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A Convocation on Lawyer Independence: Challenges and Best Practices for Solo and Small Firm Practitioners

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ON PROFESSIONALISM IN THE LAW

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A CONVOCATION ON LAWYER INDEPENDENCE: CHALLENGES AND BEST PRACTICES FOR SOLO AND SMALL FIRM PRACTITIONERS

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, and welcome. My name is Paul Saunders, and I'm the chair of the New York State Judicial Institute on Professionalism in the Law, and we, together with Hofstra Law School, are sponsoring this Convocation on Lawyer Independence For Solo Practitioners and Small Firm Practitioners.

Let me say a word about the Judicial Institute on Professionalism. The Judicial Institute grew out of the Craco Commission headed by our keynote speaker today, Lou Craco. Lou was appointed by then Chief Judge Kaye to study issues relating to lawyer professionalism in New York State, and to do that he and she put together a commission of prominent judges and lawyers who spent a good deal of time traveling around New York State asking questions about lawyer professionalism. And one of the things they were concerned about was the perception, which at that time wasn't very good, of the legal profession.

And growing out of the Craco Commission was a series of recommendations, I think all but one of which were ultimately adopted. And one of those recommendations was the creation of a permanent institute in New York State to study lawyer professionalism. That recommendation was adopted, and gave rise to what is now the New York State Judicial Institute on Professionalism in the Law. We are about 20 members of the Institute. We are all appointed by the chief judge, and we have a very broad mandate to study lawyer professionalism.

We are now engaged in what is going to be a three-year study of the issue of lawyer independence. This is the third convocation in that series, and there will be at least two more. The first convocation in the series was held at Fordham University Law School in the fall of 2009, and we studied lawyer independence in big firm law practice, and in particular, the phenomenon of law firm general counsel; why did that phenomenon arise, what was the perceived need for it, and what is the future.

Our second convocation was held in Albany, and studied the question of lawyer independence for government lawyers, lawyers employed by the government.

This is our third convocation in that series. Our fourth one will be held a year from now in White Plains, and will study the question of lawyer independence for in-house corporate counsel, and the fifth and final convocation will be held in New York City.

Now, why do we study the question of lawyer independence? What's this all about? Well, as you all know and you are going to hear more today, the New York Code of Professional Conduct requires that lawyers render independent — use independent professional judgment when they render advice to their clients.

What does that mean and why are lawyers required to give independent professional advice, and what's the importance of lawyer independence? Well, I think, as you will hear more

today, and especially from Lou Craco, lawyer independence is at the heart of the legal profession.

If we — as Lou says, one of the reasons why we are autonomous as a profession is precisely because we are able and required to be independent. And as Lou said in his lecture at Pace University Law School that gave rise to this series of convocations on lawyer independence, "When private lawyers give private advice to private clients, they are actually performing a public service," because for the most part, that's how law is delivered. It's not only the courts that deliver law, it's lawyers that deliver law to their clients. And even when they do so in the most confidential of settings, they are performing a public service, and that's why lawyer independence and public service go together.

There's been a lot of study about the question of lawyer independence and for whose benefit is there such a requirement, and I think you will hear that it's not so much for the benefit of the clients that lawyers are required to give independent legal advice, but it's for the benefit of society at large that lawyers are required, and do, in fact, give independent legal advice.

Now, today we're going to focus on solo practitioners and small firm lawyers. And those of you who are small firm lawyers and solo practitioners know that you make up the vast majority of practicing lawyers in the United States and in New York State. And in our suspicion — and we'll find out today whether that suspicion is true — small firm lawyers and solo practitioners face increasing challenges when they try to give independent legal advice to their clients because, in many cases, their livelihoods may be at stake.

So, with the help of the participants in today's program, we're going to examine first the challenges that we think might exist to solo practitioners and small firm lawyers when giving independent legal advice to their clients, and then we're going to explore some of the best practices that might be used, that have been and that could be used to overcome those challenges to the giving of independent legal advice.

So, without further ado, let me get the program started by giving some thanks. First, I want to thank Hofstra Law School, and in particular Dean Demleitner, for not only making this wonderful facility available to us, but also for co-sponsoring this convocation. They have been a wonderful, very supportive partner, and in particular, I want to thank Dean Dodge for all the help that he's given to us in this effort.

Second, I'd like to thank Judge Juanita Bing Newton, from whom you are going to hear in just a moment, for being here and for sharing some words of welcome from her Institute. As many of you may know, Judge Newton is the Dean of the New York State Judicial Institute. Now, what's the difference between her institute and ours? There's one very big difference:

She has a building; we don't.

So, I want to thank Judge Newton very much for being here.

I want to thank Judge William Pauley from the United States District Court for the Southern District of New York, who I have had the personal privilege and pleasure of knowing and working with for probably 25 years, maybe. A long time.

HONORABLE WILLIAM H. PAULEY, III
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

And it's just wonderful to have Judge Pauley with us today. He will be our luncheon speaker. We'll say a few more words about him later, but he has a perspective that will be very, very useful to the rest of us in this Convocation because before he went on the federal bench, he was a practitioner in a small law firm. So, he comes to us with two perspectives:

First, that of a practitioner in a small law firm; and second, from the other side of the bench, that of a federal judge.

I would like to thank our keynote speaker, Lou Craco. Lou Craco is the founding father of the Judicial Institute on Professionalism in the Law. He ran, as I said, the Craco Commission, which gave rise to the creation of the Judicial Institute. He was for many, many years a very active chair of the Judicial Institute, and he is now the chair emeritus of the Judicial Institute.

He is going to be our keynote speaker, and it was his address to Pace Law School that I mentioned earlier, an address that's been published in the Pace Law Review, entitled "Carpe Diem," which talked about lawyer independence and gave genesis to this series of Convocations we are now engaged in.

So, thanks to Lou Craco for not only being the chair emeritus of The Institute, but also for being our keynote speaker.

Thanks, finally, to Jim Wicks from the firm of Farrell Fritz, who is the chair of this convocation and a member of The Institute, who has worked very hard to put this together and to run the focus group that we had prior to today's Convocation, and also to our executive director Lauren Kanfer, who, together with Jim, has worked very, very hard to make this Convocation the success that I'm certain it's going to be, so thanks to all of you.

It is now my pleasure to introduce to you Judge Juanita Bing Newton. She is, as I said, the Dean of the New York State Judicial Institute. She has been the Dean since 2009. Prior to that, she was the Administrative Judge for the New York City Criminal Court. She was appointed to the Court of Claims in 1987. Prior to that she was an Assistant District Attorney in the Bronx, and she received her J.D. degree from my wife's alma mater, the Catholic University of America.

So, without further ado, Judge Newton.

HONORABLE JUANITA BING NEWTON
DEAN, NEW YORK STATE JUDICIAL INSTITUTE

Good morning. It's always exciting to come to educational programs. On the paper that Lauren sends out to us, it looks like a very thoughtful program, and then you get to a room, such as this, and you are really psyched about what's about to happen, that this educational experience feels like it's not only going to be a learning experience, but maybe even a transformative experience.

A good friend of mine, a Dean at the University of Memphis, tells me that's the measure of good education, as good educational experience is transformative as well as informative.

So it's delightful to be here with you this morning to bring you greetings. I think some of you may know that an earlier agenda had a difference leader for you at this particular junction,

and believe me, I am no Chief Judge Jonathan Lippman. However, he and I have been great friends for these last 25 years that I have been on the bench, and I tell you that he sends you greetings and hopes that you have a wonderful educational experience.

I want to also just confirm that in next fall — during next fall, the Judicial Institute, with the building — and other responsibilities as well — will welcome you all for the third in the convocation series on lawyer independence, and we trust that we will have as well an attended program as this is.

I want to say particularly welcome to the court attorneys for the New York State Court, a system who we provide CLEs for, and we've been very limited in our budget as being able to provide as many live programs as we ordinarily did, so it's wonderful to see so many of you; as well as a number of the judges of the New York State courts who have taken time from their busy dockets to join us this afternoon. So, I welcome you not more, but in particular you are my special groups of people, so it's a pleasure to welcome you here.

In welcoming you this morning, I just want to say a little bit about why I think from a 25-years-on-the-bench perspective, from an educator's perspective, that this is an important effort that The Institute on Professionalism engages in every year, and that it matters on a real level that attorneys are independent.

I took an opportunity in preparing these welcoming remarks to read some of the materials. I confess to say that there's so much to learn that you don't really stay up on everything, but I did read "Carpe Diem," and some other materials that Lauren sent to us, which totaled about a thousand pages. So, thank you very much, Lauren.

But the one quote that I selected that struck me is this one, and I quote: "It's always been true that some moral courage was required to doing the job of being a wise and candid counselor to a client on whom a lawyer depended on in any great extent. It has always been true that all sorts of pressures from partners, family expectation, the urge to prosper, for example, have insinuated themselves into the mix of considerations that lawyers weigh in deciding whether to take that job in particular instances, and to be sure that the moral courage and self-respect needed to give tough advice to a tough client has become greater as the pressures of modern commercialism in law practices have become more intense."

And I looked at this from the perspective of a story I want to tell you just happened two days ago about the pressures on lawyers both from their clients and in some cases from the institutions that support our existence. I went to my doctor for my annual checkup, and, of course, it's my "annual" checkup so I hadn't seen him for two or three years and we got together to talk about how our families had been doing, and he had a son who had just graduated last time I saw my doctor. He's now admitted to the bar, hallelujah. He was a working in a small firm. He was assigned to 18B, and he was talking — this is my doctor, who was so proud of his son for a particular case he did. His son was assigned a case of a career criminal defendant, who, of course, protested that this time he really was innocent.

