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JUDGES OF THE
NEW YORK STATE COURT OF APPEALS
As of November 15, 2010

HON. JONATHAN LIPPMAN, CHIEF JUDGE

HON. CARMEN BEAUCHAMP CIPARICK

HON. VICTORIA A. GRAFFEO

HON. SUSAN P. READ

HON. ROBERT S. SMITH

HON. EUGENE F. PIGOTT, JR.

HON. THEODORE T. JONES

NEW YORK STATE JUDICIAL INSTITUTE
ON PROFESSIONALISM IN THE LAW

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A CONVOCATION ON INDEPENDENCE AND THE GOVERNMENT LAWYER

OPENING SESSION AND KEYNOTE ADDRESS

PAUL C. SAUNDERS
CHAIR, NEW YORK STATE JUDICIAL INSTITUTE
ON PROFESSIONALISM IN THE LAW;
CRAVATH, SWAINE & MOORE LLP

Good morning everybody and welcome.

My name is Paul Saunders, and I am chair of the New York State Judicial Institute on Professionalism in the Law. It is a delight to welcome all of you to the second in our series of Statewide Convocations in which we are addressing the issue of "lawyer independence". I want to first welcome Chief Judge Lippman, who has appointed members of the Judicial Institute and who is in fact our sponsor, and the other members of the Court of Appeals who are here. Also, I would like to welcome the other State, and, I think, Federal Judges, who are here and to thank all of you and especially to thank our speakers today in what I hope will be an interesting and enlightening program.

The Judicial Institute on Professionalism was created in 1999 by Chief Judge Kaye to provide continuous attention to the condition of professionalism of lawyers practicing in New York and to the needs of clients whom they served and the public at large. Some of you may recall that the Judicial Institute came out of one of the recommendations of the so-called "Craco Commission" headed by Lou Craco in 1995. Chief Judge Kaye asked Lou Craco and a number of other prominent lawyers and academics to study the issue of professionalism among lawyers in New York State and for two years Lou and his commission traveled around New York State and inquired into and examined the issue of professionalism. Coming out of that work was the recommendation of the creation of a permanent institute in New York State, to pay attention, to address publicly, issues relating to professionalism among lawyers, not just ethics — the mandate goes beyond ethics — but to issues of professionalism. The members of the Institute are members of the bar, the judiciary, the academy and the public at large. We have a mandate to address on a continuing basis many influences that affect professionalism in the practice of law. The Institute has embarked on a two-year study on the issue of lawyer independence and this is the second in a series of convocations that we are going to hold around New York State in which we address issues of "lawyer independence."

Why is independence so important for the practice of law? Why is it important to lawyer professionalism? Well, we can start with the preamble to the New York Code of Professional Responsibility: The legal profession is largely self-governed, and an independent legal profession is an important force in preserving the self-governance of the law.

The relative autonomy of the legal profession carries with it special responsibilities of self-governance and that's one of the things we are here today to discuss. I can think of no better guidance than to give you what I regard as the guiding force behind our two-year effort to examine issues on lawyer independence and that comes from our chair emeritus, Louis Craco, from the memorial lecture he gave at Pace Law School in 2006. The title of that lecture, for

those of you who are not familiar with that, is "Carpe Diem," which in Latin means "Seize the Day," an opportunity to reclaim lawyer independence, and this is what Craco said:

"It is only because we have the fundamental role to deliver the rule of law that we have a legitimate claim to independence. Independence in both senses that we lawyers use the term: Our collective autonomy from supervision by others and our ability to give disinterested legal advice to our clients." And here is the key sentence: "We are allowed to be independent in the first sense because it's necessary for our independence in the second sense. Our professional claim to collective autonomy and the willingness of society to allow it depends over time on our individual willingness to use that freedom from outside interference to provide our clients advice we know they need whether they want to hear it or not."

"The whole notion of a lawyer as a public actor delivering the rule of law to clients in private practice best explains what it means to be an American lawyer today. It is forfeited if we fail to deliver the goods in the exchanges we have with our clients." I could do no better in explaining the relation of lawyer independence to professionalism than to quote those words from our chair, Louis Craco.

Now, the purpose of today's exercise is to examine one aspect of lawyer independence, and that aspect of lawyer independence is from the perspective of Government lawyers. The issues, we suspect, are somewhat different from and considerably more complex than the issues relating to lawyer independence in private practice. It is our hope today that the three groups of distinguished panelists will explore those issues in some detail and it is our hope and expectation that by the end of the day we will be able to shed some more light on this very, very important subject.

Let me just take a word to let you know what is going to happen, how the day is going to progress. First, we are going to hear from Chief Judge Lippman, who I'm going to introduce in just a moment. Then we are going to hear from our host today, Steven Younger, who is the President of the New York State Bar Association, whose organization has graciously agreed to host this one-day convocation. In your program you will see that the Keynote Address was to have been given by Bernard Nussbaum, who is a partner at the Wachtell Lipton firm in New York City, and who was former White House Counsel during the Clinton administration. Unfortunately, Bernie Nussbaum's mother died on Thursday, so he will not be able to be with us. But his colleague, Kevin Schwartz, who has been working with Bernie in preparing the Keynote Address, will deliver the address as if he were Bernie Nussbaum, very, very big shoes to fill. So let me first introduce the sponsor of the Judicial Institute on Professionalism in the Law, Chief Judge Jonathan Lippman of the State of New York.

THE HONORABLE JONATHAN LIPPMAN

CHIEF JUDGE OF THE STATE OF NEW YORK AND
CHIEF JUDGE OF THE COURT OF APPEALS

I know Bernie and I can do a better imitation of Bernie than you can. Bernie and I come from the same part of the world. It is great to see all of you and what a crowd this is, what a great crowd. I could virtually introduce everyone in the hall. I just want to mention that I'm so pleased my colleagues from the Court of Appeals, Senior Associate Judge Carmen Ciparick, is here and she is a member of the Institute, and the next Senior Associate Judge Victoria Graffeo.

I'm so glad that they're both here to kick off the event. We are going to excuse ourselves right after Steve's remarks because we have to go into conference and we hear arguments this afternoon. Otherwise it would be a delight to listen to this fantastic program. Also, I note that the Presiding Justice Anthony Cardona, from the Third Department, is here. I'm so delighted that he is here and so many other dignitaries: judges from our courts, government officials — how often do you see two former corporation counsel of the City of New York sitting in the first row? This is a great event and it is a pleasure to welcome you to the Institute's second convocation in its lawyer independence series. I want to thank you, Paul, for the wonderful job you do as chair and for the invitation to offer a few remarks. I also want to thank Steve Younger, our terrific State Bar President, who participates today, and for his outstanding leadership of the state bar. Great to see you, Steve.

At the outset, I want to commend all of you for your dedication to public service. Today's program underscores the importance of your work, as public servants, to our governmental institutions, to public policy, to public safety, and to the general well-being of our fellow citizens. I want to recognize and thank each of you for choosing to put your talents and experience to work in the public arena, and, on behalf of the best clients any lawyer could have — our fellow New Yorkers. Indeed, it is the careers of so many of you here today that have come to define the high standard of service for government lawyers and I say that sincerely.

As Chief Judge, I have enormous admiration for the bar of this state. I am especially proud of our bar's tremendous response to the urgent call for pro bono assistance during these difficult economic times, which have been painful for so many of our neighbors. We have record numbers of volunteer attorneys logging in millions of hours to assist self-represented or unrepresented litigants in our courts. And, in many instances, it is government lawyers who are spearheading the efforts, for example, by instituting specialized training programs for volunteer lawyers, exemplifying the age-old tradition of *pro bono publico*.

The unique relationship between the government lawyer and the client — whether it is an elected or appointed official, an agency or municipality, or, ultimately, the public we all serve — gives root to so many issues and challenges, but none more important than the professional independence theme the Institute is examining today. I know from firsthand experience that today's keynote speaker, Kevin Schwartz pinch hitting for Bernie Nussbaum, will do a terrific job on the subject of protecting the independence of government attorneys, which along with the panel discussions among the seasoned former and current government practitioners, will illuminate the everyday challenges to professionalism and independence faced by government lawyers. Our judges' conference and a full calendar of arguments this afternoon require my presence back at the Court of Appeals, but I am pleased to see many of our court staff in attendance and I designate them as my representatives.

The roster of topics the Institute is addressing today could not be more timely and relevant to the myriad issues that arise daily in our courtrooms. The question "Does a government lawyer have an obligation to do justice?" and the recurring issue of what role does the public interest and public opinion play in governmental decision-making both parallel the kinds of ethical challenges that the judicial branch regularly confronts in different contexts. And these are precisely the types of questions that the Institute was created to address over a decade ago with the directive that its work "promote awareness and adherence to professional values and ethical behavior by lawyers in New York State." In furtherance of its administrative mandate,

the Institute continues to devote thoughtful, scholarly attention to the critical questions that shape both public opinion about our legal system and public confidence in a fair and accessible justice system.

In this context, I would like to touch on a particular challenge to a judge's independence that has been highlighted by the difficult economic climate we now find ourselves living in — that is, to provide equal justice under law as our Constitution commands.

As many of you are aware, I recently presided over public hearings in the four Appellate Divisions to document the vital role of publicly funded civil legal services. Even before the hearings began, we had abundant evidence showing that our network of civil legal service providers could not meet the ever growing demand from financially strapped New Yorkers facing home foreclosures, evictions, domestic violence, divorce and custody matters, consumer credit proceedings and denials to disability, health and welfare benefits. What the hearing testimony made resoundingly clear is that without adequate publicly funded legal assistance for moderate and low income civil litigants, the independence of our judges is challenged.

In each appellate department, our trial court judges reported that the disadvantage to the unrepresented or self-represented litigant in an adversarial proceeding was so painfully obvious that it challenged the judicial ethic of impartiality. These judges testified that their neutrality was regularly threatened when, for example, a pro se litigant inquired how to respond to the demands of the lender's attorney or when a domestic violence victim remained mute in fear of her abuser and his lawyer. These judges explained that the scales of justice were tipped against the unrepresented or self-represented litigants, even before they stepped into the courtroom, because the litigants were unfamiliar with the process and unprepared to offer proper pleadings and evidentiary proof. This confusion is only exacerbated once formal court proceedings begin.

Over two million New Yorkers appear in our courts on civil matters unrepresented, and 70% of these cases involve what I term the "essentials of life" — shelter, family stability and personal safety, access to health care and education, and subsistence income and benefits. These statistics are alarming and judges face enormous pressure to remain ethically neutral when confronted with such an imbalance of equities.

Fair and equal access to justice is a cornerstone of our democratic society. There is no easy answer to the dilemmas our judges, and you, as practicing lawyers, face in remaining true to your professional and ethical obligations but it is even more critical that we maintain our independence and integrity in the discharge of our professional obligations. It is my sincere hope that all of us — judges and lawyers who serve our lawmakers, municipalities, schools, medical facilities, housing authorities and so many more — will work together to address these challenges effectively. Our citizenry and their confidence in our legal system demand no less.

This convocation presents a great opportunity to consider these kinds of very serious issues. In so doing, the Institute fulfills its mandate to direct our collective attention to significant and emerging professionalism trends. I commend the Institute, your keynote speaker and panelists, the State Bar Association, and, of course, all of you, for spending your valuable time here today to actively engage these issues and develop appropriate responses to the ethical challenges we face as public servants. It is of the utmost importance that our legal system deliver equal justice and provide access to the courts for every New Yorker. I know this will be a fascinating day and I think it will generate noteworthy results. I'm delighted to be here at the opening of the Convocation.

Thank you very much.

MR. SAUNDERS

Thank you very much, Chief Judge Lippman. It is now my pleasure to introduce to you the President of the New York State Bar Association, Steven Younger. Steven is a partner at Patterson Belknap. He was educated at Harvard and Albany Law School and it is a delight to welcome you, President Steven Younger.

STEPHEN P. YOUNGER
PATTERSON BELKNAP WEBB & TYLER LLP
PRESIDENT, NEW YORK STATE BAR ASSOCIATION

Judge Lippman, Bernie Nussbaum and I all grew up a few blocks away from one another on the Lower East Side of Manhattan. We all went to Stuyvesant High School but I was the only one who failed to graduate.

Chief Judge Lippman, Paul Saunders, who is the superb chair of the Institute, founding father of the Institute, Lou Craco, my good friends Judge Ciparick and Judge Graffeo and so many guests: Attorney General Cuomo's Counsel, Hank Greenberg, Mike Cardozo, Corporation Counsel; Catherine O'Hagan Wolfe, Clerk of Court, Second Circuit, Judge Randolph Eng, Supreme Court, Appellate Division, Second Department; Catherine Richardson, Past President of the New York State Bar Association, Bob Witmer.

The New York State Bar Association is proud to extend the hospitality of our beautiful bar center to host the Judicial Institute's Convocation on Independence and the Government Lawyer. Since 1999, we have been an enthusiastic supporter of the Institute and its first-class cutting-edge convocations.

When the Institute was formed, then-Chief Judge Kaye recognized that the legal profession faced enormous challenges, which required "high level and continuous attention." In her opening inaugural address for the Institute, she mentioned several challenges facing our profession, including the challenge of modern technology in a global economy; the growing unmet need for legal services to the poor; as well as the public's loss of understanding and respect for our justice system.

Now, ten years later, these challenges persist and some may say they have grown more challenging. That is why these convocations are so important and we are so fortunate that Chief Judge Lippman made it one of his priorities to advance these key issues assisted by the phenomenal Judicial Institute.

Today's topic, Independence and the Government Lawyer, is perhaps more important to our profession than ever before. Public confidence in our government institutions is at an all time low. Unfortunately, many of those employed in public service have had their integrity smeared by the comments of a small number of bad actors. We need only consider the recent campaign season, which was plagued by a series of unfortunate ads, where a candidate attacked his opponent essentially just for being a lawyer. It has become popular to vilify government lawyers for the clients they defend and to attack judges for the decisions they render. It is no wonder that public service has lost the hold it once held in the public's eye. Yet, every day, in

towns and cities across New York, thousands of lawyers pursue careers in government service with utmost integrity.

I believe that we have a responsibility, as the leaders of our profession, to devote our efforts to turn around the public's perception of our valued public servants and the government institutions they serve. We need to do this not only to support our colleagues who have chosen careers in public service but also to ensure that a career as a government attorney remains attractive to the best and brightest of our profession.

