . . I have represented smaller legislative bodies, town boards, in particular, where they had a custom, that is perfectly legal and personally, I think, it's a very good custom. There were only five members, I would reach each individual town board member before any particular board meeting and then they would be free to ask whatever question they wanted. Some of those questions were heated in a public setting and in my opinion, it was much easier on me as a lawyer and resulted in a better government, because they were able to air their concerns on an individual basis without the camera and without the transcripts.[240]

Another aspect of serving as a government lawyer that can complicate the provision of independent legal advice is the potentially ambiguous identity of the client.[241] The government lawyer's primary client most immediately might appear to be the office-holder in charge of the department under which the lawyer serves. The office-holder was elected or appointed to lead the organization, so it is her duty to interpret what the agency's priorities are, and not the lawyer's.[242]

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237. In re Grand Jury Investigation, 399 F.3d 527 (2d Cir. 2005).

238. *Government Counsel Hearing*, *supra* note 199, at 37.

239. *Id.* at 70.

240. *Id.* at 61–62.

241. *See* Clark, *supra* note 215, at 1049–1073.

242. *Government Counsel Hearing*, *supra* note 199, at 48. *See* Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987).

One panelist likened these office-holders to the directors of corporations. Directors are the shareholder-elected officials that decide what is in the best interest of the company; it is they, and not the lawyers, who determine the business course of the company and derivatively, what legal issues their lawyers will need to address.[243]

Lawyers working within an agency may generally regard the agency as their client, but lawyers representing more complex governmental entities may need to negotiate among several different constituents. One lawyer representing county government, for instance, noted that the county is governed by both an executive and a legislative body, and that the latter is comprised of multiple members who may not agree. The lawyer explained:

> [T]here is an elected County executive, there are 18 members of the County Legislature. The way the charter is set up, the County Executive can direct the law department to do something. The County Legislature, by passing a resolution, can also direct the law department to do something. Sometimes those two things are at odds and thank goodness it doesn't happen as often as you would think. The problem is that when you're representing 24 elected officials, and I represent those 24 elected officials, who are constantly at odds with one another—I think that's an understatement—it is a constant that they must be reminded of their place in the county government.[244]

The moderator asked the lawyer if she had a conflict by virtue of representing people with different interests.[245] She replied:

> That was a struggle, I can tell you, when I first took the position. A lawyer whose opinion I respected tremendously called me up and told me that I would never be able to survive that. There were tremendous ethical challenges because there were different priorities among my clients, because there is, quite frankly, very little guidance in ethical canons and whatever material was out there, I was happy to hear others were hunting too because I do know I researched everything there was. I established 18 independent relationships and what I represented to be confidential channels, and I would not repeat my conversations with one to another. And when I was in the public forum, my opinions were limited and circumspect.[246]

Complicating the ability to identify the client, another panelist suggested that the particular office to which the lawyer owes the primary duty may shift depending on the situation. For example, a municipal organization lawyer may at times have duties to the particular organization, but at other times the city

243. *Government Counsel Hearing*, *supra* note 199, at 39.
244. *Id.* at 21.
245. *Id.* at 62.
246. *Id.* at 62.

government might be the appropriate "client."[247] In particular, panelists indicated that the task of identifying the client might be guided by determining where liability might fall in a potential lawsuit; whatever level of government is liable for a particular issue is the one whose interests the lawyer should primarily consider.[248] However, if the lawyer has a duty to different or multiple levels of government, then she may need to choose sides when conflicts between the different levels of authority arise.[249]

A panelist who served as Corporation Counsel for New York City was asked if he had encountered occasions on which the view of the City Council and the Mayor differed. "[Y[es, of course, not on a too-frequent basis, but it certainly happens," he said. "In New York City, the City Council and Mayor can end up on opposite sides, so to speak, on an issue. It has always been the practice that Corporation Counsel represents the Mayor and authorizes the City Council to hire separate counsel."[250] He described two instances in which the Council and Mayor were at odds, and why he took a different approach in each case.