And this young attorney concluded that he thought his client, indeed, was innocent, and he was compelled to give this client all the proper advice given all of the mandatory minimums and other issues that confront the solo practitioner who happens to also work in the world of current criminal justice matters, whether the federal or the state court.

And he concluded that he was going to pursue it. He thought his client was innocent. He did all of the necessary leg work far beyond whatever it is we're currently paying 18B lawyers.

He was not making money on this, but he felt passionate about it. And then he got to the court and found numerous obstacles; the dockets were too busy, and, I'm unhappy to say, he actually encountered some judges who said, "We don't waste time with jury trials anymore. Let's just get this over. Look at this guy. Look at his record, look at the witnesses. We don't want to waste time."

And I'm sure this young man had to think, "Do I tackle the judge, the system, the prosecutor? What happens if I become that 18B attorney who is considered an obstructionist, a person in the way? How do I advise my client that this may or may not be a good thing for him?"

And, of course, he said he believes that he, as Mr. Saunders said, is the deliverer of law, insisted, proceeded, went to trial, and his client was, in fact, found not guilty. Whether he is actually innocent or not is a different story — it doesn't matter — but he pressed the system with great challenges, pressures from both his client and, alas, from the system.

And if today will give you all — us all tools for how to manage these pressures that come from more than one dimension, more than just from clients, from families, from institutions, from systems, from laws that may or may not make sense, we will well benefit from it, and hopefully, again, we will be transformed.

I bring you greetings again, and I look forward to seeing you all at the Judicial Institute in the fall where we will go to the next chapter of this important subject, and have a great day.

Thank you.

JUSTICE NEWTON

By the way, the footnote is why this matters. My doctor was so proud of his son, and people will be proud of you, because, he said, "My son delivered justice."

Thank you.

MR. SAUNDERS

Thank you very much, Justice Newton.

Now, I would like to introduce to you our host, Dean Nora Demleitner, from Hofstra Law School. It's a delight to have her with us today.

Those of you from Hofstra know well her outstanding academic record. She is, as I understand it, one of the world's experts on the subject of criminal sentencing — something that I hope I never have to learn about — and she has had an outstanding academic career not only here at Hofstra, but truly in academic institutions around the world.

She has her J.D. degree from Yale, and her LL.M. degree from my alma mater, Georgetown, and it's a delight for me to introduce Dean Nora Demleitner.

NORA V. DEMLEITNER
DEAN AND PROFESSOR OF LAW
MAURICE A. DEANE SCHOOL OF LAW AT
HOFSTRA UNIVERSITY

Well, good morning. It's truly a special privilege to welcome you here to the Maurice A. Deane Law School at Hofstra University. We are delighted and proud to have you with us this morning, and I obviously want to issue a special welcome to Mr. Saunders, the chair of The Institute on Professionalism; Mr. Wicks, the chair of today's convocation; the two keynote speakers, Mr. Craco and Judge Pauley; and especially, of course, also Judge Newton, from whom you have already heard this morning.

Now, we're very grateful to The Institute on Professionalism to have asked us to host today's convocation. We think this is a crucial issue for the profession, especially in light of today's changes in the profession, and we would like to see ourselves as a think tank not only for our students, but for the profession as a whole.

So let me thank the institution and, of course, Mr. Saunders and Judge Newton for really being on the forefront of many of the issues that are currently facing the profession, and for challenging all of us to think very hard about them.

I also want to thank Lauren Kanfer, who I understand has put an incredible amount of hard work into today's program, despite, also, very serious funding restrictions.

Jim Wicks, obviously, is the chair of today's convocation, so he was very much involved in the program design, and you have heard from Mr. Saunders about Jeff Dodge, but I would be remiss if I didn't mention Joann Mashi and Andrew Frye on his staff who have been instrumental in making this program happen here today.

Now, many of you may know that Hofstra Law has for many decades been on the forefront of working on matters of professional responsibility and legal ethics. That has been exemplified by the work of my colleagues, Monroe Freedman and Roy Simon, whose name, I realize, is well familiar to all of us. And today, you have our center represented by the center's director, Professor Susan Fortney, from whom you will be hearing on a panel later on.

In addition to having had a strong focus on issues of professional responsibilities in the curriculum, we have as of late turned to much more training of our students in thinking about the profession. And we've built an extracurricular program that is designed to make our students much more aware of the changes that are going on in the profession, the challenges that they will be facing, including many of the issues Mr. Saunders and Judge Newton raised for you so they are much better able to really address those as they are entering the profession. And Dean Roberts and Assistant Deans Monticcolo and Ende, are also here today to, I'm sure, hear much more from you about what they can bring into their programs to prepare our students even better. And I have to say that I am particularly delighted that I've seen a number of our students in the audience today, because as you may remember, thinking back to legal ethics and professional responsibility, those courses seem so far off from you.

Why would anybody take their clients' money? Of course, nobody would do that, and that's about where legal ethics always seemed to end. And I think with them here today, they will get a much better sense of what some of the pressures really are like, and how the law functions in the courtrooms and the offices of our lawyers.

And I want to also say that I'm particularly thrilled that we're hosting the convocation for smaller and mid-sized firms, because as we all know, putting sentencing aside, the vast majority of us need lawyers in criminal cases, sadly enough in family law matters, usually more uplifting in real estate matters and wills and trust issues, and those are the matters that small and mid-size firms in this country handle. So I want to commend you for doing that, and also recognize the challenges that you are facing in that.

What I am left to do now is to wish you a very challenging and exciting day with lots of learning and hopefully lots of networking, as well. Enjoy and welcome. Thank you.

MR. SAUNDERS

Thank you very much, Dean. Before I introduce our keynote speaker, I need to do a little bit of housekeeping. I've been asked to remind you that in order to receive CLE credit for this exercise, you need to complete two evaluations that are apparently at the back of your materials, and you are required to turn those in before you leave today in order to receive CLE credit.

It is now my distinct pleasure to introduce to you our keynote speaker, Lou Craco. As I said just a moment ago, Lou Craco is the founding father of the Judicial Institute on Professionalism. He is, and has been, a distinguished practitioner in New York City for many, many, many years at the firm of Willkie Farr, and now he is of counsel in a smaller firm on Long Island where he practices law with others, including his son, Paul.

Lou was also the president of the Association of the Bar For the City of New York, and he and I have practiced together on and off over the years, and I think it's fair to say that he is one of the most highly respected lawyers that I know of in the State of New York, and maybe even in the country.

As I said before, Lou was the founding father of the Judicial Institute. He ran the Craco Commission which gave rise, gave birth, to the Judicial Institute, and more important, his address at Pace Law School, from which I think Judge Newton read "Carpe Diem," really was an extraordinarily thoughtful insight into the issue of lawyer independence; not only the requirement for lawyer independence, but the reason why we have it to begin with.

So, without further adieu, it gives me great personal pleasure to introduce to you our keynote speaker, Lou Craco.

LOUIS A. CRACO
CRACO & ELLSWORTH, LLP

The instructions say to put this (indicating) up, so I have now obeyed the instruction.

I should be smart enough at this stage to go home now, before I ruin the reputation that was established by Paul's excessively generous invitation and introduction, but as at least one member of this audience knows, I never shut up at the right time, and so I will press on.

I want to add a footnote to the introduction that Paul offered about the purpose of the Institute, and that is he emphasized our approach to studying intrinsic problems in professionalism as they appear across the state, and indeed, it is our primary function to do that. But as the unfortunately called "Craco Commission" found as it did its travels around the state, the degree of adherence to professional ideals that we discovered in the commonplace practice of law across New York State those years ago and ever since had been extraordinary.

The legal profession takes a really lousy rap from the popular press and elsewhere because every day in all sorts of ways, real lawyers serving real clients do what they are supposed to do and do it with extraordinary skill and devotion. So we set, as a second goal of The Institute, and one of which is a goal for today as well, not only studying the intrinsics of professionalism, but encouraging and nourishing those behaviors we found existed already against the kinds of emerging pressures that make it hard to sustain them, and that's one of the things that we hope will happen today.

The keynote address at our first convocation of the Institute years ago was given by Professor David Wilkins of Harvard. He set the table not only for the meeting of that day as I hope to do now, but for almost all of the work that we have undertaken as an Institute since. He challenged us to think new thoughts about what it means to be an American lawyer at the dawn of the 21st Century and as the new millennium progresses. And he made no bones about what his view was about the stakes of that endeavor. He thought them absolutely fundamental.

This is how he put it: "One does not need to invoke much hyperbole to put forth a credible argument that the legal profession's survival as an independent profession depends upon its ability to articulate a persuasive and public-regarding justification for its privileged place in society."

It has been the Institute's mission to answer that challenge not only by articulating a credible argument, but by identifying, encouraging, and nourishing the behaviors that corroborate that argument and make it persuasive to the public that we serve. One of the hallmark behaviors that's involved in that professionalism involves lawyer independence.

And again, let me borrow from Wilkins' first keynote speech, maybe at a little length: "One of the most hallowed ideas," he says, "in our profession is the idea of professional autonomy and independence, and for good reason. An independent legal profession," he says, "is a bulwark of democracy and the most effective method for preserving individual liberty that anybody has thought of so far. It is also one of the chief appeals of a professional career that has control over one's mind and one's time." Tell that to an associate in a big firm.