Toward this end, this past June, we, at the State Bar, created a Task Force on Government Ethics. This Task Force is undertaking a systematic review of public sector ethics issues that impact the legal profession. To regain the public trust, we need comprehensive ethics reform, which will restore confidence in our government institutions. While many agree that reform is needed, few agree on the type and scope of reforms that are required. Our Task Force is ably led by the director of Albany Law School's Government Law Center, Patty Salkin, and former U.S. Attorney for the Southern District of New York, Mike Garcia. Their work is framed by four guiding principles of government ethics, which were adopted by our executive committee earlier this year. The principles call for (1) the independence of those who are responsible for implementing and enforcing our ethics laws, (2) the importance of government transparency, (3) the need for enforcement procedures to be fair and to safeguard due process and (4) the goal that ethics reform, particularly in the area of client disclosure, encourage the full participation of lawyers in government service.

Early next year, the State Bar's policy-making body, our House of Delegates, will consider the Task Force's recommendations. At the same time, a new administration will be taking office in our state and will be considering comprehensive government ethics reform. As a profession, it is our responsibility to have a say in this process. The independence of the government lawyer depends on our support of a sound system of government ethics.

It is my sincere hope that we will see meaningful government ethics reform in the coming year — but we all need to rally around this cause to make this happen. Thank you.

MR. SAUNDERS

Thank you very much, Steve and Chief Judge Lippman for joining us this morning. We now come to the part of our program that will hopefully set the stage for the rest of the discussion in today's conversation, the Keynote Address. At our convocations over the years, the Keynote Address has been probably the most important part of the day's exercise because it goes a long way in setting the table for the rest of the discussion.

As you heard, our keynote speaker today was Bernie Nussbaum, a choice that I must say the Institute was unanimous about; we all decided he was the person we wanted to hear from. Bernie Nussbaum is a partner at Wachtell Lipton, was the White House Counsel for President Clinton, and we thought that his special insight and experience would be most important for all of you to hear today. Unfortunately, Bernie's mother passed away last week, and Bernie is not able to be with us but he has sent a colleague, Kevin Schwartz. Now I should say that for those of you who don't know these convocations, they don't happen overnight. We typically precede these convocations with focus groups around the state. In this particular case, we had three focus groups, one in New York City, one in Albany and one on Long Island. Bernie Nussbaum and

Kevin Schwartz both participated in the very first focus group that we held in New York City. So this is an issue that Bernie and Kevin have been thinking about for some time. Now, I should say also that Kevin is not merely an associate of Bernie Nussbaum's, but he is a very, very impressive young lawyer in his own right. He was educated at Harvard and Yale and at Oxford. He clerked at the Supreme Court for Justice Ginsburg, a very impressive young lawyer in his own right. He is someone from whom I predict we will hear a lot in the days to come. So let me introduce Kevin Schwartz.

KEVIN SCHWARTZ

WACHTELL LIPTON ROSEN & KATZ

Well, thank you very much for having me today, Paul and Chief Judge Lippman, on behalf of Bernie.

KEYNOTE ADDRESS BY BERNARD W. NUSSBAUM[1]

NEW YORK STATE JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW

PROTECTING THE INDEPENDENCE OF THE GOVERNMENT LAWYER

NOVEMBER 15, 2010

A shared value brings us together today — our commitment to professionalism in the law. As you heard from Paul Saunders' welcome, the groundwork for this Institute was laid with a set of principles — of professionalism; independence; excellence — principles that inspired Judith Kaye, my good friend and our former Chief Judge. For more than a decade you have explored these principles in the legal profession from a variety of perspectives — from the solo practitioner; to partners in large law firms; to in-house General Counsel; and to government attorneys.

Today the Institute has chosen to tackle an issue that cuts across these perspectives, one that implicates the foundation of professionalism in the law — attorney independence. Our focus will be on the lawyer in *government.* But as you will hear, many of the concerns about protecting the independence of government attorneys, arise in the private bar as well. I will reflect on this a little later on. Right now, let me describe why the independence of the *government* attorney is so important.

* * * *

On a daily basis, public officials rely on their lawyers for candid, independent advice — whether they are worried about lobbying, gifts, conflicts of interests, political uses of their public office, or the administration and enforcement of complex legal mechanisms.

But what is at the heart of this relationship between government attorneys and officials? What makes these communications possible? What makes them worthwhile?

The key to the independence of the government lawyer — and this will be the theme of my talk — is the *attorney-client privilege*. The oldest of the common-law privileges for

[1] Mr. Nussbaum wishes to thank Kevin S. Schwartz, an associate at the law firm Wachtell, Lipton, Rosen & Katz, for his assistance in the preparation of these remarks.

confidential communications, the attorney-client privilege protects communications between lawyers and their clients from being divulged to others. The purpose, of course, is to encourage full and frank discussions between lawyers and their clients.

That purpose is undermined unless there is a guarantee of confidentiality. As I will show, in recent years this guarantee has, in fact, been undermined for *government attorneys*, by a number of significant federal court decisions. I will discuss those decisions I will discuss this worrisome trend. And my basic proposition is that — if this erosion continues, it will undermine compliance with law — it will undermine the independent role of the lawyer in both the public and private sectors; it will undermine the rule of law.

I. Erosion of the Attorney-Client Privilege

The erosion of the attorney-client privilege for the government lawyer raises core questions involving his independence, or lack of independence, *questions our panels will be discussing today*:

— Are the obligations of government lawyers different from those of the private bar?

— Who is the client of the government lawyer?

— And what is the impact on the professionalism of government attorneys if the guarantee of confidentiality is diminished?

These questions have divided the courts in addressing the privilege issue.

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.[2] 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.

The courts have given two main explanations for this position. Each is wrong, in my judgment, but before telling you why, I want to set them out for you. I also want to note that at least one federal appeals court — the Second Circuit in 2005 — has wisely pushed back.

If you review the decisions from the appellate courts in the Seventh, Eighth, and D.C. Circuits over the past 15 years, you will find a certain incantation — *that government lawyers are different*. These courts acknowledge the need for full and frank communication between government attorneys and their clients. They concede the importance of the privilege to attorney independence. *But* they have concluded that this paramount interest should be subordinated.

Why? Because a government lawyer owes his duty to the public; he has a higher calling.

This, then, is the mantra used to eviscerate the privilege for *government* attorneys; they have what the courts called a "*higher, competing duty to act in the public interest*"[3] — they take an oath to that effect; their salaries are paid by public assets; their client agencies do not face

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[2] *In re Bruce R. Lindsey (Grand Jury Testimony)*, 158 F.3d 1263 (D.C. Cir. 1998); *In re A Witness before the Special Grand Jury 2000-2*, 288 F.3d 289 (7th Cir. 2002); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997).

[3] *In re Special Grand Jury*, 288 F.3d at 293.

criminal liability while private corporations do. And, the courts reason, government officials bear a special responsibility to act in the public interest as they exercise the power of the state. "Unlike a private practitioner," they conclude, "the loyalties of a government lawyer . . . cannot and must not lie solely with his or her client agency."[4]

In effect, these court decisions rest upon a view that in government, "*the proper allegiance*"[5] 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 and to which I will return.

II. Attorney-Client Privilege and Executive Privilege

But before I do, let me turn to the second ground relied on by the Courts — which compares the attorney-client privilege to *executive* privilege and reasons that because executive privilege is limited in nature, so must the attorney-client privilege be limited. Now, why did this comparison arise?

It is significant that several of these cases eroding the attorney-client privilege involved the White House Counsel's Office under President Clinton. That setting led the courts to perceive *a connection* between disputes over the President's attorney-client privilege and the President's executive privilege. These cases were decided after my time in the White House. But I want to discuss two of them — from the Eighth and D.C. Circuits — focusing on *how* they related attorney-client privilege to executive privilege.

As you will recall, in 1974, the Supreme Court issued its landmark decision ordering the White House to produce the Nixon tapes in response to the special prosecutor's subpoena. The White House had refused, invoking Executive privilege, and the Supreme Court agreed there *is* such a thing as Executive privilege — that the Constitution's separation of powers *does* protect the confidentiality of presidential communications.[6] But, the Court found that constitutional privilege to be "significantly diminished" in the face of a subpoena.[7] Between these supposedly competing objectives, the Court determined that the "legitimate needs of the judicial process outweigh Presidential privilege."[8]

How does the Court's limitation on executive privilege relate to our topic today? Decades later, in construing the White House Counsel's attorney-client privilege, the reasoning from the *Nixon* decision was front and center.

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4 *In re Lindsey*, 158 F.3d at 1273.

5 *Id.*

6 *United States* v. *Nixon*, 418 U.S. 683 (1974).

7 *Id.*, at 706.

8 *Id.* at 707.

In effect, the Eighth and D.C. Circuits concluded that legal advice is no different from a President's communications with his other advisors — communications which are only protected by a qualified executive privilege under the *Nixon* decision. As the D.C. Circuit put it in 1998:

> "Only a certain conceit among those admitted to the bar could explain why legal advice should be on a higher plane than advice about policy or politics, or why a President's conversation with the most junior lawyer in the White House Counsel's Office is deserving of more protection . . . than a President's discussions with his Vice President or a Cabinet Secretary. In short, we do not believe that lawyers are more important to the operations of government than all other officials, or that the advice lawyers render is more crucial to the functioning of the Presidency than the advice coming from all other quarters."[9]

Well, that ruling was clear: If the President's executive privilege can be limited, so can the attorney-client privilege in government.

In 2005, the Second Circuit took a different tack.[10] It acknowledged the public's interest in ensuring that grand juries collect all relevant information. But unlike its sister circuits, the Second Circuit found that objective outweighed by the public's interest in having state officials receive and act upon the best possible legal advice. In fact, the court noted, the rationale for the attorney-client privilege applies with "special force" in *government*, because officials must be encouraged to seek out and receive fully informed legal advice while conducting the public's business.[11] And there you have a split.

The Supreme Court has not reviewed the split on this question, but I have no such hesitation. I want to tell you why each of the two grounds on which courts have eroded the privilege is wrong — and I'll start with their conflation of the privileges in relying on *United States v. Nixon*.

Nearly two decades before I was in the White House thinking about the attorney-client privilege, *I* actually devoted a bit of time to the other privilege discussed by both the Eighth and D.C. Circuits — executive privilege. That was in 1974 when I was a member of the staff of the House Judiciary Committee conducting the Nixon impeachment inquiry.

And I have a confession to make: I believe the Supreme Court's decision in the *United States v. Nixon* case — which did turn out to be so useful to us on the impeachment staff — was wrong.

The Supreme Court is, of course, the final arbiter of the Constitution, and it properly determined that Executive privilege arises from the Executive Branch's co-equal, independent status. But the Court decided to qualify that privilege — to balance — to weigh whether that

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9 *In re Lindsey*, 158 F.3d at 1278.

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

11 *Id.* at 534.

privilege may be overridden based on the general interests of the judicial process. This, I believe, was a mistake.

If there is a privilege, as executive privilege, inhering in the Constitution, then it should be absolute. There is, for example, another privilege set forth in the Constitution — the Fifth Amendment privilege against self-incrimination. That privilege is absolute. No balancing test is administered before a citizen may invoke it. And that is appropriate. Why, then, should executive privilege be less protected?

Don't get me wrong, I believe the Nixon tapes should have been produced. But not to the special prosecutor. It was the subpoena from Congress, in its impeachment inquiry, that should have been obeyed.

Congress's power of impeachment triggers the only exception to Executive privilege established in the Constitution. That's because "the very purpose of such an inquiry is to permit the legislative branch, acting on behalf of the people, to curb the excesses of another branch, in this instance the Executive."[12] This was the view expressed 36 years ago by the House Committee on the Judiciary.

You may recall that the third article of impeachment against President Nixon involved his refusal to comply with the Impeachment Committee's subpoenas. The Committee's report explained that "it is for the Committee — not a trial judge in a criminal case — to determine what is relevant and necessary to the Committee's [impeachment] inquiry."[13]

In support of this position, the Committee traced the long history of the impeachment exception to Executive privilege, including President James Polk's concession in 1846 that only by an order of the "House of Representatives, as the *grand inquest of the nation*," would "all the archives and papers of the executive departments, public or private, be subject to the inspection and control. . . . The power of the House in the pursuit of this object would penetrate into the most secret recesses of the Executive Department."[14]

So, while I believe the Nixon tapes should have been produced to Congress, I also believe the *Nixon* decision — abrogating executive privilege in the face of a grand jury subpoena — was incorrect. And, consequently, relying on it to undermine the attorney-client privilege for government attorneys is also incorrect.

But even assuming the *Nixon* decision was correct — even accepting that you can diminish executive privilege in the face of a subpoena — the lower appellate courts were nonetheless wrong to apply that reasoning to the attorney-client privilege.

In refusing to distinguish these privileges, they failed to appreciate that the President's lawyer is a *lawyer*, and every lawyer — even one representing the President in his official capacity — must be able to provide independent, confidential legal advice to his client, both to ensure his compliance with, and to assist in his implementation of, the law.

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[12] Report of the Committee on the Judiciary, House of Representatives Report No. 93-1305, at 208 (Aug. 20, 1974) [hereafter "Committee Report"].

[13] Committee Report, at 189.

[14] H.R. Jour. , 29th Cong., 1st Sess. 693 (1846), quoted in Committee Report at 207.

I fear the courts' concern about the "conceit" of lawyers clouded their insight into the nature of the advice at stake — legal advice. It is indeed the *special* nature of legal advice — its importance to ensure compliance with law — that for centuries has formed the basis of the common law attorney-client privilege.

III. The "Higher Calling" Rationale

Let me now return to the other ground I mentioned earlier which is cited by courts to justify piercing the governmental attorney-client privilege. These courts concluded, as I indicated, that government attorneys are different; they have a higher calling. They have taken an oath to uphold the law, they are paid by public assets, and their clients are expected to enforce the law and obey the law.

This rationale — while rhetorically satisfying — is not sound. All lawyers, whether in the public or private sector, take an oath to uphold the Constitution of the United States. All attorneys must promise to follow the law as a prerequisite for admission to any bar. All lawyers are officers of the court. And all clients, public or private, are expected to follow the law.

Now, courts have not been alone in trying to find distinctions between government attorneys and the private bar. Some commentators have taken up this charge, pointing to the various identities of a government lawyer's "client" as proof that attorney communications with public officials cannot be insulated in the same way as they are for clients in the private sector.[15] They cite a host of possible clients of a government lawyer:

- the supervising official
- the government agency, like the White House
- the branch of government
- the United States as a whole
- "the people" or "the public interest"[16]

The argument goes, that among any of these clients, the privilege must be pierced, at least for criminal proceedings, because "the government lawyer works for a public-abiding client, one that would expect disclosure of internal government wrongdoing."[17] Government lawyers "do not have the same ethic of client protection as do private lawyers."[18]

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[15] *See, e.g.*, Ross Garber, *The Government Attorney-Client Privilege*, in ETHICAL STANDARDS IN THE PUBLIC SECTOR 325 (2008); Elisa E. Ugarte, *The Government Lawyer and the Common Good*, 40 S. TEX. L. REV. 269 , 269-274 (1999); *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1414 (1981).