In the first, the Council passed legislation prohibiting the use of aluminum bats in youth league baseball games because of their potential danger. The Mayor vetoed the bill because of his difference of opinion on its desirability, but the Council passed it over his veto. The aluminum bat industry then sued the City on the ground that federal law preempted the legislation. "Well, whose job is it to defend the validity of the law? Obviously mine. So I called up the Mayor and said, 'Mike, I'm defending that law that you vetoed,' and he thought for a moment and said, 'All right, I hope you lose.'"[251]

In the second instance, Council again passed legislation over the Mayor's veto, but the veto was based on his and Counsel's belief that the bill was unconstitutional. The panelist described:

> The question, then, was, does the City have to obey the law that we thought was illegal? We declined to obey the law passed by the Council. The Council . . . hired separate counsel, brought a lawsuit, and the Court of Appeals decided 4-3, with my office representing the Mayor, the majority said that if the Mayor in good faith felt that Council's action was unconstitutional, he did not have to obey the law unless the judge said otherwise.[252]

Another panelist who has served as counsel to the state Attorney General observed: "In the public sector, with considerable frequency you have multiple upstate agencies where the government attorney, Corporation Counsel and the Attorney General's office represents all of those clients . . . Welcome to the real

247. *Id.* at 32.
248. *Id.* at 32.
249. *Id.* at 21.
250. *Id.* at 22.
251. *Id.*
252. *Id.* at 22.

world we're in."[253] He emphasized the importance of working to develop common ground among multiple government constituents:

> It doesn't do to say "I don't know," when there are multiple clients who have different points of view. As an attorney in the public sector, it seems to me as though the most important responsibility in this capacity is to mediate those differences and work hard on it. It's not oftentimes easy, but it's a relatively rare case that where Corporation counsel, Attorney General's office, will certify outside counsel case where they can't reconcile their differences; it happens sometimes, it's inescapable. But the government attorney, it seems to me as his or her most critical obligation, is to get the clients in the room talking about these kind of issues . . . . [T]his all sort of goes to point out that it is very challenging, it is very complicated.[254]

Another panelist who served as clerk for the federal court system echoed this view that ideally the government lawyer is "cultivating dialogue with a large percentage of people and including other institutional considerations in the debates."[255] The latter include not only immediate but long-term implications of a decision for the governmental entity.

In addition to conflicts of interest between decision-makers or departments, problems also can emerge with respect to the lawyer's traditional duty of the lawyer to "report up the ladder" when there is an organizational legal issue or malfeasance that requires correction. In light of potential difficulty in determining who speaks for the client, it can be challenging to discern at what point the lawyer is still reporting up the chain or has essentially gone outside the client relationship.[256] A suggestion for determining client identity in the context of privilege was offered from the audience: whatever official has the authority to waive the privilege in a hypothetical legal proceeding on a certain issue should be the one who holds that privilege when the attorney is giving legal advice.[257]

In sum, as one counsel put it, determining who is the client is not, "ever going to be easily susceptible to a solution, and I suppose that in order to maintain independence of thought and professionalism, you have to be constantly mindful of that because the clients may have different objectives and purposes."[258]

Another issue that panelists mentioned as a potential challenge was assessing the appropriate role of clients' political viewpoints in determining courses of action. Panelists were asked, "In rendering advice, how do you take into account the political platform of the elected official for whom the government lawyer works?" One lawyer who has represented the state Attorney General replied:

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253. *Id.* at 60.
254. *Id.*
255. *Id.* at 42.
256. *Id.* at 34.
257. *Id.* at 63.
258. *Id.* at 51.

> I think the attorney who sees what his employer has presented to the public as a platform can make a judgment about whether or not to work for him and if it's an eyes-wide-open judgment, then the government lawyer sort of got what he expected. It's [the official's] prerogative to make the decision, right or wrong, good or bad, as long as it's consistent with the law.[259]

Another panelist declared:

> The reality is when government works and governmental decisions are made, politics can be and is taken into account and that is how it should be. If you don't say that governmental decisions are tainted because there are political motivations and there's something wrong with that, then there is probably something wrong with about 95% of the decisions being made every day. Government is a political system and so outside the prosecutorial context, I do not have problems with decisions being made with political concerns taken into account.[260]

Still, one former New York City Corporation Counsel described a situation that could have led to political influence that he would have regarded as inappropriate:

> When the Mayor was running for re-election during his first term, on a Friday afternoon a Judge in New York Supreme declared a portion of the domestic relations law unconstitutional as it prohibited same sex marriages. The Mayor was scheduled to do a campaign event for gay and lesbian groups the next day and if I didn't file a notice of appeal from that decision on Monday morning it would mean that all same sex couples in [New York City] and around the country would come to [New York City] to be married. The Mayor was a very strong supporter of gay marriage as was I . . . . What was my obligation and what should I have done if the Mayor told me not to file a notice of appeal? The good news is that I didn't have to reach the second question and I felt frankly it was fairly simple. I wasn't going to let politics intrude upon my decision, I was sworn to uphold the laws of the State of New York and so I filed a notice of appeal.[261]

Ultimately, government lawyers exist in a state of some uncertainty as to what degree of independence their position may permit. The particular department's organizational structure and mission, as well as the nature of the specific legal issue, all can change to whom the government lawyer owes a duty of loyalty and to what extent counsel can or should independently provide advice and recommend actions that may countermand the department official's will.

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259. *Id.* at 55.
260. *Id.* at 63.
261. *Id.* at 26.

C. CONCLUSION

Most government lawyers did not regard their duty of independence as imposing obligations that differ significantly from lawyers who counsel private clients. There was some skepticism that government lawyers represent the "public interest" in a general sense.[262] Counsel who work in government agencies can assess alternatives on their understanding of the agency's mission, much as lawyers advising private organizations can draw on an understanding of those entities' goals. In addition, government counsel, like counsel representing private organizations, are obligated to regard duly authorized individuals as speaking on behalf of the organization absent extraordinary circumstances.

Government lawyers did acknowledge, however, that they may be required to disclose past or contemplated wrongdoing by officials and employees in instances in which private counsel might not be required to do so. Even in these instances, however, the first step is to work within the organization to bring such conduct to the attention of those who are superiors of the person in question.[263]

Participants expressed concern that some courts have not recognized the applicability of the attorney-client privilege in situations where counsel has provided advice with respect to a matter that eventually involves criminal proceedings. The rationale for such a holding is the ostensible duty of the government lawyer to favor disclosure of official wrongdoing. Counsel believe that the absence of an assurance of confidentiality under such circumstances can discourage clients from consulting government lawyers and can undermine the ability of such lawyers to provide effective advice.[264] The result is that officials may feel the need to bear what could be the considerable expense of hiring outside counsel.

Providing effective independent advice can also be more difficult for the government lawyer when the identity of the client is ambiguous. Lawyers for a specific agency tend to encounter this challenge less often, but identifying the client can be difficult at times for a lawyer who represents a municipal, county, or state government with executive and legislative bodies. Discharging one's duty under these conditions requires the lawyer to work diligently to help build common ground and determine a common perspective among multiple constituents.[265]

Government lawyers also acknowledged that occasions may arise when they need to resist making decisions based purely on the political concerns of their clients. They emphasized, however, that political values are a ubiquitous and integral part of the government process. This requires deference to them,

262. *See supra* notes 202–204 and accompanying text.
263. *See supra* notes 214–230 and accompanying text.
264. *See supra* notes 237–239 and accompanying text.
265. *See supra* notes 242–246 and accompanying text.

especially when they are held by publicly-elected officials, as long as there is no attempt to use them to subvert the requirements of the law.

The hearings underscored that focusing on "the government lawyer" can obscure the fact that government lawyers play a variety of roles in a wide range of settings, all of which may present their own distinctive issues. Further research would be valuable in providing more fine-grained analysis of how these settings and issues create distinctive challenges for government lawyers.[266]

CONCLUSION: LAWYER INDEPENDENCE IN CONTEXT

What conclusions can we draw from this review of lawyers' discussion of independence in these four practice settings? The literature on lawyer independence focuses on two meanings of the term. The first is independence from influences that might inhibit the lawyer's ability to provide effective representation to the client. This notion of independence can be seen as an emphasis on the importance of the lawyer's loyalty to the client.[267] The second focus is on the independence of the lawyer from the client. The concept of the lawyer as an officer of the court and as a distinctive professional emphasizes the responsibility of the lawyer to ensure that the client acts within the bounds of the law, regardless of how this may constrain what the client wants to do.

The New York State Judicial Institute on Professionalism in the Law hearings reflected sensitivity among lawyers in all practice settings to both conceptions of independence. No session raised or covered all possible issues, but each provided a forum for rich and thoughtful discussion.