"So autonomy is justifiably a core professional idea. Nevertheless," he says, "we have to think about what autonomy means in the complex world of the 21st Century, in a world of increasing client sophistication, of beauty contests and bake-offs, of growing pressure on lawyers to fulfill what clients want no matter what it is that clients want. Lawyers need to be autonomous not only from mistake, but from their clients as well. Not ignoring clients. This isn't the paternalism of the past where the lawyer always knows best. But in a world of increasing client demands, we must remember that the true 'professional autonomy' means that a lawyer must be both the client's representative and the representative of the public order."

Thus, as they say, is the end of the reading.

The Institute has conducted the convocations that Paul described to look at this core professional ideal with lawyers in big firm practice, in-house practice and in government, and it continues to do that. Today we turn to those who pursue their calling in small firms or on their own. If the existence of an independent bar is ultimately at stake in facing the challenges of this new era, then this cohort of the profession is the one whose risks and opportunities are the greatest.

As of 2006, which was the last year for which I was able to obtain reliable statistics, of all the lawyers in private practice in New York State, 83 1/2 percent were solo practitioners, and

another 14.7 percent practiced in firms of fewer than ten. That, in the aggregate, is 98.2 percent of the lawyers in private practice. Despite the long shadow, imposing as it is, cast by the great firms of the metropolis, the vast bulk of lawyering in this state is done by small, you might say, tiny practice units.

Unless Wilkins' well-rounded challenge is made real to these lawyers, unless they are attracted to help shape the response to it, the effort will fail. To be sure, pressures on lawyer independence are not at all new, although with the rise of the advertising-driven competitive environment they have become more acute. Robert Gordon, in the materials that are cited in your bibliography, for example, leads off his comprehensive paper on the subject of independence with long quotations from Louis Brandeis, Woodrow Wilson, Chief Justice Harlan Fiske Stone, Adolph Berle, and several others, all excoriating in their day the rise of "the new lawyer" who did not, in Woodrow Wilson's turn of phrase, "hold aloof" from their clients' particular interests so as to give disinterested and wise advice.

If there were a silver bullet that could solve this issue and all the problems that it presents, the minds and characters of such men as these would have found it long ago, but it persists. And it persists, I submit, because it is inherent in the tension that every lawyer experiences — you do and I did — between the law as a calling and the law as a livelihood. Since it can't be resolved one way or another forever, it has to be managed. A continuous effort must be made to maintain and practice the independent ideal, lest it be lost altogether. And that would be a grave outcome, I submit, for lawyers, to be sure, but for the public as well. It is from that public from whom the lawyers enjoy the gift of that privileged place in society that Wilkins spoke.

The Institute was created in major part out of recognition that problems like this are persistent and emergent and recurrent, and that assigning them to occasional blue ribbon panels to solve was an insufficient response. So the evolving challenges of which The Institute are one are our preoccupation, and so here we are today.

I'd like to do three things today. First, and briefly, I'd like to touch, as the British would say, for avoidance of doubt on what we mean when we use the word "independence" in the context of today's program.

Second, and this is the heart of what I came to say, I want to offer some thoughts on why it matters, why the effort to assert and maintain lawyers' independence, despite the longevity in the issue, despite the difficulties and the pressure is still worth waging.

And third, I'd like to suggest, not provide, but suggest some lines of inquiry for today's discussion about how to encourage and revitalize the practice of independence, especially in that segment of the profession that is certainly the most numerous and arguably the most at risk.

What do I mean when I'm talking about "independence" today? Gordon, in that article that I mentioned before, gives an elegant and discursive — it takes him 95 pages — explanation of what "independence" has meant in its various nuance definitions to lawyers over the decades. It is certainly worth reading, and it is a stimulating thing to do. So, too, is Kevin Michaels' much more constricted view of the subject, in his Case Western Reserve Law Review, which is one of the more pointed views of the subject that you have in your bibliography.

For present purposes, I think I'd like to look at the independence issue that we're discussing in this way: We lawyers use "independence" in two senses. We refer first to our collective autonomy from supervision by others, and second, we refer to our ability to give

disinterested advice to our clients. I submit — and this is crucial to the notion that Wilkins posits — that this is a survival issue. We are allowed to be independent in the first sense, to enjoy the autonomy we do, because it is necessary for us to exercise our independence in the second sense. We are an independent autonomous profession precisely because and only because we are called upon to give our best disinterested advice free from exterior interference by other pressures.

So, we are called upon by a professional self-conception that I'll mention in a minute, as a matter of the existence of the profession as well as our own self-respect, to speak truth to power whether the power is held by the President of the United States or the CEO of Enron or the local contractor who gives us 20 percent of our business. And that is truly a "use it or lose it" proposition.

Our profession's claim, as I've said, to collective autonomy, the willingness of society over time to allow that autonomy in the privileged place of which we spoke depends on our willingness to use that freedom from outside influence to provide our clients the advice we know they need to hear, even in those cases when we know they don't want to hear it. And it is in that sense that I use the term "independence" in today's discussion.

Why does that matter? Well, why is the game worth a candle if the game is so persistent? There's a whole portion of Gordon's article that is addressed to the so-called futility argument, why we ought to forget about the whole thing because it's futile to achieve. Well, if aspirations to be a good husband or father were abandoned the first mistake you made, we'd all be drunk and unfaithful people because we all make mistakes. This is an imperfect world, and what we are talking about is a process, a process that needs to be pursued. I think it needs to be pursued now more than ever because, to use a phrase from Judge Newton, this is a transformative period.

We live in a world that in all sorts of ways — political, economic, demographic — is changing before our eyes. I've often wondered what it might be like to live in the enlightenment, when everything, all the presuppositions were changing and a new world was being born. We're there. We're there, and we're no less there in our professional lives than we are everyplace else. This is an hinge point in the history of our profession in the United States.

So focusing on what the values are that make us what we are is of crucial importance now perhaps more than ever. I think it's important to focus on it, too, because of an inadequacy that the Dean mentioned. The traditional CLE courses tend to deal with this and many other professional goals by saying, "Do it because it's in the rules and I told you to do it." Well, that's a reason to do it, I suppose, but it hardly frames the perspective that will encourage this behavior against the odds that commercialism now presents against it.

But most of all, it seems to me we have to continually refresh our understanding, particularly in light of what I just said, about the unique role we lawyers play in the American scheme of things, and we need to pay attention to this independence for some practical reasons that I'll allude to in the end.

Paul mentioned my belief that when private lawyers are doing private work, they are performing a public calling, and I certainly do believe that. Why is it that that's the case? I think it's axiomatic and in tune with our experience, at least when I reflect on it, that the rule of law is crucial to the American experiment. We're a country made up and put together by all sorts of dominating oxymorons, "one for many," and all the rest of them. And the fact of the matter is that the rule of law in the United States more than any place else in the world, in my judgment, is

essential to America's ability to function as it wishes to. It's the indispensable instrument by which we manage the tensions inherent in the grand national experiment; by which across all that divides us, we make the adjustments that are necessary to live as one, by which we create the conditions in which a free economy can efficiently operate and plans be reliably laid. It's the necessary instrument by which we attempt to do justice and resolve disputes and largely succeed. It is, as Paul mentioned, in my view, both the lubricant and the glue of our society.

If it is that important, it's important to consider how lawyers play a role in it. What the law is not, in my view, as Oliver Wendell Holmes put it, is a brooding omnipresence in the sky. The law is a composite of thousands of cases and matters, laws made and used, transactions done and broken, advice given and received, cases tried and won and lost, day in and day out.

If the rule of law is essential to American society, it is equally true that lawyers are crucial to the rule of law, because they are the ones who deliver it every day in every case or every transaction in which they act on behalf of a client.

That is why I think it is not an exhortation — although it's often thought to be — it's not an exhortation but a simple description to say that lawyers in private practice are always engaged in a public calling. To return the favor and quote Paul, he has put it, "We are where the rubber meets the road."

Let's just look at one particularly pertinent example that bears on the value we're talking about today. Several years ago, Stephen Carter of Yale offered an insight into this inherently public aspect of the lawyer as advisor. And this is what he had to say, and it's something I guess I knew in my bones but not in my head until I read it.

He said, "The principal lawgivers in America are neither the courts nor legislatures nor administrative agencies nor other entities, but rather, lawyers. This," he continued, "is because most people's principal experience with understanding their legal obligations and legal rights is working with a lawyer. Whether it is a matter of buying a house, defending a lawsuit, establishing a business, the lawyer becomes, in the life of that person, the lawgiver. It is the lawyer who comes forward and says, 'This is what you can do, and this is what you cannot do. These are the possibilities, these are not.'" So in the daily counseling practice of lawyers, the adjustments of interest I suggested were made by the rule of law are made by the — are delivered by the lawyer to the client and become for that client, that day in that deal, the law.

The lawgivers, in Carter's analysis, are overwhelmingly real life practitioners in solo offices or small firms. All over the state they are carrying out this public function very well, as I said before, albeit, usually unaware. That they do so is a crucial part of the American social contract. It is also the essential consideration in the grand bargain by which the public confers on the profession its privileged, monopolistic, autonomous place in society. If we do not deliver the goods — honest, competent, wise, independent advice — then the bargain cannot last.

So, at the most fundamental level, the maintenance of independence matters because for American lawyers, it is existential. It is part of what we are and who we are. It matters, perhaps less importantly, but maybe more urgently, for increasingly important practical reasons. And out of the many I could give, given the fact I have a timeline here, let's just mention two.