[16] *See, e.g.*, Ugarte, supra note __, at 271.

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

[18] *Id.* at 635.

In my judgment, these distinctions are baseless.

First, it is misleading to suggest that the governmental privilege must be pierced in light of what one scholar called "the moral force toward revelation" of wrongdoing.[19] It is already part of the law that the attorney-client privilege is abrogated by the crime-fraud exception. If there was evidence that a government official used a government attorney to further a crime, the privilege would not apply.

Second, there is no good reason for singling out a criminal proceeding as a basis for piercing the governmental attorney-client privilege. This was made clear in a Supreme Court decision which came down two decades after the *Nixon* case.

In that case, Chief Justice Rehnquist explained that while Executive privilege may perhaps be strictly construed in light of the "judicial goal of truth seeking," a different analysis applied to the attorney-client privilege, which the Chief called "the oldest recognized privileges in the law."[20]

Now, this case also arose from the White House Counsel's Office, but in this instance a member of that office, my deputy Vincent Foster, had retained a *private* attorney. After Foster's death, the Independent Counsel — Ken Starr's office — obtained a grand jury subpoena for production of notes that were taken by Foster's attorney of their conversations.

In holding the attorney-client privilege survives a client's death, the Supreme Court noted "there is no case authority for the proposition that the privilege applies differently in criminal and civil cases."[21] The Court explained, "a client may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or a criminal matter."[22]

I believe the focus should always be on private & government attorneys' *common professional objective* — to provide independent legal advice. For centuries the critical insight of the privilege has been that confidentiality is indispensable for candid communications between lawyers and their clients. That remains a fundamental principle, both inside and outside of government, in civil cases or criminal cases.

That is why the erosion of the attorney-client privilege with regard to government lawyers threatens the public interest, the common good, or whatever broader ideal one may wish to invoke.

IV. <u>The Rule of Law</u>

I believe that the ideal which we must strive to protect is — the rule of law — compliance with law. It is that ideal which is imperiled by limiting the attorney-client privilege in any forum.

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[19] *Id.* at 635.

[20] *Swidler & Berlin* v. *United States*, 524 U.S. 399, 409 (1998).

[21] *Id.* at 408-409.

[22] *Id.* at 409.

Going back to my own experience in Washington, it became fashionable for a time to assert that the Counsel to the President is really Counsel to the Presidency — that I should have dedicated myself to the office, to the institution, to the White House, rather than to the person. In part, I understand that view. My role did include defending the institutional interests of all Presidents — even Republicans. And I agree that there are some purely personal matters that should be handled by a private attorney.

But I also know that the Counsel's responsibility to the institution of the Presidency begins with advising the particular individual in that office. You do not give advice to a building or an office. You can only advise its current occupant, who is a human being. That human being — in his or her official capacity — *is the client* to whom you are bound by an ethical duty. And that duty includes the duty to *preserve his confidences*; to represent him zealously; and to help him achieve his legitimate objectives.

These are duties that a lawyer has in representing *any* client. They cannot be compromised because the client happens to be President of the United States or some other government official. If a Counsel to the President is forced to diverge too far from the role of a lawyer generally, we will have weakened both the Office of Counsel and the Office of President.

Now, let me be clear — one should not kid oneself into thinking that the reasoning used by courts to limit the privilege *in government* cannot easily be exported to the private bar.

It's not difficult to imagine the courts' rationale about so-called "duties to the public" someday being used in the context of private business lawyers — after all, business entities, like governmental clients, ultimately owe duties to various public constituencies.

Already, the Supreme Court has hailed, for example, accountants' "public watchdog" function, ruling that an independent auditor should not receive work product immunity because he "assumes a *public* responsibility transcending any employment relationship with the client."[23] In fact, the 8th Cir. relied, in part, on this very precedent in limiting the attorney-client privilege in the White House — due to the so-called higher calling of public servants.[24]

If successful, erosion of the attorney-client privilege for the private bar would have a serious negative effect on the quality of legal service provided to individuals and corporations in this country. By chilling candor and openness between a lawyer and a client, evisceration of the attorney-client privilege will undermine the rule of law.

For, make no mistake about it, compliance with law in a country of 300 million is not, in the first instance, dependent on prosecutors, or courts, or judges.

It is dependent upon honest lawyers giving candid, knowledgeable advice to clients.

To interfere with that relationship — to break down the bond between lawyers and clients — to tear away the veil of confidentiality which is necessary to induce candor and openness — undermines the rule of law.

That is why the attorney-client privilege — for government lawyers and their clients, and for private lawyers and their clients — is so important.

That is why it is so essential to their independence.

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[23] *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 817-18 (1984).

[24] *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 920-21.

That is why it must be fiercely defended.
Thank you.

MR. SAUNDERS

Now, you see why we asked Bernie Nussbaum to speak. It's hard to imagine as thought provoking an address as the one we just heard. On behalf of all of us, first let me ask Kevin to convey to Bernie Nussbaum our condolences on the death of his mother; and, second, let me ask you to convey to him our gratitude for setting the stage, setting the table, for the discussion that is going to take place today. That address did exactly what we hoped to do. I couldn't help but think, as I heard it, about what the late-night conversations must have been like in the White House between Bernie Nussbaum and President Clinton, who himself was a professor of constitutional law, and those discussions late at night must have been dramatic, interesting and enlightening. Please thank Bernie for sharing his very provocative thoughts.

Now let me ask the members of the first panel to come forward and please bring your name cards with you. I'm going to act as a moderator for all three panels and I'm going to try to let the panels lead the way and we will be provocative in our way.

PANEL I – WHAT OBLIGATIONS ARE UNIQUE TO LAWYERS IN GOVERNMENT SERVICE? DO GOVERNMENT LAWYERS HAVE AN OBLIGATION TO "DO JUSTICE"? HOW DO GOVERNMENT LAWYERS EXERCISE INDEPENDENCE IN THEIR GOVERNMENT PRACTICE?

PAUL C. SAUNDERS
CHAIR, NEW YORK STATE JUDICIAL INSTITUTE
ON PROFESSIONALISM IN THE LAW;
CRAVATH, SWAINE & MOORE LLP

Hon. Michael Cardozo, New York City Corporation Counsel, was a litigation partner at the Proskauer, Rose firm. He was also, among many, many other things in his career, the President of the Association of the Bar of the City of New York. And to Michael's right, former member of the Judicial Institute himself, Justice O. Peter Sherwood, received his JD from New York University School of Law, who was among many, many other things, Solicitor General of the State of New York and he was also Corporation Counsel for the City of New York. Please welcome Justice Peter Sherwood.

To Peter's right, Christine Malafi D'Amaro, currently the County Attorney for Suffolk County, where she has held that position since 2004. She holds a bachelor's degree from Dowling College and a JD from Touro Law School. You will hear from her that among the many other things she does in her capacity as County Attorney, she is also counsel to the Suffolk County Legislature and to the Suffolk County Attorney, and we will hear from her how she balances those seemingly very difficult jobs. To her right is Joel Weiss, a partner at the Farrell Fritz firm on Long Island. He attended college at SUNY Binghamton and Boston University School of Law, and for ten years he was an Assistant District Attorney in Nassau County, where he was the Chief of Frauds Bureau and Chief of the Rackets Bureau. To Joel's right is John White, who is a partner of mine at the Cravath firm in New York. John went to the University of Virginia for undergraduate and New York University School of Law and what is most significant to today's discussion is that from 2006-08 he was the Chief of Corporate Finance at the Securities and Exchange Commission in D.C. To his right is also a member of the Judicial Institute, Catherine O'Hagan Wolfe. Catherine is currently the Clerk of Court of the Second Circuit Court of Appeals in New York. Prior to that she was Clerk of the Appellate Division, First Department. She was educated at Fordham Law School and has been a long-time member of the Judicial Institute.

Let me welcome all the members of this panel discussion on the issue of Lawyer Independence for Government Lawyers. As shown in your program, we have framed a couple of questions that we hope the panel will address. The first of the questions for this panel is somewhat deceptively simple. Are the obligations unique to lawyers in government service? I think before we answer that question you need to ask yourself what are the obligations of lawyers generally. We have an obligation to represent our clients, we are officers of the legal system — and I noticed that the new code of professional responsibility in New York changes the phraseology — I thought we were officers of the court. But under the new code we are officers of the legal system. We are obligated to respect our clients' confidence except under very, very limited circumstances. We may not reveal confidential information. We may not

represent our client if representation would involve us representing different interests, with some very limited exceptions.

Question:

Do those obligations apply to lawyers in government service and if they do are there any other obligations that apply to lawyers in government service that are different from those that apply to lawyers in private practice?

HON. MICHAEL CARDOZO

CORPORATION COUNSEL OF THE CITY OF NEW YORK

Well, I would like to start by saying I think we need to first distinguish who the government lawyer is. I think there is a significant difference between, for example, a prosecutor on the one hand, and a non-litigator functioning as John White did at the FCC. First we have to make the distinction, although I would start by giving my bias basically agreeing with Bernie Nussbaum in terms of what I think is an overriding issue here that we as lawyers, government or private bar, have an obligation to our client and I know later this afternoon we're going to talk about who the client is. There are differences, significant differences, as a government lawyer on the civil side you don't have to worry about practical matters such as malpractice, you don't sign opinion letters on which you could as a practical matter be sued, and you frequently have to make a judgment on any particular case that you take to litigation, like a judgment about what is the best long-term interest of the client or entity. For example, should you take a case that was lost? Should you appeal it? If you were in the private sector the client might say, "of course." In the public sector I think you have to ask, well, is this the right case, do we have the right fact pattern, are we making good law, bad law, etc. 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.

JUSTICE O. PETER SHERWOOD

SUPREME COURT, NEW YORK COUNTY

I do think there is a distinction to be made between lawyers who are prosecutors, that is, government lawyers who are prosecutors, and there is a specific ethics provision that addresses the obligations of prosecutors. But 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. Often there is a debate over, for example, a conflict of interest. The argument is made that government lawyers who represent two agencies that are at odds have an inherent conflict of interest and somehow should step away from one of those represented parties. Well, it seems to me that if you are an agency represented by, say, the Attorney General and its leaders are unhappy with the results of a particular judicial decision but their Chief Executive, the Governor or Mayor, has a different view, he or she may seek an opinion from separate counsel so they can take an appeal, but if the Mayor or the Governor has a different view, should they be entitled to do that? Should the Attorney General say, "Okay, I have a conflict because I'm responsible for representing the State"? In Michael's case, he represents the Mayor, for example, but the agency wants to go out and do something different, it seems to me that that kind of conflict is not very different from the conflict one might see in a large

corporation. I can conjure up, for example, a manager of a very successful division of a major corporation whose plant uses some toxic substance and believes that the substance causes or may cause injury to a fetus, that women shouldn't be hired, and feels very strongly about that. Subsequently, the corporation is sued for sexual discrimination and the General Counsel of the company says, "You know, we're not going to appeal the adverse decision that just came down." Should that plant manager or division chief be able to go out and obtain his own counsel in order to appeal that decision because he thinks women's health is at risk or is that the responsibility of the General Counsel and the Chief Executive of the company? I don't think there's much difference between that circumstance and what you might see, for example, in the public sector. So I suggest to you I could go on and give you other examples that there really aren't many differences.

CHRISTINE MALAFI
SUFFOLK COUNTY ATTORNEY

I see the difference not in what the ethical obligations are but who the client is and what obligation is. In Suffolk County there 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. There is an example, I can talk about it because it was in the paper. We had a lawsuit challenging the MTA tax. Suffolk County went into this lawsuit very late, over a year and a half ago. Nassau County started the lawsuit. The reason it took Suffolk a year and a half is that the County Executive told me to bring the lawsuit and I said I didn't feel comfortable bringing the lawsuit on various legal grounds. He listened to my advice and we did not join the lawsuit. A year and a half later, while the last election cycle was going on, the legislature, for various reasons, put forth a resolution directing me to join the lawsuit. Now the County Executive said to me, "You said we can't do this." I said, "No. I advised you it wasn't a wise thing to do and you listened to me." So I have one client, the County Executive, who listened to advice and I have another client, the legislature which, contrary to my advice, directed me to join the lawsuit and I did. There is no need to send it to outside counsel because I didn't do what the County Executive wanted me to do. There's no conflict. He's not telling me right now not to follow the resolution. He signed the resolution so I can join the lawsuit. It's a matter of whenever I have to give advice to elected officials that goes beyond what their charter duties are they can't ask me to do that, it's not my duty. I would need outside counsel to advise me. So that's the battle I have and I've spoken to a lot of County Attorneys and we all have the same problems. The greater part of that is when you're giving legal advice to all these people you have to understand and know that the attorney/client privilege doesn't belong to you, it belongs to the client, and if the client decides to publicize your opinion, that's something you can't control. You can choose not to talk about it, but you can't control that it's been made public. So add into all the legal things you have to do and legal advice you render is the fact that you are

going to get a call, at least in Suffolk County, I will get a call from a newspaper demanding to know why I did X, Y & Z, 99% of the time I didn't do X, Y, & Z, so it's a whole different dynamic. I don't think my ethical obligations or my ethical duties are any different than when I was in private practice representing clients every day. I worked in a corporation, I had corporate clients and individual clients and my ethical obligations, as far as I'm concerned, didn't change one bit when I stepped into the role of County Attorney. It's difficult walking the line and remembering the politics that are going on outside my office are outside my office and making sure that no matter how much the pressure to join in those political activities I remember my professional obligation as a lawyer never changed no matter who the clients are.

MR. SAUNDERS

Before we hear from Joel, let me ask Michael and Peter whether, in the course of their work as Corporation Counsel, either of you have ever run into a situation in which the City Council's view is different from the view of the elected Mayor and, if so, what do you do about that?

MR. CARDOZO

The answer is yes, of course, not on a too-frequent basis, but it certainly happens. 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. I would like to give two stories, one, perhaps is silly, but illustrates something. There was a bill passed by the City Council that outlawed in NYC aluminum baseball bats for kids because the ball would come off the bat and hurt the kid. The Mayor vetoed that law saying that was bad public policy. The City Council passed the law over the Mayor's veto. The aluminum baseball bat industry then brought a lawsuit claiming the law as illegal on some preemption theory. 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." The second case is actually more serious in that the Council passed a law again over the Mayor's veto that the Mayor and I felt was unconstitutional. Again, it was a preemption issue involving procurement. The Council said the City should not enter into a no-bid contract if a particular company did not provide benefits to same-sex couples. Its public policy was a very good but we felt it was preempted. The Council passed the law. 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 again 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.