While participants expressed some unease about presenting themselves as expert advisors on moral issues, there was remarkably widespread acceptance of the view that being an effective lawyer involves more than opining on legality. This can be seen as consistent with conceptions of independence that emphasize both loyalty to and some detachment from the client. One panelist suggested that the law necessarily reflects moral judgments, and that advising on legality therefore requires some appreciation of this dimension. "I have a practical perspective about drawing a hard and fast distinction between what is moral and what is legal," he said. He elaborated:

> In the real world of lawyering, our clients typically expect more from us than 25-page research memos telling them what we think the law is, especially when the 25-page research memo ends with a hyper-technical conclusion that, while legally defensible, is nevertheless unconscionable.

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266. For instance, the role of legal advisors in the military context is the subject of illuminating analyses in David Luban, *Military Necessity and the Cultures of Military Law,* 26 LEIDEN J. INT'L L. 315 (2013); Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance,* 104 AM. J. INT'L L. 1 (2010).

267. *See* Myers, *supra* note 3.

> It's been my experience that arguments made to courts that shock the conscience frequently end up being losing arguments. Lawyers, I believe, must see the world three-dimensionally; they need to appreciate that appearances count and conduct which appears immoral stands a good chance of ultimately being adjudged unlawful . . . If, on reflection, the legal position for which you are advocating is immoral, you do your clients a grave disservice not calling that to their attention.[268]

An inside corporate counsel made the same point in a more homespun way:

> So in terms of what is moral, the way I think about it is, given the risk profile of whatever strategy we are headed down, how is the world, how do my kids, how do—I use my mother, when I counsel my clients—how would my mother perceive what it is we're going to do. It may be perfectly legal, I may be able to create the best argument that what we were going to do is absolutely within the bounds of the law. But when I come in front of a judge, or I explain to my mom, yes, I said this was okay to do, but also does it feel right to do it.[269]

Finally, the hearings illuminated the ways in which independence is not simply a matter of establishing distance between the lawyer and the client. An independent lawyer is not someone who resists commitment to and identification with the client. A lawyer who explicitly or implicitly communicates an attitude of distance may not be successful in encouraging the client to approach her with difficult issues, or to be fully candid when he does so. Clients who are considering action that could be legally impermissible or ethically dubious are those most in need of sound and fully informed advice. These also may be those clients who are most hesitant about being completely forthcoming. A client in this situation is more likely to trust and confide in a lawyer whom she sees as supportive of her aims and committed to her success, rather than as a "cop" who stands in judgment.[270] As one inside counsel put it:

> [W]hen you're in a 60/40, 70/30 situation you are performing a very important role if you're saying, I think you can do it, but the facts here are lousy and moral arguments A, B and C, which may be pretty persuasive, you better damn well take those into account. It seems to me, that's the way to do it. I certainly don't think that we can simply be—consider ourselves an independent moral compass, because if we do . . . we are going to get less communication from our client, not more.[271]

Both law firm general counsel and in-house corporate counsel in particular elaborated on how their ability to serve as effective independent attorneys draws

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268. *Principled Discussion*, *supra* note 9, at 10–11.

269. *Principled Discussion*, *supra* note 9, at 12.

270. *See* Robert Nelson & Laura Beth Nielsen, *Cops, Counselors, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 L. & SOC'Y REV. 457 (2000).

271. *Principled Discussion*, *supra* note 9, at 26.

upon the ongoing relationships that they establish in daily practice. In these instances, professional independence is an asset that lawyers create through close engagement with their clients, not through insistence on standing apart from them. The lawyer must set limits when necessary for this asset to be meaningful. Approaching her responsibilities from the start as focused on line drawing, however, may undermine the very ability to provide effective independent representation that it seeks to accomplish. As one lawyer put it, "[W]e should really focus not so much on the independence of the lawyer from the client, but the lawyer's acting on behalf of the client. The lawyer serves the client best when he acts objectively, he acts strongly, he gives him sound legal advice."[272]

In these ways, in both senses of the word, independence furthers the values of the legal system. In that vein, it is only fitting that a participant in one of the sessions have the last word: "[A]lthough we have judges who tell us what the law means, the rule of law on a daily basis is delivered not by the courts, not by the legislatures, but by practicing lawyers in their private communications with their clients. That's where the rule of law is delivered."[273]

272. *Id.* at 16.
273. *Id.* at 5.