First let's pick up the lawyer/client privilege. In the wake of corporate scandals not too many years ago, there were whistleblower pressures and all sorts of attacks on the lawyer/client privilege, which, it's fair to say, we lawyers think at the least is very important and at the most is

sacrosanct, and in both we probably exaggerated a bit, but it is a very essential part of our self-conception into the toolkit we bring as being lawyers.

But think about it for a moment. We are called upon to keep secret what our client tells us not because in and of itself it is a moral good, not because it is an intrinsic characteristic of the lawyer/client exchange, we are required to do it because society has agreed with us that it is a useful thing to keep such information private so that we may better do our job of advising and advocating for our clients. It is a purely utilitarian assessment of what is the best way to promote good legal advice and advocacy. And the society has an interest in that despite the cost of lost information, because both the rule of law and an approach to an ideal of justice are thought to be served by facilitating that lawyer's role.

When it is thought widely enough that the costs of providing that environment in which independent advice can be given are not worth it, because the independent advice is, in fact, not being given, our opportunity to consult privately with our client and they with us will begin to shred. The lawyer/client privilege was not handed down on the tablets of ten. It is an artifact of lawyers' independence and designed to create an environment in which that value can be exercised.

Take another practical reason why independence matters. I don't need to tell anybody in this room about the rising competition from lay and even technological sources in the practice of law. Websites now abound that will write your lease, write your will, write your sale of contract for your house. I was in an airport in Washington, D.C. last month and went into a bookstore looking for something interesting to read, and the first thing that hit me in the face was a bookshelf crammed with "How to be your own lawyer" how-to books.

There is a populous tide which we all feel lapping at our ankles, echoing the Jacksonian era's slogan that every man is his own lawyer. And particularly, for solo practitioners and small firms who do, as was mentioned, the trusts and estates and corporations and small corporations and leases and so forth, this competition is both bitter and threatening.

And it leads to the essential question: What is the lawyer's comparative advantage? What is his or her value added to the transaction such that the client should forgo the book and seek the lawyer? It's what Dean Kronman of Yale in a discouraging book called "The Lost Profession," called "practical wisdom," or what Gordon in his more uplifting piece calls "purposeful lawyering." What the lawyer offers is the judgment that if independently rendered can cause or prevent a deal, can provide an important nuance, can avoid a legal or practical pitfall.

This strand of non-mechanical legal advice in the private setting has an ancient pedigree. You know, the first lawyers of the common law were clergy. They had two things that entitled them to that role which they avidly sought. The first was that they read and wrote, not a common thing at the time. But they were also thought to bring to bear, and to the value of the clients whom they served, a more comprehensive understanding of the morality at the time. Now, out of that heritage emerged some conception of what lawyers are supposed to do.

And the reading and writing, the scrivening part, is a mechanical craft that the clerics at that time had to do themselves, but we no longer do, and that is the part of the work that is easily lost to the new competitors. But the practical judgment, the moral sense, the discernment, the prudence, was the wisdom our ancestors brought to bear, and that is not similarly vulnerable. We look for the insights of that sort to different sources from those searched by Medieval priests.

Look we must, and when we look, we must be willing to say to our client what we have found and what it means, unvarnished. That is our ultimate value added in the transaction with our clients, and that cannot be ceded to or seized by a mechanical competitor.

I've laid out in some detail the underlying notion of a need for independence before turning briefly to a sketch of what techniques you might want to consider to encourage and nourish it. I've done that for two reasons. One is a recollection of Karl Llewellyn's famous aphorisms who once told a student who was complaining about having to learn all the practical stuff of commercial technique, he said, "You know, son, technique without ideals is a menace, and ideals without technique is a mess." It seemed to me important to frame the ideals that we're talking about before we spend some time trying to figure out how to support and encourage it.

And the second reason I've done it is because of what the first technique is. John Sexton was the Dean of NYU Law School when he gave a really enormously influential speech in London to the ABA about legal education. But as we lawyers say, mutatis mutandis. What he said is applicable as well to the whole enterprise of professionalism in the law.

He used a very densely packed phrase in his speech. In fact, he used the same phrase twice, to emphasize his point. He said that he believed that "reflection and vigilance will be necessary if we are to notice and maintain what we consciously or subconsciously cherish about what we now do." No wonder he said it twice.

But the first step in preserving and protecting and enhancing independence is to notice that it's important to do, and so I've spent some time encouraging you to do that. But what else might you be able to do? Now, here I don't want to preempt the panels that are going to meet today. I just want to toss out some ideas that occurred to me in the course of preparing to come here.

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

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

One of the things we ought to talk about today is how that absence of colleagueship in the small firm, and even more acutely in the solo practitioner's, can be rectified, because I think it does help not only reinforce the value, but contrive ways in which it can be delivered.

The Institute during my tenure as chairman made a run at trying to figure out how to encourage and sponsor mentoring programs, and we went to Rochester and saw how they were doing it up there. We did a number of things. The effort petered out because it was overtaken by other events and because it proved to be so hard to do. Nevertheless, the idea of creating some kind of mentoring that will permit younger lawyers, who I suspect strongly in this cohort of solo and small firm practitioners are increasingly predominant, as big firms shed lawyers and new lawyers graduate with no place to find a job in big firms. Where do these young lawyers go to get some sort of role model, some sort of advice? We learned in the efforts that we did that

among the things that helped to create mentoring vehicles is what in Rochester was called "associative groups." That's a fancy word for saying find people who are doing the same thing you are or are located in the same place you are, who have some things in common with you, and create informal groups. They could be Inns of Court, which is a rather more formal thing, they could be the zoning practitioners in a town in Long Island having lunch every month. They can be real estate practitioners who network at a CLE program and do it on a more continuing basis.

There are all sorts of ways that the association can be thought of, like which people can come together and, outside of firms, establish some sort of network by which they can talk about the problems they are encountering and how they try to resolve them.

Bar associations. Now, bar associations have lately become, in many ways, primarily a vehicle in which CLE is delivered. That's no bad thing in itself. One of the sins for which the Institute has to repent is having recommended, as one of the recommendations that got adopted, mandatory CLEs, so we have no one to blame but ourselves for that phenomenon.

But there is more that bar associations can do to try to foster the practical delivery of independent legal services. And those of you in bar associations ought to strive to achieve that, and those of you who are not in bar associations ought to get in one and try to do it.

There's a great tendency, and it was meant to be a help in fostering the competence of the bar, to have CLE programs delivered on tape so that you can stick them in your home video after the basketball game is over and watch them as you doze off. That's all very good and well if you look at some of the other demographic information. The opportunities in Lawrence County for the 14 or 15 lawyers who practice in that county to come together for an in-group CLE program is obviously limited. But what it does do is reinforce the isolation of the solo practitioner or small firm practitioner, and I would urge that in your conversations today about what best practices might help, you might want to consider thinking about, particularly the solo practitioners, finding group settings for the CLE so that the networking that occurs there can reinforce the values that are spoken about there.

For example, there are plenty of CLE programs that I've seen advertised by bar associations to tell you how to build a practice; that is to say, how to get clients. There are very few that advertise that what they are going to do is tell you how to talk to the clients once you got 'em, and that's the heart of the matter.

All right, the issue is an old one. It's a persistent one, yet it's a new one with fresh dimensions and current importance. It's intractable, but I think it is susceptible to an elegant handling. It has a transcendent, I would say existential meaning for us in the bar, and it has daily impact on how we live our lives. So it's surely worth a day's thoughtful discussion, and to that, I now happily yield the floor.

MR. SAUNDERS

I suspect that many of you will want to think about and reflect on what Lou said today, because I don't think it can be taken in completely in one seating; there's too much there to think about and reflect on. In time we will publish Lou's keynote address on our website, the address of which is at the bottom of the printed program for today's convocation. Don't go looking for it tomorrow, but in time it will be up on our website, as will some of the other proceedings from today's program. And I encourage all of you, when the time comes, to go back and to read Lou's

comments carefully again, because there is probably a no more comprehensive and thoughtful definition I've ever heard of what it means to be a lawyer today than in the thoughts contained in Lou's remarks. I encourage you to do that.

Now, without any further ado, let me ask Jim Wicks, the chair of today's convocation program, to take over the program and to present the first panel.

PANEL I – CHALLENGES FOR SOLO AND SMALL FIRM PRACTITIONERS

JAMES M. WICKS
FARRELL FRITZ, P.C.

Thank you, Paul, and I guess I need a panel, don't I? If we could assemble.

MR. WICKS

I think hearing Lou you realize and you come to appreciate why this committee was first called the Craco Commission. I think it's pretty obvious his insightful and thoughtful remarks really are the foundation for this group, and it's a privilege to have Lou here today to deliver that address, and he's a tough act to follow, even with the six of us, so we appreciate that.

The way we're going to do this is we've divided it up into really two panel discussions, as you know. The first panel, which we're going to do right now, is discuss the challenges. What is it that the solo practitioners, the small firms — by the way, when we say "small firms," the literature seems to speak in terms of one to five lawyers. That's really what we're talking about.

What are the challenges? How can we identify these challenges that we're talking about that stems from this Rule 2.1, this independent lawyer rule? So, that's going to be our focus this morning in terms of what the lawyers face, what challenges they face.