JUDGE SHERWOOD

The City Charter says something like, Mike has looked at it more recently than I have, the Corporation Counsel shall have charge of all the City, so as a formal matter the Corporation

Counsel has many hats and represents both the Council and the Mayor and the Commissioners and virtually all the so-called independent agencies of the City. There are similar to things I've heard but over time, as Mike has suggested, there has been recognition that when practical circumstances demand it is appropriate for an agency to be separately represented and the Corporation Counsel represented the Mayor. But I think the important point here is that there is a recognition that there are such circumstances and you will notice, as Mike mentioned, that the Corporation Counsel authorized retention of outside counsel. But the decision in terms of the formal authority to allow that really rests in the office of Corporation Counsel by virtue of the City Charter itself and as I said there is a comparable law in the State of New York but there are practical realities and, as Mike suggested, the Corporation Counsel has recognized the times when it could be appropriate to authorize outside counsel. I did not have a circumstance where Mayor Dinkins and the Council disagreed similar to what Mike described to you. I did have a circumstance and, fortunately, we didn't have this problem when we had an independent Board of Education back in the old days since, as a practical matter the Mayor was able to work with the Board of Education and had quick control of it because there was jockeying back and forth with it. Under the new Charter that changed and the power of the Borough President was greatly diminished and the political influence caused the Board of Education to become very dysfunctional. So you had certain circumstances in which the Board of Education wanted to go in one direction and the Council wanted to go in another direction, the Mayor wanted to go in a third direction and in this system the Charter directs that the Corporation Counsel is responsible for all the legal business of the City, including representation of the Board of Education. I did have a circumstance where the majority called the Corporation Counsel to authorize outside counsel in order for the Board to challenge, I believe it was a curriculum issue, involving teaching sex education and the Borough President from Staten Island had very strong views on that and was able to influence some other members of the Board of Education. At the end of the day my office refused to allow outside counsel. That created some controversy.

MR. CARDOZO

There is a fascinating case from the 40s where the Board of Higher Education hired Bertrand Russell as a Professor of CCNY and it became a huge, huge controversy. A lawsuit was brought challenging his appointment on various grounds and the lower court said, yes, he should not have been appointed. But the Board of Education wanted to appeal that ruling because they felt otherwise and the Corporation Counsel at the time refused to file a notice of appeal. The Board of Education retained separate counsel to file the appeal. The Corporation Counsel moved to dismiss the appeal because the only person authorized to appeal would be the Corporation Counsel.

MR. SAUNDERS

I certainly anticipated this issue might be coming up so I went back and did some research. Fritz Schwarz, who was a former partner of mine and was Corporation Counsel for the City of New York under former Mayor Koch, here's how Fritz put it, and let me ask Michael Cardozo, Peter Sherwood and Christine Malafi: What should happen if, for example, the City

Council passes a law which the Mayor vetoes and the Council then overrides the veto. Should the Corporation Counsel support the Mayor in a lawsuit challenging the law? Fritz would say no, if the Mayor's only objection was based on policy.

MR. CARDOZO, JUDGE SHERWOOD AND MS. MALAFI

Yes.

MR. SAUNDERS

But what if the Mayor also claims a legal defect in the law? Here Fritz would say that the Corporation Counsel should still support the law unless the legal defect is crystal clear.

MR. CARDOZO

I have great respect for Fritz but I disagree with him. In fact, a case referred to a moment ago highlights that. I think there's another point to keep in mind is the public perception as to whether or not the public is going to think you're doing it and your boss vetoes the law and you're defending it. What is the public going to think? That he's not doing such a great job, look what his boss did. I think there's that concern. But I believe if the Mayor has vetoed the law on legal grounds then the Corporation Counsel should not be defending it.

JUDGE SHERWOOD

Well, I guess I think somewhat differently. It seems to me before the Mayor appeals the law on legal grounds chances are he has been in communication with his Corporation Counsel. The views that he expresses probably reflect, in significant part, the views and advice that he has already gotten from the Corporation Counsel. If and whether or not the Corporation Counsel ends up defending the law it seems to me depends largely on how strongly the Corporation Counsel's analysis of the law favors the conclusion that the law is safe. If the Corporation Counsel thinks the law cannot be defended then I think he is hard-pressed to nevertheless defend the law but if he finds it is legally supportable he has obligation to defend it.

MS. MALAFI

In Suffolk County the charter is written in such a way that if that situation happened the County Attorney's office would be obligated to defend the law on behalf of the County Legislature. However, as it has been said before, if a law is unconstitutional or has legal problems in all likelihood my office would rely on a legal opinion stating whether the law is legal or if it is not practical or if there's any problems with the law. The legislature has their own legislative counsel and that person usually renders those opinions to the legislature. So what happens is, if it did come up that I would have to defend the law that was vetoed by the County Executive and I did a legal opinion against the passage of the law, although my office would be charged with the duty of defending it, I would immediately send it to outside counsel because the reality of the situation is, although I can be a lawyer and defend the law, that I personally do not

believe it is the perception, as was said, that it would be that I would go down or take a hit for the County Executive. It does put you in a very bad position. I would feel compelled to move the charter group mandate that I would defend the law to give it to outside counsel. If it was just a battle in the newspaper between the County Executive and County Legislature as to whether the law was good or not and the law was passed after it was vetoed. In this type of challenge I would have no problem doing my job, which is to represent the County.

MR. SAUNDERS

Let me get back to the first question, that is, are there are obligations that are unique to lawyers in government service?

JOEL WEISS
FARRELL FRITZ, P.C.

I have to hijack the conversation briefly from where it has been traveling. I have spent my 33 years as a lawyer in the criminal justice system, 10 years as a prosecutor, 23 years as a defense lawyer, so I am coming to this question entirely from that angle. My wife is still a prosecutor. I forgive her. But I think that the government lawyer who is a prosecutor has a unique and inarguable obligation to do justice. I will give you several reasons why. As a starting point, the boss of every United States Attorney in the country is an officer of the Department of Justice and either that title is an Orwellian doublespeak which I think it is not or shouldn't be or it has some real meaning. It has some real meaning for several reasons. In the dry, theological sense, I think is has meaning in terms of the fact that the prosecutor represents the sovereign and the sovereign has a duty to govern and a bigger duty to govern impartially. But in a more real, everyday human sense I feel the obligation flows from what the prosecutor does. There's an old saying that the District Attorney has the keys to the jail in his or her pocket and there is quite something to that. The United States Attorney does even more so. They make charges, they make investigative decisions as to "cooperate and escape" the judicial sentence that otherwise might be sought or the so-called advisory guidelines which aren't as advisory as they should be. They really possess the power over an individual's reputation, their liberty and in some cases their life, and because of that level of power, because we're now in the 21st century, and when 99% of the criminal justice cases are resolved by deal rather than trial, I don't mean to offend any of the judges here, but I believe the prosecutors at this junction have more power than the judges over life, liberty and the pursuit of happiness and for that reason I think prosecutors might agree with me and have a complete obligation to exercise that power impartially and therefore, do justice rather than to seek momentary best results.

MR. SAUNDERS

Of course the Code of Professional Responsibility recognizes, although somewhat limited in a way, what you described, the special obligation of the prosecutor. But John White was not a prosecutor, he was a government lawyer, government official with a considerable amount of power at the Securities and Exchange Commission.

Do you think that lawyers in government service have special or unique obligations?

JOHN WHITE
CRAVATH, SWAINE & MOORE LLP

Largely not, I saw a lot of quizzical looks when you introduced me, I'd like to ask how many corporate lawyers are there here? Not a single one. I'm going to take this off in a slightly different direction, since you don't know what corporate lawyers do. I've spent three years in Washington, from 2006-2008 I headed up the Securities & Exchange Commission Corporation Finance Division and my job was to administer the disclosure rules for U.S. public companies. Just to give you an example, one of the rules that we administered, and actually wrote, was what and when banks had to disclose information to investors about their equity problems. I'll get back to that. It was our job to administer disclosure rules; just so you understand where I fit in here, I represent the tens of thousands of lawyers working for the government or in government service whose job is not on the litigation side but is really implementing rules and regulations in government programs. That is what a whole lot of lawyers working for the government do. We face, it seems to me, a similar question, same questions raised today but from a different angle. We have the question, "Who is the Client?" is it the United States? Is it the State of New York? Is it the agency? What's justice? I think the closest I have come to on the what is justice question is to look at the mission of the agency. It could be whatever your agency is, public safety, environment. But I think that's part of how you would define justice. But let me see if I can translate, let me give you two examples of where, at least for me, the question of independence comes in. The Securities and Exchange Commission responsibility is disclosure to investors. What do you do if you have conflicting government agency missions? In the middle of the financial crisis, my job was to implement the disclosures, in this case, to require banks to make disclosures to investors about their problems. Okay, that was my job. But there was another set of agencies, the bank regulators supported by the Administration, Treasury, and everybody else. The bank regulators' job was to focus on the safety and soundness of the banks and on the large scales, the U.S. financial system. So, as a government lawyer in an agency with a mission to take care of investor protection, was it my job to insist that U.S. banks make disclosures to U.S. investors? What does an independent government lawyer do in that circumstance? That's the first question. When you have conflicting agency mandates and say political pressure, and there is an initial public offering of a U.S. company where a lot of the money was going to come from a foreign government using U.S. dollars, my job was to determine whether that idea would go over. Well, there is a lot of political pressure because people did not like the idea that this foreign government was going to invest in this U.S. company. Political pressure on an independent government agency and the government lawyers in that agency were sworn to enforce the law, to apply those laws and the result is that the foreign government may be barred from investing in the U.S. company. So two examples of pushing government lawyers who are in court administering the law, in one case conflict with government agency and another case conflict with politically driven motivations.

MR. SAUNDERS

In that case should you determine your own personal view of what the public interest requires and do that?

MR. WHITE

Well, I think it was my job, my agency's job, remember there are tons of lawyers down in the trenches administering these rules. 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.

MR. SAUNDERS

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?

MR. WHITE

The answer is of course.

MR. SAUNDERS

As a lawyer in private practice, however, do you use your own personal view of what the client ought to do assuming that two different courses of action are equally lawful.

MR. WHITE

Depends, as an adviser I certainly advise on the course.

MR. WEISS

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 have both eyes working. You have to look long range or lawful constitutional, and desirable results in the long run. Whenever I hear about politics influencing decision making, from a public prosecutor's standpoint, I think of the ugly examples of waterboarding, I think of Alberto Gonzales firing nine U.S. Attorneys. This is my view and I think other prosecutors who weren't prosecuting political cases in the way the White House wanted them to be prosecuted. In terms of public interest, I think short range. I think a government lawyer has to be long range as well.

CATHERINE O'HAGAN WOLFE
CLERK OF COURT, UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

Well, I bring yet another perspective to the table. In my world "yes Judge" starts and ends each conversation. But there's a broader perspective and that's where I would like to spend a little more time this morning. There is an awful lot from my perspective that is common between the private and public sector lawyers and it derives from as long ago as the definition that has been one of the foundations of this Institute and that is the profession as presumable learned art in public service. So that whether you're on the government side or the private sector side, the fact that there is that public service element involved at the crux of the profession serves

to make Bernie Nussbaum the private attorney in that context as well as making a public sector attorney very much a member of the profession. Similar to that is the notion that lawyers act as intermediators among interests, among institutions and among values. To lose sight of those two notions leads us into imperious territories. There is a unique subset of what it is to be a government attorney. Joel touched on it and John most immediately, and, that is, I think that there are two notions that negatively reinforce each other in the government lawyers' world more often than not. When government lawyers go far afield, it is because these two negative notions have increased their power in that particular moment. The first one is that unlike in the private sector where there are a number of, at least to my way of thinking, natural constraints in place, there is the constraint of the partners, constraint of the marketplace, your client and then there is the constraint of your judges. In the public sector, those constraints are far less apparent. As Joel mentioned you have power on the part of the prosecutor if not restrained.

The second is the negative notion dating back to something that Oliver Wendell Holmes wrote in an essay that might be familiar to a number of you. He noted that the Justices of the Supreme Court were well aware that their decisions were not final because they were infallible but in fact they were infallible because their decision was in fact final. Day in and day out at almost every level of government, the most modest staff attorney, the prosecutor handling misdemeanors, the clerk's office personnel and clerks hold in their hands that spectra of being final and therefore infallible. So then of course the question becomes how do you address those negative notions. I think the answer to the question comes under the professional foundation of self-regulation.

MR. SAUNDERS

Let me change the discussion very slightly. We have heard that prosecutors have the obligation to do justice. We know that, for example, under the modern rules of professional conduct the prosecutor has the responsibility of a minister of justice and not just that of an advocate. The question is, do other lawyers in government service, not prosecutors, have a similar obligation to do justice? At one end of the extreme, at least as far as I found in my reading, is Jack Weinstein, when he was County Attorney in Nassau County. Here's what he says, "If there is a wrongdoing in government, it must be exposed. The law officer has a special obligation not to permit a cover-up of illegal activity on the grounds that exposure might hurt his party, where his duty to the people, the law and his own conscience requires disclosure and prosecution." The confidentiality rules are deliberately designed to allow the client to disclose certain bad acts to his lawyer without fear of disclosure. Why? So the lawyer can help the client to cut his losses or make the best out of past mistakes. But government lawyers are said to be in the justice business. We do not want the government cutting its losses if mistakes have been made in the past; we want those mistakes rectified so that justice can be done. 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.

MS. MALAFI

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. For example, to prosecute a case against parents, to try and take away a child, which is in my realm, if there are extenuating circumstances that need to be discussed that might be outside the exact structure of the law, it is my duty as a lawyer to discuss the obligation to do justice with a client. Maybe I'm in a lucky position but I have never worked in a position when I discussed doing justice with a client that they tell me to do something that I'm not comfortable with. But 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. I would not violate their confidence. To do justice is not part of the job in the private sector realm of giving advice.

JUDGE SHERWOOD

First, 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. It seems to me that there are certain obligations that lawyers in government service have; there are statutes that give government lawyers certain responsibilities. For example, we talked about the City Charter giving the Corporation Counsel the responsibility to oversee all the legal business of the City. That is an obligation that is embedded in the statute. 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 once you have given that advice then the executive makes the decision based on a range of possible options. 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 more so than to be 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. It seems to me that ultimate responsibility to make a judgment as to how to act with respect to that probably rests with Corporation Counsel.

MR. SAUNDERS

Let me put a sharper point on this. John White, a private corporation client comes to you privately and tells you that the disclosure that your client made last year in his annual report was false. Now you can advise the client about what the client ought to do under the circumstances. But you may not have an obligation, but in fact you probably don't have a right to make a public disclosure. Your client might, but you don't.

MR. WHITE

That's close, because there are rules in draft before the SEC and so far the rules have not been adopted.

MR. SAUNDERS

The Mayor tells you that she was bribed to make a particular appointment to a particular city agency.

JUDGE SHERWOOD

In that circumstance it seems to me I've got some responsibility and problems.

MR. SAUNDERS

But are they the same or different from John's?

JUDGE SHERWOOD

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.

MR. SAUNDERS

You most certainly would not.

MR. WEISS

Let me ask a question about this. Is the Mayor telling Peter she was bribed in the course of seeking his legal advice or is she talking to him anecdotally as they eat lunch?

MR. SAUNDERS

She says "You're my lawyer," he says "Yes." She says "I want to tell you something. I received a bribe last year."

JUDGE SHERWOOD

In that circumstance we would go back to Bernie Nussbaum's issue and I must say I wonder where Bernie is on that question. Happily, I'm in the Second Department.

MR. CARDOZO

I think the corruption or the bribe is obviously the hardest, and on that, all of my attorneys, when they are in that situation and its not on the Mayor's level, take it one, two or three steps. The attorneys are always advising people from the agency that we represent the agency, we represent the city, we may be representing them as well. But we make it clear to them, for example, in a question of police misconduct case, we represent the City of New York. We go through a very aggressive process before we decide if we can represent the police to see whether or not we do have a conflict. So that's the hardest question. But let's take, picking up what Bernie said, let's take attorney-client privilege, because I think one of the most important roles of a government lawyer, particularly at my level, is to give advice to the agency — maybe coming to close to the line or doing something potentially illegal — to advise the agency don't do it, or don't do it that way, do it this way. Anything you do that's going to impede that kind of conversation that you should have day in and day out with your client. If your client is afraid and I tell you to do x and you tell me its illegal, you're going to do something about it, you're going to blow the whistle or what you have. Not only are you eroding your attorney-client privilege, you're eroding your own role as a lawyer trying to keep your client on the straight and narrow.

JUDGE SHERWOOD

Michael, if 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 what you would do while serving in the role as counsel. First, you would advise the agency and, certainly if I were in that role, I would talk to the Mayor.

MR. CARDOZO

Absolutely.

JUDGE SHERWOOD

Because when I was in office and I did have circumstances where I had those kinds of disputes with a commissioner and the Mayor and the way he took the advice of his counsel.

MR. CARDOZO

I couldn't agree more because every agency is part of New York City and when there is a lawsuit, the lawsuit technically is not against the agency, it's against the City of New York. So if I think the agency is doing something wrong and the commissioner won't listen to me, I call the Mayor and I have done that.

MR. WHITE

But say you're counsel to the agency, what do you do then? You go above the agency?

MR. CARDOZO

Yes, I call the Mayor. In fact every general counsel in NYC who is hired by an agency has a theoretical reporting responsibility to me. When I interview counsel, I make exactly that point.

MR. SAUNDERS

So the Mayor says to you, I don't care what Cardozo says, we're going to do it anyway. I'm the Mayor and you're just a lawyer and that's my political decision. We're going to do it. Don't tell anyone.

MR. CARDOZO

"Don't tell anyone." I think that's the hardest question. It depends on what it is.

MR. SAUNDERS

That's evading the question. The Mayor says, "I've decided as a matter of public interest it's a good thing. If it costs the city a little money, so what? That's what we're going to do. It's a political decision and if you tell me you think its illegal, we're going to do it anyway."

JUDGE SHERWOOD

Paul, your example is, "We're going to do this and don't tell anyone."

MR. SAUNDERS

Let me tell you why I said that. It goes back to something John White said. The Securities and Exchange Commission (SEC) has struggled with something for a long time — it's referred to as "up the ladder reporting." That is when a client or someone inside your cooperation violates the law and refuses to correct the wrongful conduct. There is an obligation on lawyers, so the SEC says, to report that fact up the ladder, all the way up to the Board of Directors. Now where the SEC ran into difficulty, in particular with the bar, was a proposal that if the Board of Directors refused to correct the conduct, the lawyer had an obligation under the proposed regulation to make what they called a "noisy withdrawal". You had to go to the SEC and you had to say "I have just resigned as a lawyer for the corporation. I can't tell you why, but I'm resigning under the noisy withdrawal rule," and the bar said you have implicated the attorney-client relationship. It's one thing to require reporting inside the client relationship. It's yet another thing to require reporting outside of the client relationship, and that is the reason why I used "Don't tell anyone", because the SEC never was able to pass that formulation.

MR. WEISS

I want to focus on how you changed the game. Because now you strayed into my ballpark and I'm suddenly understanding the discussion. You're talking prospectively, you're talking about the Mayor saying "we're going to."

MR. SAUNDERS

No, I think Peter and Michael changed the game when they talked about prospective crime. I meant to talk about existing crime, "this is what we have done and also keep doing."

MR. WEISS

Then you changed the game, the obligation is different, the privilege is calibrated by other considerations that we all know.

MR. SAUNDERS

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 Michael or Peter saying that under that circumstance there might be an obligation for the government lawyer to do what he 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.

MR. CARDOZO

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 IG or DA, so I think as a practical matter you can get out of it.

MR. SAUNDERS

But that's because you're government lawyers.

JUDGE SHERWOOD

I was simply confirming Michael's thoughts. There is indeed an obligation to report past crimes to the community.

MR. WHITE

Well, just to finish the Corporate Education for everyone here. The question regarding "outside the corporation" never really comes up. The real question that you face often is who's the client because when you find these things out, if they're whispered to you by individuals at corporations, senior officers, and the issue you have to constantly remember is the client is the

corporation. Therefore, you have to figure out who speaks for the corporation. Due process in this case is satisfied through the general counsel's memo to the board of directors, and in most companies independent directors will almost and inevitably do the right thing. So you almost never get to the issue whereas with the individual client you almost always do.

MR. SAUNDERS

In the time remaining for this panel, I want to play a game. I would like to put a hypothetical situation to the panel and ask them to comment on it. I have to acknowledge at the outset I have stolen this hypothetical from Professor Bruce Green who wrote about it in the context of trying to understand the ethical rules and ethical issues that were raised by attempts by the White House to fire some Assistant United States Attorneys in the last administration. He wrote a long article and in the course of that article he raised several different scenarios he thought, and I agree, raised interesting ethical and public policy issues that remain germane to our discussion.

Professor Green posits that person A is a convicted felon who is a registered Democrat and, who according to news reports, illegally voted in a federal election in a heavily Democratic district in a swing state. The FBI investigates and determines that there is no evidence of intentional misrepresentation or that person A knew she was barred from voting. It turns out that the Republicans and the Democrats are fighting over proposed legislation that would make voter registration more difficult and federal prosecution of somebody like person A would boost the Republican position. The Attorney General discusses the issue with the Republican President and then the Attorney General raises the issues with the local U.S. Attorney. Normally, the U.S. Attorney would not become involved in such a minor incident. But after discussions with the Attorney General of the United States, the U.S. Attorney directly raises the issue with the Assistant U.S. Attorney. So what you have is a relatively minor offense that the FBI has determined was committed by a woman, who didn't know she did something wrong. There's a political reason why prosecution of this woman might be desirable. Should the Assistant U.S. Attorney ask the grand jury to indict?

MR. WEISS

Right in my strike zone. I think it was in my strike zone when I was a prosecutor. Absolutely not, and the way you define this is that number one, the FBI, which is the investigative arm of government, has no evidence of intent or knowledge. Without the "I" you have no crime. It is an amazingly trivial crime and you have an individual whose back is going to be walked upon for a political purpose in bad faith to make a political point. I think that's the opposite of doing justice. I think it would be amazingly ugly and I think it dovetails with what happened when Alberto Gonzales fired the U.S. Attorneys.

MR. SAUNDERS

Well, the question is who should make the decision, is that a decision the Assistant U.S. Attorney should make?

MR. WEISS

Its not the A.U.S.A.'s decision; the A.U.S.A. is within his duty as an attorney but cannot carry out the decision. They either need to resign or otherwise refuse.

MR. SAUNDERS

It's not illegal.

MR. WEISS

I think it is, sir, I think ethics rules dictate that a prosecutor may not prosecute a case when they appropriately understand the likelihood of innocence and, at least, entertain a clear reasonable doubt.

MR. SAUNDERS

I think what I said was the FBI determined there was no evidence of intentional misrepresentation but that she didn't know she was barred from voting. She clearly violated the law by voting. If you're a convicted felon, you can't vote.

MR. WEISS

Well every penal statute has a *mens rea* requirement which usually involves intent, and knowledge. If neither of those are present unless further investigation develops and the FBI is wrong, the case cannot be prosecuted.

MS. O'HAGAN WOLFE

Within the context of the institution that is considering the question, there is a law professor who has a template for an institutional consideration of issues that carry both political and legal upsides and downsides and where the intent element is apparent. In his construct, he talks about the dynamic of deliberation and in the dynamic of deliberation, you engage in this process of cultivating dialogue where, instead and in a circumstance like this, what the players typically want to do is narrow the range of the discussion. They want to narrow it down to the people involved so that the sun doesn't shine so brightly on them and by doing the opposite under the "dynamic deliberation" you would be increasing your conversation, you would be cultivating dialogue with a large percentage of people and including other institutional considerations in the debates. You would be including not just the short term goal of this particular prosecution in this particular time, but you would have built into the institution a long term perspective on the long term effect of what you're contemplating. You would also be engaging in what they call a transformation of categories that you are considering, not just rigid analytical methods and you broaden your perspective so that you don't get caught in this false dichotomy which is very apparent in this particular circumstance.

MR. SAUNDERS

I want to assume that you could successfully prosecute this woman but you typically would not do so, but for the interest of the Attorney General in this case.

MR. WEISS

Do I still have to answer?

MR. SAUNDERS

You could successfully prosecute her but you wouldn't typically allocate your resources that way to go after such a small fry. But the Attorney General is personally interested in this because there is legislation pending in Congress.

MR. WHITE

In other words, she has been in town meetings announcing that she couldn't vote and she got very adamant about that. She been advocating a change in the law.

MR. SAUNDERS

I want to assume that you could successfully prosecute but you wouldn't typically do so but for the personal intervention of the Attorney General of the United States, who clearly has political motivation.

MR. WEISS

And there is the rub of it, because there is no illegality for a prosecutor, but it's a devotion of resources that might be contra policy, contra past practice, contra good government.

MR. SAUNDERS

In the larger question, if you decide what the system ought to do as a matter of institutional justice, should we permit that or not?

MR. WEISS

As a matter of institutional justice, the Assistant U.S. Attorney has two choices: to proceed with the boss's wishes, which are not illegal, he or she was not appointed Attorney General, thereby pleasing the Attorney General, or to resign. I'd like to think a lot of A.U.S.A.'s, like in the Saturday Night Massacre during Watergate, would have resigned, but I don't think the A.U.S.A. could be faulted legally for prosecuting the case. I think he or she could be faulted morally.

MR. CARDOZO

I agree that there would be nothing illegal by prosecuting, but I would hope that the A.U.S.A. would resign. I must admit when I hear a hypothetical like this, I harken to one that I faced on the civil side, which perhaps is more realistic to some in this room. 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 NYC and around the country would come to NYC to be married. The Mayor was a very strong supporter of gay marriage as was I. What should I do? As subsequent events proved, this is a close legal question, three judges decided the other way; the Court of Appeals often as you know divides 4-3, so 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 and I think those kinds of questions perhaps come to bear a lot more frequently.

MS. MALAFI

I agree we're just the lawyers. We have to do, if we're not being asked to do something illegal, we have a duty to our clients to do what they want us to do, just the way we do in the private sector.

MR. SAUNDERS

Does it matter to the analysis whether the person who is making the request was an elected official or not?

MS. MALAFI

I don't think that's a fair question because those are our clients, they are the government and in the prior question we were talking about the Mayor or County Executive doing something illegal and you cannot do anything about it. A lot of the time it's the staff people who are representatives of the government entity, so that would be automatic. Some are doing something they shouldn't be doing but it would be reported up. Thank God I've never been in that situation where the people who are the clients don't do the right thing.

MR. SAUNDERS

In the hypothetical I gave you, indicting this women would not be illegal. I'm assuming she would be indicted and convicted. I'm also assuming you would not normally do that, given the allocation of resources in your office, but for the intervention of a clearly political purpose in doing so.

MS. MALAFI

You would have to do it because it's your client's fault not yours. I'm sure in the private corporate settings there are times that same thing happens, just different issues.

MR. SAUNDERS

Well, that's why I asked you if it made a difference whether the official was elected or not. It seems to me that for an elected official, it's easier for the elected official to say "I was elected. My view of what is in the public interest is entitled to more weight from an elected official than that of an official who's not elected."

JUDGE SHERWOOD

I just wonder how that is different from a lawyer who is in-house at a corporation who advises with passion his general counsel or CEO against a certain course of conduct and that individual says look I represent the shareholder here. I was elected or appointed to pursue the highest value we can obtain for this corporation. In my judgment, as the person so designated, this is the course we should follow and assuming it's not illegal, I don't think the government lawyer is analytically or fundamentally in any different position.

SPEAKER IN AUDIENCE

I think the hypothetical focuses precisely on the issue that you were talking about before, and that is the obligation of government lawyers to do justice. There is a big difference in applying that standard to a litigator, compared to government prosecutor, the failure to do justice by prosecuting. Think about the poor defendant, a women who is going to be defended by a public defender. She doesn't have the hundred of thousands of dollars to hire a defense lawyer and that's why it seems that the obligation of the prosecutor, the A.U.S.A., to do justice transcends his or her obligations as a U.S. Attorney.

MR. SAUNDERS

The difficulty with that comment is that if this particular A.U.S.A. says "I'm not going to do it," there will be another A.U.S.A. who will and then what have you accomplished? I'm not talking about your personal obligation, I'm talking about institutional justice. What have we accomplished in terms of the system by simply replacing one A.U.S.A. with another?

MR. CARDOZO

Watergate highlights that they really did accomplish something significant when two or three people resigned.

MR. SAUNDERS

Publicly, and the whole world knew it. Would this Assistant U.S. Attorney be permitted to say I'm resigning because the Attorney General told me to indict someone and I didn't think she should be indicted? No. So you may not have accomplished anything by simply changing one person for another. In terms of the system, I think you all may agree political interests can inform the work of the government lawyer. I want to thank all of you for a very lively and thought-provoking discussion.

PANEL II – WHO IS THE CLIENT OF THE GOVERNMENT LAWYER? SHOULD LAWYERS IN GOVERNMENT SERVICE CONSIDER THE PUBLIC INTEREST IN THEIR PRACTICE?