The second panel, after lunch, moderated by Michael Ross, will talk about how to deal with those challenges, what are the best practices, what are the things that these lawyers can do to make sure they meet these challenges.

To get a sense, how many are solo practitioners or are in small firms?

MR. WICKS

I would say a quarter of the audience fits within that category.

Okay, anyway, it's my pleasure to introduce the panel. We really have an interesting group of panelists here. To my right is Tom Foley. Tom is a partner in the law firm of Foley, Griffin. Tom was a former ADA in Nassau; right Tom?

THOMAS J. FOLEY
FOLEY, GRIFFIN, LLP

Yes.

MR. WICKS

He now has his practice with two or three?

MR. FOLEY

One partner, and one associate.

MR. WICKS

So a firm of three. Tom's principal emphasis is really personal injury, wrongful death; his partner is in criminal defense.

MR. FOLEY

Correct.

MR. WICKS

To my immediate right is Leo Barnes. Leo — this is sort of a homecoming for Leo. He is an alumnus of Hofstra. He has a small firm. He and his brother formed Barnes & Barnes.

And, Leo, you have what, five or six?

LEO K. BARNES, JR.
BARNES & BARNES, P.C.

Five now.

MR. WICKS

Leo's emphasis is really commercial litigation, although it is a general practice firm.

Right behind me — and I apologize to the panel if my back is to you, but better to you than to the audience.

Anton Borovina, behind me, is a solo practitioner. He practices really in corporate commercial litigation, counseling practice in Melville. Anton was affiliated with other lawyers over time, other firms, in the past. I guess right out of law school, he was an Assistant County Attorney in Suffolk, and then at some point worked for — he was the Associate Counsel for the House Appropriation Committee. So, he has an interesting background for what we're going to talk about today.

Next, Andrew Crabtree, to my immediate left here. Andrew probably has the most varied experience of our panelists today. He's been an ADA in the Bronx, Assistant District Attorney in the Bronx, he worked at several large firms, he has worked in-house for a real estate developer, and for the last number of years — how many years?

ANDREW L. CRABTREE
LAW OFFICES OF ANDREW L. CRABTREE, P.C.

Ten.

MR. WICKS

— ten years, private practice, his own firm, a solo practitioner, general practice. Again, he sort of emphasizes commercial, corporate, real estate, does counseling, does litigation.

And then to my far left, not the least of which is Professor Susan Fortney. She's from Hofstra here. She's the Howard Lichtenstein Distinguished Professor of Legal Ethics and Director of the Institute for the Study of Legal Ethics. In her role, she really focuses mainly on law firm governance issues, which is perfect for what we're talking about today, as well as ethics.

Previously a professor at Texas Tech, she has also worked for a private practice, and I believe for a judge in Texas.

SUSAN FORTNEY
MAURICE A. DEANE SCHOOL OF LAW AT HOFSTRA UNIVERSITY

Correct.

MR. WICKS

Thank you.

Welcome to our panelists.

Many of the writings about small firms and solo practitioners speak in terms of their role as the sort of the "womb to tomb" lawyers, meaning they really service the client from the very beginning right up until their death and the estate of administration. They handle every legal problem that a client may have.

The problem is — it's not a problem, but the challenge that has arisen, really in the last decade or so, is that legal consumers are becoming more and more sophisticated. And as Lou alluded to, technology has helped that, so what's happening is there's an expectation of specialty. How do you deal — there's a move towards specialty, even in the solo and small firms.

Leo, do you find that in terms of specialization or clients looking for more and more for that, and how do you deal with it?

MR. BARNES

I deal with it personally by specializing. They do have that expectation that they are now looking for the IP attorney, the DWI attorney for a criminal guy, and for me, I found it does help me sleep better. I focus on commercial litigation, as Jim mentioned earlier, and I'm not the guy that you're going to go to for your bank closing or for your bankruptcy hearing. And for me, it helps me sleep better.

MR. WICKS

Andrew, it helps Leo sleep better, but your long-standing client comes to you and asks you to do something really out of your area. What do you do? Turn it down or pass on it?

MR. CRABTREE

You know, the hardest thing to do when you have your own practice and it's starting up or whether you are establishing, is to say "No." Everyone wants to say "Yes," but malpractice

aside, or you just can't handle it aside, if it's not within your expertise, the best thing you can do is refer it out.

I typically won't even ask for referral fees, I just want them to make me look good. And once you do that, it actually goes to your benefit; referrals will come back to you, and the client, at the end of the day, will be happy.

MR. WICKS

What's the challenge, Anton, in terms of specialization or is there really not one?

ANTON J. BOROVINA
LAW OFFICES OF ANTON J. BOROVINA

Well, there is a challenge to specialization — oh, excuse me, my microphone works, even though I don't ordinarily need one.

MR. BOROVINA

The specialization challenge is that you represent a client that wants to succeed in that area of the law, and there are a lot of nooks and crannies that have to be mastered, and proper advice has to be given in advance of the client committing him or herself to proceed. So, there is a challenge in that regard.

MR. WICKS

Let's focus on the independence rule itself. What is the source? And Lou alluded to it before. It's this Model Rule 2.1, and we have it up here on the screen.

"In representing a client, a lawyer shall exercise independent professional judgment and render candid advice." That seems to be the touchstone what we're talking about today. "In rendering such advice, a lawyer may refer not only to law, but to other considerations, such as moral, economic, social, psychological and political factors that may be relevant to the client's situation."

So that's the backdrop of what we're talking about today. Judge Newton mentioned "moral courage." Moral courage. Is that what we're really talking about, Professor, moral courage?

MS. FORTNEY

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

MR. WICKS

What about the concept of morality in this rule?

MS. FORTNEY

From the standpoint of?

MR. WICKS

Of you taking it into account, and perhaps imposing your morals on the client.

MS. FORTNEY

Well, it's not just your morals, it's also you considering your role as a representative of the public system, of the public good. And so when we think about independence, one thing that I appreciate in that article that was referred to by Robert Gordon, it was the reference to independence as the lawyer being the kind of buffer between the client's illegitimate kind of desires and societal good. So that may be a version of moral discourse, instead; basically being that buffer and asking those hard questions.

MR. WICKS

Let me just read to you a portion of the advisory notes to Rule 2.1.

"It is important to remind lawyers that a client is entitled to straightforward advice expressing the lawyer's honest assessment. Nevertheless, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."

Tom, do you find that, that sometimes it's difficult giving advice to clients because they may not want to hear it?

MR. FOLEY

Sure. And part of the difficulty that I encountered as a younger attorney was the client, many times, being older and looking at you and thinking "Well, this person may not have that level of experience," and as more time goes by — at least I hope I look older, for these purposes only — but in dealing with the client, now you have been around a little longer, you have more experience, and you are able to give advice based on past experiences, like "Listen, you may think this and you may want this to happen, but I have a role here to explain to you that that's not what's going to happen."

MR. BARNES

Picking up with that, I think it's a great lesson for the law students in the audience or the recent graduates, that you have to realize that you are the target for the unscrupulous client, that you are the sole buffer between their, sometimes, bad intentions and bad transactions, and that they will be targeting and looking for someone who may be just out of school, someone who is happy to cash that initial retainer check because they think you will not have the expertise or experience to spot a borderline improper practice.

MR. WICKS

Leo, I've known you since you graduated from here, and you really have been in a small firm setting for your entire career. Did you find yourself sort of develop, mature, grow in terms of dealing with clients on these unpalatable issues?

MR. BARNES

Yeah, I think I do learn through the experience. I have, unfortunately, memories now which I wish I would have spotted earlier. I went on my own at 28 years old, three years out of school, and you are so happy when that phone rings initially. Initially it's telemarketers, and then eventually the client gets your name. So when you get a real client calling you, you really want to bend over backwards to get that client in and make that a client for life.

MR. WICKS

Is that bending over backwards compromising this 2.1?

MR. BARNES

It can. And I think that's what the experience in a setting like today gives you the perspective to spot those clients that you don't want and that you should look away from. And I think that's what the goal of 2.1 encourages; that there is more to the practice of this profession than just a client's singular goal or this singular client.

MR. WICKS

Anton, Paul and I spoke earlier this morning, and Paul observed that the rule — it's interesting — in New York, the Advisory Committee Notes that I just read, the first sentence in the New York's Advisory Committee Note does not appear in the ABA Model Code. Let me read you the first sentence.

"This rule, 2.1, is not intended to be enforced in the disciplinary process." What does that mean? It's not in the ABA; it is ours. Anton?

MR. BOROVINA

Well, you have —

MR. WICKS

I know you are not the drafter, but...

MR. BOROVINA

I was not. But you have two things in play. You have, of course, disciplinary considerations, but I would like to think the lawyer behaving ethically is going to avoid that in

the extreme. I also think, though, that if you have a duty to represent the client in giving advice in such a way that — proper advice, but understanding what the client wants, working with the client by communicating with the client. And I'm not so sure necessarily that the client has illegitimate or illegal motives. More often than not, I think, the client is ignorant as to what the process will be, particularly in the legal profession.

The lawyer, by communicating with the client, is able to massage, without redoing the facts, but to present the story and presentation in a way that works to the best interest of the client that does not trigger a disciplinary violation.

MS. FORTNEY

And I'd like to pick up there just from the standpoint of — 2.1 does have that reference to "shall," I think is the comment, makes it clear that you do not have discipline under 2.1, but other roles come into play; specifically, the role for a lawyer to be competent under 1.1, the duty of a lawyer to communicate to the client under 1.4. So, I think there are other ways of looking at this from the standpoint of disciplinary liability as well as malpractice exposure.