MR. SAUNDERS

Good afternoon again and welcome to the second of three panel discussions on the subject of lawyer independence for lawyers in government service. Before I introduce the members of this panel, just a bit of housekeeping. Two of the members of Panel 3 have told us unfortunately they will not make it today. After we complete the discussion on the topics that have been assigned to that panel, I'm going to turn the discussion over to those of you in the audience to see if we can get a little bit of dialogue before the appointed hour of 3:30 p.m.

I'm pleased to welcome a number of distinguished government lawyers with a variety of backgrounds. To my immediate right is Associate Justice Randall Eng of the Appellate Division, Second Department New York. Justice Eng is a member of the Judicial Institute, he is a graduate of SUNY Buffalo and St. John's Law School and, near and dear to my heart, he was a colonel in the Judge Advocate General's Corps of the New York State Army National Guard.

To the immediate right of Justice Eng is Richard Rifkin, who is currently Special Counsel to the New York State Bar Association, but prior to that was Special Counsel to Governor Paterson and also to Governor Spitzer. There are very few people who know more about the issues relating to government lawyers in public service than Richard Rifkin. He graduated from Washington and Jefferson College and graduated with a law degree from Yale.

To his right is Daniel Alonso. A graduate of Cornell and NYU Law School, he was a partner at the Kaye Scholer law firm in NYC. He is currently the Chief Assistant D.A. to Cyrus Vance in Manhattan. Prior to that he was an Assistant U.S. Attorney.

To Dan's right is Hank Greenberg. Hank is a member of the Institute and has been for a number of years. He is currently counsel to the Attorney General, who is the incoming Governor of the State of New York. Prior to that he was with the Greenberg Traurig firm. He graduated from the University of Chicago and Syracuse University College of Law.

Next to Hank is Barry Ginsberg, currently the Executive Director and General Counsel of the New York State Commission on Public Integrity. He was educated at SUNY Buffalo and served as an Assistant District Attorney to Robert Morgenthau in New York. Barry has been affiliated in one form or another with the NY State Commission on Public Integrity for a number of years.

And to Barry's right is Peter Kiernan. Peter currently serves as Counsel to Governor Paterson, prior to that he was counsel to the Edwards Angell Palmer & Dodge law firm. He's a graduate of Cornell University Law School and the Kennedy School of Government at Harvard.

Join me in welcoming the members to this panel. The topics to be discussed by this panel are core issues of professionalism for the government lawyer. It was a topic that was alluded to a bit this morning, but I would like to ask the panelists here today to elaborate on the issue. The question to be considered is, "Who is the client of the government lawyers?" That is a question that has defied description, as far as I can tell, for many, many years. The ABA Model Rules of Professional Conduct basically punt on the issue as to who is the client of the government lawyer. The commentary to ABA Rule 1.13 says "the duty defend in this rule applies to

governmental organizations," so far so good. Then it says, "Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these rules." Thank you very much to the American Bar Association. When John Ashcroft was appointed as Attorney General of the United States, he was asked, "Is your job attorney for the President or attorney for the country?" His answer was "Yes." Fritz Schwarz, who we mentioned earlier this morning, who had been the Corporation Counsel for the City of New York and also a partner of mine, said that for all government lawyers the answer is always "It seems to me." And I should say whenever anyone says "It seems to me," that means he's not entirely sure. He says, for all government lawyers, the answer is "It seems to me" that the overall government entity that lawyer serves is either the United States or for the Corporation Counsel, the City. So he's saying that the client of the Corporation Counsel is the City. It's quite clear when we're talking about a prosecutor there is a different obligation, as we mentioned this morning. The United States Supreme Court says in the Berger case, "A prosecutor is the representative not of an ordinary party to a controversy but of a sovereign whose obligation is to govern impartially that is as compelling as its obligation to govern." So, Justice Eng, who is the client for the lawyer in government service?

JUSTICE RANDALL T. ENG
SUPREME COURT, APPELLATE DIVISION,
SECOND DEPARTMENT

The answer is "Yes". I have been on the bench for 27 years. However, before that I was indeed a government lawyer. Even over the course of the 27 years I have been on the bench, I still function in some part as a government lawyer and I'll get to that in just a few moments. Seeing the presence of Dan Alonso from the NY County DA's Office, I'm going to defer any comments regarding the DA to his wise observations because of course those observations are current and they consider the perspective of a very large, and perhaps the most prominent, DA's office in the country. I'm going to focus my remarks on my two experiences as the government attorney, that is as the Inspector General of the NYC Department of Corrections and then as the Judge Advocate of the U.S. National Guard. First, I'm going to be speaking about the Inspector General's program from the perspective of several decades ago. The program has undergone some changes and I don't profess to know all of its current nuances, but let me give you an idea of what I dealt with decades ago. I want to share some of the things I'm saying without making any associations with any persons who may have come into office at a given time. I'm just going to make reference for the purpose of our discussions. The Inspector General at the time I was in office had an obligation to the commissioner of the agency and also a reporting obligation to the commissioner of Investigation and the primary focus of the Inspector General was to deal with issues of employee fraud, waste and abuse. I was Inspector General with the NYC Board of Corrections and that was a volatile agency. We all know that over the years it's had many challenges. It's probably the one agency where not only do you have to be mindful of what's going on with the thousands of employees that are in the agency but also with the population. At that time there were 20,000 inmates who at anytime could undo the careers of everyone. The point I'm trying to make is, in the Corrections Department, I found it was hard to target who was the client — who was the client in the capacity as a government lawyer. Now, of course, the

City of New York should be the client, and, in all respects, was the primary client. However, the agency received information and advice from a general counsel so I had an ambiguous role. I was an insider/outsider in that regard. And, in that regard, it was necessary for me to departmentalize and isolate my advice and decision making in order to achieve the purpose of working in the best interest of the City. Just to give you a demonstration, I received an anonymous bit of information that the academy was too easy and that it was too easy for the candidates to get through the course of instruction. We know that it was difficult to recruit officers and retain officers so I opened up an investigation. Upon opening an investigation, the passage rate started to decline precipitously — 95% were passing — to a far lower percentage. Now, by continuing this investigation, was it in the best interest of the City? A substantial investment was made regarding the recruiting of the potential candidates. So again, just an example of the kind of thing you have to consider when you're in a role where you have a responsibility to a sovereign and you have a responsibility to multiple agencies of the primary client.

That is a dilemma I have faced in other situations and it's a dilemma that continues. How far do you take a mandate? How far do you take it in an agency as volatile as Corrections that has an impact on the State and City? You open an investigation anywhere, you could develop an issue anytime, use of overtime, harsh treatment of inmates, etc., etc. But again the question is how far do you take it? Where does your responsibility begin, where does it end? I don't profess that I have the answer to the dilemma, but it's something that commands everyone's attention and consideration — the need to balance.

Very quickly going on to my National Guard experience. As a reservist, I was able to continue serving the reserve component of the NY Army National Guard while a judge, which is one of the few constitutional privileges a judge has. I have a career that spans over 30 years. But consider this, as a State Judge Advocate, you are advising a senior military advisor. The Acting General is the commanding general of the NY Army National Guard, a reserve component of the Army. Now you have a federal mission and a state mission. Not only do you have one sovereign, you have two sovereigns and the two are not always compatible. For example, there was the use of federal assets — where do you draw the line regarding the use of federal assets to support a state mission? All of these considerations had to be dealt with in that position.

Again the lesson I learned from that is that you have to remain compartmentalized. You have to recognize in that situation who your client is at a given moment in order to give the appropriate and the correct legal advice. A position like that probably doesn't exist in too many government circles. But it is something a government attorney may have to face, it is this kind of model/structure.

I say that the answer to "who is the client" is not an answer that is 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.

RICHARD RIFKIN
SPECIAL COUNSEL, NEW YORK STATE BAR ASSOCIATION

MR. RIFKIN

First of all, you said the ABA wasn't very successful in answering the question. Since you did that, I thought of the City Bar, because the City Bar put out an opinion recently about 3-4 years ago addressing the ethical responsibility of the government lawyer on the question "Who is the client?" as a matter of law that should be considered. I think everyone tries to wrestle with it. In a sense we can't come to a satisfactory answer as a theoretical concept and yet every single lawyer who has ever worked for the government knows who is his or her client and you're not sure how you know it, but you know it.

The reason you know is that whatever the theoretical may have been, as you do your job on a day to day basis, you have to know who you represent, who you report to, with whom you have attorney/client privilege, from whom do you take instruction. As you know, under the ethical rule the lawyer has to try and carry out the objectives of the client, who tells you what objectives are to be implemented. In a very practical sense, if you're a lawyer, you're a litigator, and there is a proposed settlement on the table, you've got to go to your client to determine whether or not this is a settlement that the client wishes to enter into. So the reality is that, while this is a fascinating theoretical thing, it's one that is answered in a very practical way on a day to day basis and it may differ from government agency to government agency. For example, in New York, each agency has its own counsel, so presumably if you're agency counsel you feel that it is your obligation to your commission. But if you get down to your town and village government in the state there will be one town attorney, one village counsel who represents all of the agencies in that local government, and you will have a different relationship to each one. In a sense, the answer to the question is a very practical one. For a lawyer, you carry out your day to day function when you take instruction, who you advise — the responsibilities sort of lay themselves out, sometimes without really thinking of the theoretical concept. But no lawyer can function without knowing who the client is.

MR. SAUNDERS

Well, let me offer a comment made by Professor Lawry at Case Western Reserve Law School. He says "Who is the client? is the wrong question to ask." The unique nature of government lawyers' professional responsibility is that there is an unstated assumption that the answer to who is the client will determine the answer to many of the questions concerning ethical conduct. He says this is not true and these are questions that really should be asked. First, as you just said, at whose direction should I act and on what subject? Second, whose confidences shall I respect and with whom may I further discuss those conflicts? Third, what role does my own judgment play in determining what I have to do? Do you agree with him?

MR. RIFKIN

Well, I certainly agree with him that you have to make all those determinations for those reasons. But, as I said, for whom do you answer; from whom do you take instruction, and

you've got to make a judgment. Very often, the institutional judgment has been made for you because you don't suddenly come into a government that is unstructured. We come in, in almost every instance, to a highly structured government and you know whom your predecessor reported to and that there is a certain assumption that you will have the same reporting obligation. Certainly you can examine it. That's one of the benefits of the electoral system we have. Once a new administration comes in and new individuals are appointed, they can reexamine their role, but fundamentally you have to have an understanding, for all the reasons we talked about, of at least having a sense as to who your client is.

MR. SAUNDERS

Dan, let me give you a hypothetical. Let's assume you're a prosecutor in the County of Oz, and the County Executive, who is an elected official, runs a campaign on the following platform: If I am elected, all persons 16 years of age and older in my county will be prosecuted as adults. That is my campaign promise and that is what I'm elected to do. You're the DA. The statutes appear to be giving you discretion to decide whether to charge a 16-year-old as an adult or as a juvenile, but the elected official in that county ran on and was elected on a platform that says all persons 16 years old or older will be prosecuted as adults.

DANIEL ALONSO
CHIEF ASSISTANT DISTRICT ATTORNEY,
NEW YORK COUNTY

I hate to say that's an easy question but it kind of is. Perhaps that elected official should have checked what his jurisdiction was going to be before he was elected.

MR. SAUNDERS

You're an appointed DA.

MR. ALONSO

Appointed by the County Executive?

MR. SAUNDERS

Yes.

MR. ALONSO

Well that's a new circumstance for me.

MR. SAUNDERS

You can't wiggle out of this.

MR. ALONSO

Well, I don't know of any DA appointed by the County Executive, but I'll take that as being a criminal analog to my Cardozo rule in NY. I still think you have the ethical obligation under the Rules of Professional Conduct 3.8. Something tells me it's my decision under the statute and if the law is as we have in the New York Criminal Procedure Law today, then out of principle I have to tell the County Executive it's my decision, and not his, and possibly, I'll be fired.

MR. SAUNDERS

This may not be exactly the right hypothetical. What I want to tease out in the discussion is, are there certain issues that public officials are entitled to campaign on and have as part of their platform when elected. Are they entitled to do what they can to carry out that platform assuming that it is in bounds of the law? My question to you then is, as a government lawyer, what is your obligation to help the elected official carry out his or her platform?

MR. ALONSO

I don't want to wiggle out of this and I'm not going to, but I will tell you I think there is probably a really good reason why it doesn't work this way — why a local executive doesn't appoint a local prosecutor. I don't think it happens in New Jersey, for example, where the county prosecutor is appointed and that is because there is a real and legitimate separation of those roles. When you are talking about a President running on a platform stating that the Attorney General is going to direct all U.S. Attorneys to prosecute certain crimes in a particular way. While one policy is perfectly appropriate, one would imagine that before the Attorney General takes that job he or she would be aware of what the rule will be. There is nothing illegal about an executive ordering an appointed prosecutor to carry out a certain policy in certain cases. The individual prosecutor just has to decide whether or not he or she feels ethically obligated to do it or not.

MR. SAUNDERS

Hank, let's take this out of the realm of prosecutors and ask you the same question, as the government lawyer. In rendering advice, how do you take into account the political platform of the elected official for whom the government lawyer works?

HENRY M. GREENBERG
COUNSEL TO NEW YORK STATE ATTORNEY GENERAL

Well, I think it's important to distinguish between the appointed and elected official. The government attorney's obligation is to provide helpful and meaningful counsel to the client. The function or purpose of the lawyer is to counsel the client and let him or her know what the limits of the law are, in addition to that to provide the best sense of what is the right policy outcome. And at that juncture, it's the client's determination to make a judgment and assume it's

consistent with the law. Then, I think, the lawyer has performed his or her responsibility. I think that is the right one. 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. The tricky question, of course, is when the judgment/policy decision comes about and no one really expected it, and the attorney is working for that client. I think the issue remains the same. It's his prerogative to make the decision, right or wrong, good or bad, as long as it's consistent with the law.

MR. SAUNDERS

Barry Ginsberg, we refer to the discussion over the past few years as to what I'll call, for lack of a better word, "the torture memos," where government lawyers were advising government officials about the circumstances that they couldn't engage in, certain kinds of activities involving detainees. I want to quote something to you from Jack Goldsmith, the head of the Office of Legal Counsel in the Department of Justice who left and went to Harvard and wrote a book with a subject entitled "The Terror Presidency." He quotes Jefferson quite a bit and he quoted "a leader's first duty is to protect the country, not to follow the law," but he says the leader who disregards the law should so do publicly by throwing himself at the mercy of Congress so they can decide whether the emergency was severe enough to warrant extralegal action. Do you agree?

BARRY GINSBERG
EXECUTIVE DIRECTOR,
NEW YORK STATE COMMISSION ON PUBLIC INTEGRITY

I don't. In the Second Circuit opinion that discusses attorney-client privilege, the court points to the fact that a decision to apply privilege in that case may not lead to what one might consider to be the best result in the particular case. In other words, the Governor of Connecticut might escape a bribery conviction, which is an issue in the Second Circuit Case, but the big picture is what you have to look at. The failure to follow the rule of law in any circumstance ultimately doesn't serve the public good. I have not been in a position of making a life-and-death decision, so that's easy for me to say.

MR. SAUNDERS

But Jefferson's proposition is that it is the leader's first duty is to protect the country not to follow the law.

MR. GINSBERG

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. I think if you say that there is an exception, there are times when it's debated, for example during civil war, you have the

authority to do that. You could end up in a circumstance that you've lost the reason for existence.

MR. SAUNDERS

Peter Kiernan, we heard discussion this morning about certain "up the ladder" reporting obligations and, in fact, what current rules require for conduct inside cooperate entities. We also heard this morning that there is no obligation except in very limited circumstances, Seth Rosner can give us the precise language, except for those very limited circumstances, there is no obligation to report outside the entity. The question for you then is if the client of the government lawyer is the larger public interest, and not the individual agency involved — first, whether you agree with that or not? — but should there be in the public interest, an obligation on the part of the government lawyer, under some circumstance, to report outside of the government, for example, to the legislature, to the media? Should there be an obligation, if you take the public interest into consideration, in going further than we in private practice would be required to do?

PETER KIERNAN
COUNSEL TO NEW YORK STATE GOVERNOR

I don't believe so, although I could concoct circumstances where it would be warranted, but I think it would be rather extreme circumstances. 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 — these hypotheticals have so many dimensions it's hard to draw conclusions — the a general notion is that you decide within the apparatus you're serving.

MR. SAUNDERS

This morning we talked about Jack Weinstein, who is now a Federal judge, who also was County Attorney in Nassau County. When he was County Attorney, he said "government lawyers should act as guardians of public interest. The government lawyer must be one of the chief whistleblowers of government".

MR. KIERNAN

I think those ideals that should be adhered to. But when you say the lawyer should be a chief whistleblower, to whom do you blow the whistle? If you blow a whistle in the first instance to someone who is going to hear you out thoroughly and with whom you have a relationship of trust, that's how you would exercise that relationship. Now, if it falls upon deaf

ears or ears that reject it and the lawyer is confident of those facts and the significance of those facts, of course, you would take it to another party.

MR. ALONSO

Michael and Peter referred to whistleblower statutes, and if there is criminal conduct perhaps we might have an obligation to report to a third party. This morning, there was consensus among the municipal lawyers that the attorney-client privilege is an important value. I think the Suffolk County Attorney said it's the same as if you're in private practice. I gather you have privilege as well with the executive chamber, and so I'm wondering why nobody has directly answered the question. Does a whistleblower statute trump the attorney-client privilege? I mean, if somebody, like the governor, comes to you, or the mayor comes to you and says, "I took at bribe, please help me, and give legal advice," does the public interest allow you to then violate the privilege?

MR. SAUNDERS

Before Peter answers that, let me give you a situation detailed in a Supreme Court decision. If the Act the Attorney General seeks to enforce is in violation of the federal constitution, then the officer comes in to conflict with the superior authority of that constitution and is, in that case, stripped of his official or representative character and is subject to the consequences of his individual conduct. It suggests to me that the court is saying that there is no protection of attorney-client privilege under those circumstances because the actors are acting not in accordance with a superior authority, in this case, the constitution.

MR. RIFKIN

Obviously, this is my own view, but the Supreme Court is reaching for a reason to end up with the result that it did. Let me speak publicly about this idea because it concerns me as a government lawyer. 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? Now I'm supposed to sit there and carry out their functions? Would I say to myself, "I'm Richard Rifkin, and I'm going to decide what is the public interest and then I'm going to proceed in that matter?" Isn't there a certain arrogance in saying that on the part of any individual government lawyer, whoever she or he may be?

MR. ALONSO

But that doesn't answer the whole question. In my office, that applies to any individual Assistant DA who can use their judgment everyday to say what's in the public interest, what's justice. But, at the end of the day, there is only one person who is charged by law with carrying that out and so we coordinate our own individual judgment to that one elected official.

MR. SAUNDERS

Barry, some people have said that for government lawyers there should be some kind of clearinghouse, an "office of ethics" where government lawyers can go to get confidential advice as to how to deal with these thorny problems. What do you say to that?

MR. GINSBERG

We have the Commission on Public Integrity.

MR. SAUNDERS

That's why I asked you.

MR. GINSBERG

I figured that. I think it's an unfortunate game, in some aspects. The Commission on Public Integrity enforces a few statutes sections 73, 73A and 74 of the Public Officers Law and then you have the lobbyists. So although we view ourselves as being available to assist state officials in making ethical decisions, at the end of the day, our jurisdiction is to apply these few statutes. So we don't, for example, give advice often "on the one hand this is the answer in the Public Officers Law, but the answer under the Code of Professional Responsibility might well be different." We were talking before about this obligation that we have and is true that a lawyer can report to the Inspector General for crimes that are committed. But if you come across that information through a privileged conversation, how do you relate or resolve that with your conflicting obligation as an attorney who holds public office? We can't answer those questions, we're not authorized to. Maybe we should be. Maybe some thought would be given that authority.

JUSTICE ENG

The judiciary has a subset of government lawyers as a resource that I can say works — that is the Advisory Committee on Judicial Ethics. The Advisory Committee on Judicial Ethics is meant to give judges the resources regarding the propriety of certain conduct that judges may confront. Now, it's structured and meant to deal proactively with the Commission on Judicial Conduct and, that is, if a judge has a problem regarding ethical issues, the judge may submit the issue to the Committee. The Committee will then consider the issue and vote on it and prepare an advisory letter or advisory opinion. If the judge follows the advice and guidance of the Committee, there is a presumption that the judge is acting ethically with regard to the conduct in question. This structure has been in place for a period of time and is a useful tool for judges now.

MR. GINSBERG

The same would be true with respect to either the Commission members or their staff. If the person has been open and honest in giving the facts and follows the advice given he is held harmless if it turns out, for example, in case of a staff letter, the Commission disagrees with what the staff said. But we do not have statutory authority to resolve professional ethics issues.

MR. GREENBERG

Being a government attorney is in many ways a more challenging position than working in the private sector. I spent several years as a partner in a law firm and let me give you an example. One difference that government attorneys, particularly litigators in the offices of the Corporation Counsel and Attorney General deal with in a large number of cases that one does not often encounter in the private sector is representing multiple clients in litigation. In the private sector, particularly in larger firms, it is an infrequent occurrence that one law firm represents all of the defendants. In the rare case that it would happen, the amount of hand wringing, ethical clearances and waivers from clients one would have to get to venture on such a course of action is prohibitive. It is therefore standard for litigation that multiple defendants have multiple attorneys in private practice. 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. The question of "who is the client" and Richard's point is a good one, "you know who the client is" — you are representing multiple agencies and multiple clients who will have their different views about what position the State will take in litigation, it seems to be one of the key ingredients to be successful as an attorney in the public sector is to have the capacity to come up with — which is what started this whole thing — an answer to the question of "who is the client?" You have the word of the Bar Association that ultimately provided no satisfactory real test because there is none. Welcome to the real world we're in, where Richard's point is right, you've got to figure that out. 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 that raises privilege issues, but this all sort of goes to point out that it is very challenging, it is very complicated. The government attorney it seems to me has a much more complex, from an ethical point of view, task than the attorney in private practice to the extent that somebody has a proposal creating a body that can counsel government attorney on ethical issues, it is an interesting thing. Obviously, government attorneys live by the same rules of professional responsibility as attorneys in the private sector. But, oftentimes, those rules have to be applied differently, as the circumstances the government attorney faces are different.

MR. RIFKIN

One of the very important differences between the government attorney and the private sector is that, in the public sector the attorney general represents the clients and the client has the attorney general representing that client, and they can't walk away from each other and there's tension built in there. I think it's a healthy institutional tension and in the private sector, obviously, the client can always go and find another attorney. The attorney gets fed up with the client, the attorney can tell the client, "go get another attorney." That doesn't happen in the public sector, so it sort of faces the type of dialogue that Hank was talking about and it is a very, very different dynamic.

MR. SAUNDERS

In the few minutes that we have remaining for this panel, I'm going to change the subject a little bit. I'm going to give you another one of Professor Green's hypotheticals. A U.S. Attorney decides that political corruption cases are a priority and he convicts a lobbyist and obtains guilty pleas from the lobbyist and a Republican congressman. He indicts several contributors to Republican causes. No Democrats have been charged. The U.S. Attorney is a Republican and the A.U.S.A. in charge of political corruption cases is a Democrat. The prosecutions have been very aggressive and expansive. After talking to the Republican White House, the Attorney General talks to the U.S. Attorney and says the White House is disappointed that the Department of Justice has been targeting Republicans and the Attorney General is concerned that no Democrats have been indicted. He asks the U.S. Attorney to look into whether his subordinates have been overzealous or have engaged in prosecutorial misconduct. His concerns may be legitimate. How should they proceed?

MR. ALONSO

Am I the token prosecutor?

MR. SAUNDERS

You're the token prosecutor.

MR. ALONSO

There is no legitimate role in considering whether someone is a Democrat or Republican in deciding whether to prosecute a particular person in a particular case. So we start with that proposition, I think, that's generally accepted after the U.S. Attorney scandal and that U.S. Attorney is obligated to stand up to political pressure. That being said, your hypothetical has the Attorney General of the United States expressing concern, from whatever source he got it, whether or not a prosecution has been appropriate. It seems to me that there is, at least, a limited appropriate role, in the absence of actual evidence of an ethical violation, for the U.S. Attorney, who, I assume, has been conferencing this case regularly, he may be able to answer the question

off the top of his head and say, "You know that's a good question, Mr. Attorney General. I have been following this. I assure you this has been done on the merits and officially."

MR. SAUNDERS

Well, if you were the assistant in this hypothetical, how would you react to that kind of inquiry from the U.S. Attorney and the Attorney General?

MR. ALONSO

The U.S. Attorney has to exercise his role to protect the assistant from political pressure, and so I would hope that the U.S. Attorney would make that inquiry, if he makes it all. But the U.S. Attorney may not make that inquiry at all and the U.S. Attorney might conference the case to ask how it's going, ask what subjects are involved, and then, if he's satisfied that there is nothing, he just goes back to the Attorney General and says, "Ok, thank you very much, butt out."

MR. SAUNDERS

Is it a legitimate request for the Attorney General to make?

MR. ALONSO

I would say it's legitimate for the Attorney General to ask the question, beyond that it would be very delicate, beyond that it would have to be a very gentle inquiry.

MR. RIFKIN

Well, I think of it differently in the prosecutorial and non-prosecutorial system and Dan can speak for prosecutors who have special obligations and the obligation to do justice as well. 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.

MR. ALONSO

I just want to clarify, the prosecutorial context I believe it to be, and I think it's generally accepted in the Justice Department, to be inappropriate to inject political considerations in a particular prosecution. If it is public corruption in Albany or human trafficking in Texas and those are things where it is legitimate for people to speak out, and, say, "Hey, the Justice Department should do something about this."

MR. SAUNDERS

My question is: Is it appropriate for the Attorney General, who works for elected officials, to ask a prosecutor, "Why hasn't any Democrat been indicted?" Is that a legitimate question?

MR. ALONSO

Whether it is a legitimate concern depends on context, if there is, at least, a suggestion of impropriety.

MR. SAUNDERS

All you have is five years, no Democrats have been indicted and only Republicans have. That's all you know.

MR. ALONSO

The answer I would give if I was Attorney General is, "I assure you nothing is wrong" or I would ask the U.S. Attorney, if I legitimately think there is an issue, to assure me that this is being called on merits. Hopefully, the U.S. Attorney would be able to do that and that would be the end of it.

MR. SAUNDERS

Peter would that be a legitimate question in your book?

MR. KIERNAN

Absolutely legitimate, given human nature, so if there were evidence of political corruption, it seems logical to explore delicately. Obviously that conversation can go wrong very quickly, but the initial question seems to perfectly appropriate.

MR. ALONSO

Let me give you an example. Under the Bush Administration, the U.S. Attorney in Maryland told his staff that he wanted no fewer than three public corruption indictments before Election Day. I don't remember if he said they had to be Democrats, I believe they were, but they were going to be anyway. That's illegitimate — that is a political consideration that is not appropriate for a U.S. Attorney, or even a District Attorney who is an elected official, to take. That's the difference, but to question whether decisions are being made with improper consideration, that's okay.

MR. SAUNDERS

If you're the Assistant U.S. Attorney and you get an inquiry from the Attorney General of the United States, who just consulted with the White House, and the question is why haven't you indicted any Democrats? What are you going to do?

MR. RIFKIN

You're the A.U.S.A. and you're getting a call directly from the White House?

MR. SAUNDERS

U.S. Attorney comes to you and says, "I just got a call from the Attorney General, who consulted with the White House, and they want to know why you haven't indicted any Democrats."

MR. ALONSO

I think that the attorney should be protected and that conversation shouldn't have happened.

MR. GREENBERG

I spent five years in the Justice Department doing public corruption cases in the U.S. Attorney's office. It always struck me as a prudent practice that part of the job of the U.S. Attorney is to supervise, which includes shielding line A.U.S.A.s from those kind of questions, not because necessarily the initial request may or may not be appropriate but because it could so easily be misinterpreted and make their job ever so much more difficult. So I agree with Dan that the U.S. Attorney has really no business having that conversation with the Assistant, unless they have some cause or reason to believe something is missing in that organization.

MR. SAUNDERS

So, basically what you're saying is even though the President is an elected official and even though the Attorney General is an appointed by the President, even though they may have a legitimate inquiry about whether or not there has been a political motivation in bringing these cases, that conversation never gets to the line prosecutor?

MR. ALONSO

Yes, Hank's right. Though there is no rule against it, certainly the line prosecutor is appointed by the Attorney General and can be fired, but the practice of the Justice Department and the culture has evolved so that conversation should never occur.

MR. SAUNDERS

So, in a very real sense, the A.U.S.A. is using his or her own view of what the public interest is and is shielded in doing so from any inquiry by his or her supervisors?

MR. RIFKIN

I don't think so. That's simply being a good manager of an office and knowing how to handle a difficult situation. Presumably, the U.S. Attorney has significant knowledge of what is going on in his or her office, and it's based upon that knowledge that the person who heads the office can respond to the inquiry.