MR. WICKS

So you are not saying that I can ignore this rule, are you, and say, "Gee, I'm not going to exercise independent judgment. This has been my client for years, and I'm going to do what my client wants me to do, because under the Advisory Committee Notes, I'm not going to be subject to a grievance."

MS. FORTNEY

Bad idea.

MR. WICKS

Why?

MS. FORTNEY

I think from a standpoint of what you owe your client, from the standpoint of independent judgment, but more importantly, the role of you as a professional having duties that go beyond that immediate client, not just thinking of yourself as a kind of hired gun or technician.

MR. WICKS

But I don't have duties to third parties; do I, Andrew?

MR. CRABTREE

Well, absent the commission of a crime or a fraud, I don't think you do. But there are two competing duties; you obviously have the duty to give your client the best advice you

possibly can, and you also have the duty to yourself, to your self-interest in protecting your law license. And those can conflict, but I don't think — when you speak about morality in law and the lawyer's independence, really that independence — and to harp on what Lou Craco mentioned, speaking truth to power, sometimes when you speak that truth to a client and they don't want to hear it, it's probably just good business. They may come around. You may lose them as a client, but you will gain reputation.

But most often times, the clients appreciate that and they want that, and I don't think it's necessarily conflicting. I don't know what true independence means in terms of your ability to have a duty to a third party, but your independent judgment does serve the two duties that I know you have and should have, and that's the duty of self-interest, to yourself, and the duty to the client.

MR. WICKS

In the Case Western Law Review article — that's in our bibliography — suggests that perhaps lawyer independence is really a past lost ideal, that it is a reality or requirement. What do you think, Anton?

MR. BOROVINA

No, I don't think it's a lost ideal because it's a practical effect, as Leo mentioned.

At the end of the day, the client needs independent advice, for the best — not only for the license of the lawyer, that's certainly an important consideration, but also for the best interest of the client, because the client has to ultimately resolve the problem in the context of existing rules. And the client needs to be told what the rules are.

You will lose the client, I have found in my business. If you don't give the correct advice, if you skew the advice in some fashion, thinking you are doing the client a favor, two things will happen: (A) you lose, and (b) the client will blame you for the loss. And then the client will turn around and say, "If I knew what the real advice was, I would have perhaps behaved differently." And even if the client doesn't, the lawyer will. The lawyer will say, you know, if I properly advised my client, the results would have been different.

MR. WICKS

Let me ask Tom: Do you find this rule forces you to put things in writing more than you might otherwise have to do?

MR. FOLEY

Well, that was something I learned long ago, that there's a lot of things that come up in my practice. Initially my practice was mostly criminal defense, and I learned the hard way that there are a lot of pitfalls that are facing the criminal defense lawyer, and one of them could necessarily be a claim of lack of independent judgment.

And just a simple example, there's a parent who is bringing their child in for some criminal offense that the child was accused of. And, you know, the parent is clearly going to be

the one paying the fee, but in reality, the child is your client. And there can oftentimes be a conflict. A parent may want to know some information that was provided to you in confidence by your child client, or infant client — hopefully over the age of 16 — but there are definitely issues that arise. And one of the things that I learned in retainers under those circumstances is you put right in there that you are paying the fee, but my client is your child and my loyalty is to the child, and my decisions will be in the best interest of the child.

And that's how — you know, I started using that, and now I apply that a lot in the personal injury field. If there's a potential conflict, I'll certainly put that in writing. I guess there are unwaivable conflicts, but if there is any hint of a conflict, I'll most likely try to avoid that at all possible costs.

MR. WICKS

Leo, let's take it out of the parent/child setting. Let's say they are brothers, and one pays the legal fees of the other. What kind of challenges do you face with that?

MR. BARNES

I think it's the same challenges Tom mentioned. And Andrew made a great point earlier. He said that in a situation like this, you may lose the client but gain the reputation. And that's such a wonderful observation.

If you run into those difficulties and you have that parent/child conflict that Tom is talking about, or you have brothers that come in and say, "I want to help my brother out, but I want to be intimately involved with the defense of the matter, I want to know everything that's going on," you may be able to spot right away, at that initial meeting, that this is not the client for you.

MR. WICKS

Let me stop you there. How do you deal with that? The two come in, obviously, you have a privilege issue. How do you deal with that?

MR. BARNES

You have to break them down, and you have to let them know that, yes, you can write the check for your brother. Maybe you will give the money to your brother and he will write the check to the firm, but you have to, like Tom mentioned earlier in his scenario, let the mother know or let the brother know, that listen, it's nice you are concerned, it's nice you are here, but my sole obligation and duty runs to the brother or the child.

MR. WICKS

But the brother insists on being at every meeting. Trouble?

MR. BARNES

Yeah.

MR. WICKS

Why?

MR. BARNES

You can have privilege waiver issues. You can have concerns over the brother who needs legal advice can't speak candidly to you in the presence of his older brother or meddling brother.

MR. WICKS

Let's look at some of these challenges specifically.

Keeping existing clients satisfied. Anton, is that a challenge for you as a solo practitioner?

MR. BOROVINA

Yes.

MR. WICKS

Tell us why.

MR. BOROVINA

Because the client wants to be able to know that when he or she needs advice, that a successful outcome will come from it and will hope that the advice that's being given, if followed, will lead to that.

So you have to maintain a relationship with the client, and it's always difficult to locate new clients. You also have to pay attention to the client that you have, because the clients, you can ultimately lose, if they feel that you are not paying attention to their best interest and by giving the right advice.

MR. WICKS

Let me ask you, Andrew, do you find that it's more difficult exercising this lawyer independence with long-standing existing clients than brand new ones that walk in and you don't like what they are saying?

MR. CRABTREE

I think it's easier in some ways because you develop trust over time. A new client walking in that wants you to do something you are not comfortable with, you can either quote them a ridiculously high fee to scare them away, or you can tell them straight out, "I'm not going to do that."

MR. WICKS

And they say "That's fine. I'll pay that."

MR. CRABTREE

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

MR. WICKS

Let's get the next one, "Struggle for new business." Tom, why is that a challenge?

MR. FOLEY

That's the beginning and end of my challenge, Jim, that's everything.

MR. FOLEY

I guess the second panel will talk more about managing your practice and good practices for attorneys, but a lot of times during the day, your thoughts are, "Great, I'm busy. I'm working on" whatever case it may be, "but is the phone going to stop ringing today? Is tomorrow going to be the day where I have to go back and go to a firm or lose my independence," and sometimes I think, you know, do I have independence because I chose it, because I'm focused, or because no one wants to work with me?

MR. FOLEY

So I guess you could look at independence a couple of different ways, but business certainly is — that is the primary thought process.

MR. WICKS

Control over workload, do you really have it Leo?

MR. BARNES

Again, I think it's a great balance between having enough to say "No." You know, that's the truth. Early on, you would say you don't have any control. Somebody wants to retain you, you have to write the rent check in a couple of days, and you have to go forward.

Hopefully, as your practice develops and you do diversify a bit, and maybe have a partner or two to rely upon in order to average your cash flow issues, you do gain that control, but that is a constant battle.

MR. WICKS

Cash flow. Cash flow is a challenge, and it is for everybody. But in a solo or small practitioner firm, it seems to me that's a real challenge, especially if you have that client that comes in with the difficult question that Andrew quotes a high fee on, but yet you are going through a period of light cash flow. How do you deal with that? Anyone?

MR. BOROVINA

You still don't — that happens, and you still want to maintain the relationship with the client in the long term, and giving the wrong advice or taking a case that you shouldn't because it's a loser, at the end of the day, you are going to lose the client and it's not going to be an effective way to maintain your practice.

MR. WICKS

Is that the worst thing, that you lose a client, or are there worse consequences?

MR. BOROVINA

Well, you could lose the lawsuit, but if you properly advise your client in advance, and the client knew in advance that it was a weak case to begin with but directed you to go forward, then it's the loss of the client.

MR. BARNES

Which I think sometimes can be a blessing. Again, we are in the business of collecting clients, not dispersing them. But at the same time, you learn to spot those clients who are going to keep you up at night, whose cases are going to keep you up at night, and really, that leads to the long-term erosion, I believe, of your value as an attorney.

And this goal of 2.1 I think confirms the lawyer's obligation to society in general, and it's a nice perspective on the profession.

MS. FORTNEY

Jimmy, may I say something here?

MR. WICKS

Yeah.

MS. FORTNEY

Actually, in the lawyer malpractice class that I taught this week, we covered client screening. And I asked — I actually used a visual aid. It's a stop sign that a malpractice carrier uses in their CLEs, and the idea is to stop, reflect and consider is it worth it in terms of reputation, long-term, because there is that bottom line pressure.

And the students got a quotation that I like, and I ask everybody to try to remember when they think about the bottom-line pressure. It was reportedly something Lincoln had said. Abraham Lincoln said that it was "more important to know what cases to turn down than it was to know the law." And I think that says a lot.

MR. WICKS

Good point, and I want to pick up on that, because Lou mentioned how many lawyers were in solo and small firms, and it really is a large percentage. And I would venture to say probably it is going to be even more, given the current economic climate.

That said, I think there were more frightening statistics that I came across in terms of discipline. In Texas alone, 98 percent of the disciplined lawyers are from solo or small firms. In California, it's 78 percent. I don't know for New York, but nationwide, the vast majority of discipline is meted out to solo or small firm practitioners. And this doesn't mean to suggest that they are unethical lawyers in small or solo firms, but it certainly may suggest, I think, that the challenges may give rise to this.