PANEL III – WHAT ARE THE CHALLENGES TO THE PROFESSIONALISM OF GOVERNMENT LAWYERS? TO WHAT EXTENT DO THE LACK OF CONFIDENTIALITY AND EXISTENCE OF MULTIPLE CLIENTS, OFTEN WITH DIFFERENT INTERESTS, IMPACT THE OBSERVANCE AND PROMOTION OF PROFESSIONALISM?

MR. SAUNDERS

What we thought we would cover for the final discussion are some nuts and bolts — getting away from the theoretical challenges that we talked about earlier today and discuss some of the practical challenges the government lawyers face to their professionalism. In particular, we will address the question of confidentiality when lawyers advise a public entity, especially public legislatures, like school boards, or county legislatures, when the obligation to keep their advice confidential may not be possible. Let me first ask John Gross, who as I said has spent most of his career advising school boards, how he deals with challenges to professionalism, in general, and confidentially concerns, specifically.

JOHN GROSS

INGERMAN SMITH, LLP

I think, in measure, just to set the table, there are two statutes that indirectly or directly impact the whole issue of attorney confidentiality in the school board — and that is the open meetings law and pre-information. Under the open meetings law, the direction from the legislature is that the conduct of business occur in public, with the exception of very discrete areas where the board can go into executive session, generally it is bargaining, litigation and real estate matters where the price of the transaction might be affected if the information becomes public, personnel matters and issues of public safety. And the burden is on local entity to correctly choose and support the exercise of the right to go into executive session — the penchant is for transparency at this very low level of government. I am representing a private corporation, giving them advice on a contractual or commercial transaction, I generally must do that in public because the client cannot operate in executive session on those matters, and my advice as counsel, as difficult as it often is, becomes public unless I can fit into those discrete categories. The Commissioner of Education was confronted with a case that dealt with this confidentiality issue and I think in response there was an overreaction of local school boards, as well as New York State entity that opines on open meeting issues. I was confronted with a situation, actually one of my partners was, where advice was being given to the school board that had to do with a discharge of an employee that was being reported by one of the board members, who happened to be the president. After the meeting, that board member turned over this confidential conversation to the attorney of the employee. A motion was made to remove that board member and the commissioner, while he chose not to rule in that instance, said that any breach of confidentiality in that context would be discussed in executive session and would be grounds for removal of the school board member. We have to operate around this very difficult statute. My last point is that open meetings issues have become the weapons of choice of board members fighting with each other or the community, or a section of the community is aggravated

with the board so there is a hyper-focus on executive sessions and when counsel can advise in that context or not, so we are under tremendous scrutiny in this particular area of the law.

MR. SAUNDERS

So there are many circumstances under where you have to give legal advice knowing that it is not going to be kept confidential.

MR. GROSS

In public, unless it falls into one of these discrete categories. Now, if a school board member reveals confidential information that is given in an executive session, the remedy is to remove the board member. However, another example is collective bargaining. There isn't a collective bargaining session that I'm not confronted with where the representative is saying, "I know you got 3%, a board member told me. Well, that's something very interesting, but you're going to have to give that 3% to me." The politics with a small "p" is ramped at the school board level, there are constant leaks notwithstanding the rule of the Commissioner and that's just something one has to confront and deal with.

MARIE E. KNAPP
GERMANO & CAHILL, P.C.

The most visible position I held was counsel to Suffolk County Legislature. My views were very different. As a single lawyer, I represented 18 elected officials — the even number will give you an idea of this sort of tension. The Suffolk County Legislature actually was 18 elected officials, two different parties and that is being generous. Eleven were Republicans and seven were Democrats, and on any given day they would form a coalition that was not always centered around their political party. So your idea of providing attorney advice, confidential advice, opinions, was problematic on the very best day. So my challenge, unlike John's, was to provide sound legal advice, given in the absence of the politics and that was not always a challenge that I relished.

STEPHEN BROOKS
GENERAL COUNSEL,
THE IOLA FUND OF THE STATE OF NEW YORK

The IOLA Fund is governed by the Board of Trustees, appointed by the Governor, the Chief Judge and each of the four leaders of the State Legislature. The statute fairly provides that the Board is governed exclusively by that Board of Trustees although we are, as my paycheck reads New York State, dispensing appropriations made to IOLA by the Legislature and the Governor. The best way to describe this is an entity within the State government. That means we are subject to the Freedom of Information law and subject to the public meeting laws. We award grants annually to an average 70 Legal Aid associations and societies around the State who always have low or insufficient budgets. When we make grant decisions, I provide advice to the Board of Trustees. Today that could mean shutting it down electronically because under

Governor Spitzer's early executive order you have to televise and put these meetings on the web. I have been benefitted in great measure by the Committee on Open Government particularly by Bob Freedman and Camille Jobin-Davis. Once I came to what was, I felt, the right answer was for my client, I would then call the Committee on Open Government and get Bob and Camille on the phone and say, "This is what I got.... what do you think?" In every instance their advice was valuable, it came as close as they felt comfortable in being specific, but let me say it was in every instance enough that gave me the confidence to go forward with that decision. I am the public information office, I am the entire legal department, I am the ethics officer and I am other things at the agency, so I handle the Freedom of Information Act requests. We get them from law enforcement agents looking for attorneys' bank accounts, and then we get them from the general public who asks for all bank records going back to 1983 for all 200 banks that have 50,000 IOLA accounts to report to monthly. I have been able to get outstanding advice from those folks and I can say Paul, that on these issues of confidentiality, disclosure, what I need to handle under the statutes of the State of New York I have never felt as though I was in a position where I was worried about my answer and it has to do with mentoring advice and guidance I received from various state agencies.

MR. SAUNDERS

Well, let me push back on that a little bit. We have all been involved in situations in which boards go into executive session and when that happens the employees have been excluded, the press is excluded, even the lawyer. Now, in my experience whenever that happens, the discussion in the executive session is much more robust, much more candid and frank than the discussion is in the public session. If one of the hallmarks of lawyer professionalism is the ability to give confidential legal advice to one's client, how can you do that in an open setting? How can you give true honest impartial, frank, candid legal advice to your client when it's open to the public?

MR. GROSS

Major problem, very often we will set the agenda of a meeting with the superintendent of schools, with the assistant superintendent and have a robust conversation, which, of course, is not public. Following that, we will have an opinion letter which very often can be "Foiled" if it doesn't fall into one of those categories. But the nitty-gritty conversation typically occurs between the chief executive and his assistant and that's private.

MR. SAUNDERS

And that's private?

MR. GROSS

It only becomes public when it is governed by the open meetings law and the Board of Education itself. My experience with Bob Freedman's office, and he is a very fine fellow and incredibly responsible, however, we tend to often be at odds with his expansive interpretation,

so, in those circumstances, where we are trying to get an issue before the Board, we will spend an awful lot of time looking at his committee opinions, which have been coming out for 15-20 years, and try to work around them. We will endeavor to reach a legal argument that permits us to do that in executive session.

MR. SAUNDERS

Let me ask the same question to Maria. Sounds 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?

MS. KNAPP

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. Just to speak a little more about something John said, in the past, I have represented smaller legislative bodies, town boards, in particularly, 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. That was not my experience obviously with the Suffolk County Legislature where everything was conducted in a public manner.

MR. SAUNDERS

Let me ask you a related question before we throw this out to the audience for questions. The related question is whether or not you were not in fact representing people with different interests and whether or not that represented a conflict for you.

MS. KNAPP

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.

MR. GROSS

We actually have on retainer an ethics counsel and when a lot of these issues arise, we get a letter or at least get a short e-mail, which is an additional expense but well-taken. But we are so frequently challenged after we give public advice or are challenged by a board member, who makes a presentation to the executive session, who then challenges the right to go to the executive session and very often we have to backup with some kind of ethical opinion.

MR. SAUNDERS

Well, considering what we heard this morning, it seems to be the case that in the Suffolk County Legislature we have a partisan split, and the question of saying I represent the entity of the Legislature because you have a partisan split basically right down the middle, it is not really a healthy analysis.

MS. KNAPP

As I say, I have had at least four or five different positions representing either the chief executive officer, the elective officials or boards of some kind. Prior to going to Legislature, it was a unique experience and I can't tell you that I have a good answer to that question. Certainly, the stock answer is you represent the entity, to the extent the entity represents 10 votes that change on virtually every resolution. So the best I could do in a public setting was provide a very middle of the road legal opinion, and then, quite frankly I probably shouldn't admit it to this group but I have said it publicly often enough, with 10 votes and a county executive's signature you have made law until a judge sitting in a court of common jurisdiction sets it aside. Because there were times when that was the only legal advice I could give because the legislators were at such odds, there was no way I as a lawyer in a public forum could give fuller advice.

MR. SAUNDERS

Alright, let me sum up with the audience and repeat the question.

SPEAKER IN AUDIENCE

If I could make two observations, I work with the famous or infamous Robert Freedman. There is a provision in the open meeting law that says you can have a confidential discussion with your client — section 108 — and it says that when matters come under state or federal law, it's called a gathering executive from your meeting. So there are occasions when you can speak to your client privately without entering into executive session. But my comment is, "Who is the client?" That is a question we as the Committee on Open Government now — we get board members who say, "Listen, who is the client?" "Can I waive the privilege or do I have to go back to the Board to waive the privilege?" And, in our arena, our meeting slot arena, I think the answer is clear that the client is the Board, although the individual people have the physical ability to waive the privilege every day, the client is the Board. The client is the one that has the authority to waive the privilege.

MR. SAUNDERS

Just for the recording, the first comment was the open meetings law has exceptions that prevent certain privileged communications to take place under certain circumstances. The second comment, "Who is the client?", the point was made that in the Open Meetings Law context it was clear that the client is the Board, then we dropped the attorney-client privilege and the comment was made that is was up to the Board to decide in which circumstance the Communication is privileged.

SETH ROSNER
CONVOCATION CO-CHAIR

I have a mechanical question for John and that is, in the executive session are minutes taken? And if they are, are they kept separately?

MR. GROSS

The question was, are minutes taken during executive session, under the Open Meetings Law, the statute requires minutes to be taken when there is a vote? Under the Education Law, school boards are not permitted to vote in executive session except to present charges against a teacher under particular statute. So by and large, minutes are not taken. I might have an associate with me who takes notes, but generally the motion is made to go to executive session.

MS. O'HAGAN WOLFE

There's one thing I would add to the record today, which there is one piece of dessert left on the table and that is one which each panel and Bernie Nussbaum's speech, so well-delivered by Kevin, doesn't mention, the fact that every government lawyer engages in a very personal, very extensive process of self-reflection in order to reach the conclusions that they meet day in and day out in serving the public interest and in the most ethical manner.

MR. SAUNDERS

The comment was made by Catherine that every government lawyer in public service goes through a very elaborate personal process of self-reflection in trying to carry out what the person thinks is public interest and that is an important point that shouldn't be lost in discussion.

SPEAKER IN AUDIENCE

May I just follow up on Catherine's comment? It was raised by the last panel about the need for a degree of further assistance to be provided to the average government lawyer — the thousands of lawyers who labor unknown in the millions of agencies. Let's say I'm in practice by myself in one of the tiniest agencies in the state government, and while I don't really encounter the problems we discussed today, I have benefitted enormously by listening to the leaders of the NY Bar and have read a fair amount before this session began and it occurs to me

that it might be possible to take perhaps preliminary steps to provide greater access to the information. Perhaps we could begin to take small steps and I have one small step in mind which is to create a set of dedicated CLE programs for government attorneys, and it might be that in the creation that the panelists provide written material so that one can drill down upon the specifics that underlie these principles.

There is some disagreement over how do you determine who your client is, who do you report to, how do you handle wrongdoings, but the devil is in the details. That's the end of my suggestion, but I think that it might be relatively easy and inexpensive and I think it might be the first step for perhaps the State Bar to consider.

MR. SAUNDERS

I think that's a great suggestion and I will make sure it gets passed on to Steve and Mike.

[Yes] — SPEAKER IN AUDIENCE

I think what Justice Eng was saying about having a group so that if someone has a concrete problem you could pick up the telephone or send an email to that entity. We have created in effect an ethics committee that is known to all the lawyers, they know they can pick up the phone and not have to go to their supervisors because they might not want to go to their supervisors, at least in the larger offices.

MR. SAUNDERS

Has it worked well?

SPEAKER IN AUDIENCE

Well we haven't had any disciplinary problems that I'm aware of.

SPEAKER IN AUDIENCE

Without prolonging this, let me respond — I actually had three items to address: 1) written guidelines; 2) someone to communicate with; 3) CLE. I think that all three would help the average attorney and perhaps the experienced attorney. That was part of what I was thinking about this morning, that I can pick up the phone and call someone the same way I call the Committee on Open Government and say I have this problem. I have done this on occasion with a Committee on Grievance at the Fourth Department where I practice and received very good advice on an ethical problem.

MR. GROSS

Another possible resource may be the county bar president or county bar grievance committee or ethics committee. Very often, I have reached out to the Suffolk Bar Ethics

Committee and talked the matter over with a chairperson, and sometimes it has escalated into a formal of opinion. I think that's another great resource in our State.

MR. RIFKIN

You can get an opinion from the State Bar — we have at the State Bar an Ethics hotline — all you have to do is e-mail us at ethics@NYSba.org. The problem and the response will probably be from me, which may not be terribly helpful. If there is precedent for the question, I will give you an answer pretty quickly; if there is no precedent I will toss it to one of our professional ethics lawyers.

MR. SAUNDERS

I would like to say a few closing words by way of thank yous. I would first like to thank the New York State Bar Association for making their facility and lunch available to us. Second, I would like to thank the panelists who not only participated in today's discussion, but who also participated in one of our earlier focus groups. They have devoted a significant amount of their own time and energy to this enterprise. I want to thank all the panelists for the great job they have done. I want to thank Bernie Nussbaum again for lending Kevin to us for the truly outstanding speech he delivered. We have been exploring some ways we could publish that address. I do think it's worth publishing and worth being publishing in the law schools. I want to thank the members of the Judicial Institute for your continuing interest and guidance and professional attention to these very, very important issues.

As I said, the members of our Institute come from a variety of different backgrounds and we all have a common objective — to foster professionalism in the practice of law. I want to thank Seth Rosner and Marc Waldauer, co-chairs of this Convocation, for the great success that I hope it was. And, finally, I want to thank the person who was single handily most responsible for this Convocation, Lauren Kanfer. We could not have done this without her very hard work and dedication and we expect to be calling on her, beginning in about five minutes, in planning the next Convocation which takes place in Long Island sometime in 2011.

So I bid you all thanks, safe journey, safe travel home.

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