Leo.

MR. BARNES

Yeah, I think that's a great observation.

Imagine at the larger firms how there are loads of committees there. That provides a useful function because it takes — in the example of a solo guy who has to make rent, has to make his secretarial payroll next week, the client who walks in who may not be as desirable as you wish, it takes that lawyer's objective pressure out of the equation.

If the screening committee is going to screen new clients and three attorneys have to look at this without the burden of wondering if we're going to make payroll this week, and say is this client right for this firm, so you can see where absent that committee of one in a small firm, how valuable that is in a large firm.

MR. WICKS

What about the concept Lou raised, and that is solitude? That struck me as I sat there, that, boy, to me, sometimes I don't appreciate the benefits of having so many lawyers where I worked that I can tap into and bounce things off of.

Andrew, how do you deal with that?

MR. CRABTREE

Well, sometimes I call someone at Farrell Fritz, at your firm, Jim.

You know, I don't share office space with another attorney, but you build a network of other attorneys to tap on their expertise if you are going to handle something that might be at the outer limits of your experience. But it's a struggle. It's one of the biggest downsides to solo practice or small firm practice.

MR. WICKS

Tom, do you agree?

MR. FOLEY

Sure. One of the things I did — my background before I went into private practice was law school and the DA's Office, so clearly I was qualified to do real estate, commercial, and all the other things and I learned my lesson right away. And luckily it was because I was in a good office suite with a gentleman that was on the grievance committee, so he was a good teacher, and he would explain the proper way to do this.

So one of the first cases I got in was a nice federal case, criminal defense, and I figured, well, if I'm going to go into a federal case, I'm going to make sure that I do this the right way, and I associated myself with an experienced federal practitioner. We would meet with the client in my office. The client saw me as the attorney, right, but when we went before Judge Pauley or one of the other judges, you know, it wasn't me standing up, answering those questions; it was the experienced attorney. And in that situation, I was able to keep the client and earn a fee and learn how to handle a criminal case in federal court.

And I did similar things like that in real estate and commercial and guardianship, and after a while I realized, boy, I don't know a lot about a lot of things; I should specialize, and that progressed over time.

MR. WICKS

Anton, do you agree that this concept of solitude is a challenge to your independence?

MR. BOROVINA

Well, I was going to comment that at least the solitude — it comes from two places. The solitude of attorneys who are experienced and who have a network know in their solitude when they should be reaching out and seeking the advice, and that advice will be discussed by their colleagues and their peers.

The real problem is, if you do not have these — you are just not out there that many years, you are alone — and you do not know where the grenades are, and you do not have the network. And that's where the danger, to me, really is.

Solitude in itself is not a problem. There are many attorneys, all of us — I think anyone several years out in practice knows colleagues they can trust and bounce ideas off back and forth. They do not have to work for the same firm.

MR. WICKS

Let me ask you this: Do you discuss this concept of independence with your clients? Do you tell them what it means, or what your role is?

Leo?

MR. BARNES

I find that oftentimes it doesn't come up, you know, that you have good clients who are on the same page. When it will come up —

MR. WICKS

But doesn't it come up when they say, "Wait a second, I told you to do X" —

MR. BARNES

Yeah, that's exactly where the problem is.

MR. WICKS

What's your conversation in that situation?

MR. BARNES

My conversation is this is my profession, my lifelong occupation, and I feel strongly that I have a duty beyond your champion cause right here. And that's what 2.1 is about; it's about your duty to society generally.

And I will give that client my best opinion I can after research and investigation, and if ultimately we go separate ways, it's better for both of us.

MR. WICKS

Anton?

MR. BOROVINA

I'll tell you where the issue really arises; where you have a client and you need expert testimony, and you retain an expert — actually, the client did, or the client funded it — and you have to tell the client up front that I as the attorney, my mission is to harangue that expert as much as I can so that that expert can survive cross-examination.

I need to know, and therefore the client needs to know, that when that expert testifies, that he or she is not going to wilt on the first question being asked on cross-examination. So therefore, Mr. Client, you are going to be hearing me ask questions — when the expert comes to a purported expert opinion, you are going to be hearing me challenge the living hell out of that assumption. And I need to hear it. And I want to know, even if that expert never will go to court, the client is hearing this. I want to make sure my client understands the strengths and weaknesses of that expert's testimony, and don't think that just because you spent $20,000 for an expert, that all of a sudden the heavens open up and you won your case.

MR. WICKS

Let's go to some hypotheticals.

I guess we're going to talk about, if we get through them, five challenges — six, actually.

Challenge 1: Andrew, you get this text from your client — because your clients now have texting and it's easier — "Selling car wash. Worth much more than deal on paper, but have buyer willing to pay cash for difference under table and need you to document deal."

What could be clearer?

MR. CRABTREE

Well, the first issue is, is my client paying the money or getting the money? And that's a distinction with a difference because if my client is going to be paying the cash under the table, then the advice is easy —

MR. WICKS

Your client is selling. He's got a car wash, and he's selling this thing, and he's telling you, at least, from the text, that I got somebody that's going to buy this thing for a lot of money, but on paper it's not going to show so much.

MR. CRABTREE

If he's selling, he's going to sell it for, you know, on paper $500,000 and he's going to get $500,000 under the table, my first response to him is: "Are you really getting that? Do you think you can depend upon that? Once we have a written contract and it goes to court, that bag of cash doesn't come in, you are out of luck." So really, it's an easy question as a practical matter; that, don't do it because you will not be able to rely on that.

If he says, "Well, it will happen beforehand," I tell him, honestly, "I don't want to hear about it. As far as I'm concerned, the transaction is what's on paper."

MR. WICKS

Is it, "I don't want to hear about it, get out of my office," or is it, "I don't want to hear about it, you can go on with the deal"?

MR. CRABTREE

It is I don't want to hear about it and you can go on with the deal, but what I'm going to do is do the deal as it is on paper. If they tell me that they actually are going to do it, then I am going to have a serious talk with them, take it to the next level. There's tax issues, there's — you know, to me that's a crime. It's tax evasion. And once you know about that, and if they actually tell you that that's going to happen, then I'll tell them that I'm not going to do that deal.

MR. WICKS

Anton, I saw your eyebrows raise. What happened?

MR. BOROVINA

Well, there's two conflicts — when you say "under the table," it's a petard term.

If "under the table" means that cash is going to be transferred, my position is — and I've been in many instances like that — I am recording what I see. My closing statements — my advice — as far as I'm concerned, the cash accomplishes nothing.

MR. WICKS

You're not seeing the case. It's not literally being under the table; this is, the cash is going to be transmitted from buyer to your client, even though the deal is, on paper, for much less.

MR. BOROVINA

If I am — the client is going to be told that if I — my documents, my paperwork is going to reflect what the value of that deal is. To the extent that it's 1.5 million, of which $500,000 was transferred first via Cambodia, that doesn't matter to me.

MR. WICKS

Yeah, but the client came to you with a term sheet, you see, and the term sheet says it's a $500,000 transaction. But he whispered in your ear, "You know, because you have been doing my taxes for years, you know that the car wash is worth much more than that."

MR. BOROVINA

If that's all he says, I have no problem with that because as far as I'm concerned, this is why I'm only talented to be — I decided to go in the legal profession, because there are business people — and Donald Trump, by the way, and others happen to be like that, when they make a decision that a particular piece of junk, worth nothing, I'm willing to acquire it or I'm willing to sell it. I've made a business decision. That is different than me being told that money is being transferred.

MR. WICKS

Now Leo's eyes are raised.

MR. BARNES

Yeah. What I'm doing is giving him Tom's number for the criminal defense work.

MR. BOROVINA

This is good networking.

MR. BARNES

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

MR. WICKS

Yeah, but, Leo, I'm 40 percent of your revenue. You want to kick me out of your office for this? You don't have to see the cash. In fact, I'll draft the contract; I just need you to be the Notary there.

MR. BARNES

It's a brutal balance, and obviously the temptation is there. The desire to keep the client happy and keep your cash flow current are very highly pressured influences.

At the end of the day, when you have time to reflect on that, for me, it's still "Listen, I can't help you out with it that way."

MR. WICKS

Okay, so I'm now taking my 40 percent revenues, and I'm going down the block to Crabtree, because I hear he might do it.

MR. BARNES

And that goes back to what we were talking about earlier about losing the client and gaining the reputation. If you've got your eye on the long term perspective of your career, of your occupation, you are going to have to take that hit. It's terrible, but that's the risk of small firm practice.

MR. WICKS

But listen, I really like you. I've been with you for years. I went to law school for two years, I dropped out, but I know that the Advisory Committee first sentence of New York says don't worry about it; there's not going to be a grievance.

MR. BARNES

Yeah, right, and when the IRS knocks on my door, I'll be sure to cite that.

MS. FORTNEY

And note, there may not be a grievance under 2.1, but you can have disciplinary liability under 1.2 because you are in some way furthering the crime of fraudulent conduct.

MR. CRABTREE

And that's not worth the client. It's — you know, it's a tough choice, but in some ways it's an easy choice. And I think when you lay it out to the client that they are committing a crime — number one, you are not going to help them commit a crime, they are going to commit a crime, and is it really worth saving the capital gains tax on something that is going to pose real liability to them. And most clients will appreciate that to hear that. If they don't, then there's other problems with that client besides this transaction.

MS. FORTNEY

And I'd like to pick up on that.

That's one reason we have the duty of lawyers to preserve confidence. It's the interplay of the client having the confidence that they can come to you, share this kind of information, and then you can counsel them so they get the benefit of knowing what's legal and illegal, and hopefully they have enough confidence in you that they will understand and clean up their act.

MR. WICKS

Let's go to the next easy hypothetical.

Challenge 2: The hard money lender client. You have a client that comes to you and is prepared to ask you to document a loan deal that you are going to prepare because he's got a friend that wants to borrow money short term, and the interest rate is just huge, and you well know that it violates the usury laws.

Leo, how do you deal with that client? What are you telling that client?

MR. BARNES

You know, at this stage, it's not a difficult discussion because this greedy client of yours will learn from your advice that the loan could be characterized as violating the usury laws and you are subjecting not only the interest, but the principal to being not recoverable.

MR. WICKS

Okay, so you told your client that, and he says, "Okay, but I still want that interest. It's my choice, and by the way, I thought that the usury laws only applied to individuals."

MR. BARNES

Well, your client has done his research.

MR. WICKS

Okay.

So now that it's just an individual, you know what, this borrower, I was mistaken, it's not Joe Smith, it's Smith Co., he's got a company, and it's the company that's going to borrow it. In fact, he just formed it yesterday, and here's the certificate of doing business. What do you do?

MR. BARNES

It's an interesting point, and the stuff that the panel covered earlier about the — with the increase in technology and the savvy client, they may have done this research and come into this scenario a little bit more educated than you wish they were at times. And that will provide them, under the scenario you just laid out, he has a perfectly viable course of conduct.

He knows that the corporation may not be able to assert a usury defense, and now, at first blush, it seems specious maybe, but the transaction looks viable.

MR. WICKS

Anton, do you have a problem with that?

MR. BOROVINA

I have no problem at all. It happens early and often, particularly with commercial litigation, for the client to say that an entity has been formed yesterday. And once I have, as you say, Jim, a certificate indicating the due existence of the corporation — by the way, I'll take the word of the client on that regard —

MR. WICKS

Wait a second. You are going to take the word of the client even though you have suspicions that it really is a phony corporation that is set up?

MR. BOROVINA

Well, you really haven't given me enough facts that —

MR. WICKS

I'll give you the facts. You have suspicions.

MR. BOROVINA

Don't confuse a suspicion versus lack of business judgment, where I decide if I worked at a business such as the client, I may have decided not to go forward with the deal, and therefore — that is, not to form a legitimate shell corporation that is about to own real estate — it hasn't yet owned it; it's about to own it, and the client, acting prudently, and has done in the past and been very successful in doing it, forms the corporation, I have no problems that.

I need more information for me to conclude there's suspicion.

MR. WICKS

Tom, at what point do you feel you have a duty to inquire further with the client?

MR. FOLEY

I think you probably want to know who the person is that's receiving the money. If it's a savvy business person versus a widow, an elderly woman that's never dealt with something like that before, I think under those circumstances, I think as an attorney, you would have an obligation to tell your client, listen, you've got to advise this person to get counsel before this loan goes forward.

MR. WICKS

So are you saying the circumstances of the transaction itself may give rise for the duty on your part to look further?

MR. FOLEY

I think as an attorney, you are looking at the big picture. Certainly, you want to represent your client and you want to do what's right by your client, but also you have other concerns that the loan itself may possibly be in violation of the law.

But there are circumstances where the other party may be a savvy business person, and for other business reasons they want to enter into this transaction, so I think you do have an obligation to explore that a little further.

MR. WICKS

Professor, Paul mentioned this concept about the private lawyer, private transaction, stills owes some sort of public duty, public service. Do you agree?

MS. FORTNEY

Oh, definitely. That is, once again, part of why we have our monopoly, that we have the privilege to practice law, and what comes with that is the duty to go beyond the duty to the client.

MR. WICKS

Why do I owe a duty to the public when the client is paying?

MS. FORTNEY

Because you have been given the right to practice law, and part of that is public calling, and I can go on.

MR. WICKS

Isn't this really a duty without any teeth; it's unenforceable?
Tom.

MR. FOLEY

I guess it goes back to the whole concept of it's a privilege to practice law; it's not a right. There are certain — we're bound by certain obligations to do so, and I don't think it's unreasonable for people to expect that we are operating for the greater good.

MR. WICKS

Let's go to the third challenge: Asset protection, or aiding and abetting:
The client is a defendant in a lawsuit with a sort of "bet the ranch" exposure; it's a large case. He turns to his trusted advisor, Anton, and asks for Anton's assistance to "do whatever is necessary to protect my assets because I am going down, and when I do, it's going to be hard."

MR. BOROVINA

I would say that's why God made lawyers. The purpose of a lawyer, acting within the law, is to use the law to give assistance to the endeavors of the client. And if the protection of assets is something that the client wants and makes sense, the lawyer uses — I say, "required" — is obligated to use his or her talents and competence to accomplish that need.

MR. WICKS

But we just heard about the public service/public good aspects of lawyering; now you are hiding assets from a creditor.

MR. BOROVINA

I am not hiding assets from a creditor that the framers of the statute contemplated in the first instance; and may I say, with respect to "public duty," that's a vague — I don't know what that means, because one could make the argument that in 1898 after *Plessy v. Ferguson* the public duty was not to challenge race discrimination because the Supreme Court had spoken.

But you have a client, and what trumps, as long as you are acting within the law, the best public duty that the lawyer can do, I submit, is to be the best advocate for the client. The details in terms of the public goals will take care of themselves in the end.

MR. BARNES

Yeah, I think Anton raises an interesting point here using the word "advocate." And there is a distinction here under 2.1 as to whether it has application for the "advocate" in a litigation setting or as they entitled it, as "advisor" in a transactional setting.

And in this instance, I do agree with Anton that that's a damn good reason to go to an attorney. You are under attack. Your house may be at risk, and that is when you should be seeking that advocate-type advice.

MR. WICKS

Let me ask you, Tom, Leo seems to make a distinction between advocacy and counseling, advising. The rule we're talking about, 2.1, is entitled "advisor." Does it have any application in the advocacy rule?

MR. FOLEY

Well, I guess if you are just focusing on this question here — and I do love the challenge about, I will assist you in protecting our assets, sir, but will I aid and abet you? I don't know if I'll get involved in that part of it, because I think one of our jobs as attorneys is to listen — certainly, that's an incredibly powerful tool that we have, listen to the problem — try to come up with a cost-effective strategic solution to that problem.

And if a client is sitting down with us and telling us that they face exposure, that's why, as the panel pointed out, that's why they are there. And sure, we can give advice, "Here is what the current state of the law is. If you transfer your assets, this is potentially what you could face." I could assist you in protecting your assets, but am I going to aid and abet you in avoiding creditors down the road? No, that's something I can't help you with.

MR. CRABTREE

Jim, I just want to chime in and say, I have a real difficulty with the concept of morality and the law. I believe myself to be moral; Leo, sure; Anton, I don't know but the concern is how do you make that be accomplished in the profession at large? It seems that if you have the duty to be honest, and the law is the law, absent of *Plessy v. Ferguson* when you want to advocate a

change in the law, but I certainly have no problem with telling a client that they can transfer the house to the wife's name, you can do this or that.

I'll tell them what the debtor-creditor law says, that that can be transferred back, they can have penalties and these are the risks, and at the same time, people do it every day. There are guys with million-dollar judgments against them driving Bentleys. And I'll tell them what the law is, and I'll tell them if they want to do it, they may get in trouble, they may not because there are hoops for people to jump through.

And I think that's the regulation of the lawyer, of the morality, is through that advising the witness of — the witness, potential criminal witness — advising the client of what the law is. I wouldn't draft the documents, but I'll tell them people do it every time. You can go to somebody and say "Listen, can you draft the deed?" And that's our role, to give the honest advice and to follow the law, but I don't think that we have to act for the public interest and towards a public morality; I think that's the result of our otherwise ethical obligation.

MR. WICKS

Let's fast-forward a little bit. The client says, "You know, clearly I'm headed for bankruptcy and I'm going to have to start filing at some point. Let's start transferring the stuff out, and in fact, I have some little shell corporations, they are in my wife's name. We could put the car, we could put the piece of property in Florida, and by the way, this bank account we can transfer out." So you do all that.

The debtor now files Chapter 11, and you have schedules to fill out. How do you deal with that issue, when you have some suspicion, even if you were actively counseling the client, that there may be assets elsewhere that he didn't list on his bankruptcy schedule?

MR. BOROVINA

Well, that's a problem because of the modification several years ago of bankruptcy rules. But what Andrew said is very true. If the client says, "I'm thinking of going into bankruptcy," that doesn't alter the advice you give the client, and you tell the client that any transfers may very well be stuck into a call-back provision. My advice doesn't change because the client thereafter fills the prophecy by going into bankruptcy.

Now, here's where the problem is, is that once the bankruptcy goes — and fortunately, I don't practice criminal law and I don't practice bankruptcy, also as God intended — but I will tell you this from my knowledge of this, a creditor — if I were a bankruptcy lawyer or professed to be a practitioner in it, I would not handle the petition because I know now there may be more obligations that the code imposes than I was required to ask at the time the client was not actually in bankruptcy.

MR. WICKS

Now, there's liability, of course, for misstating on schedules, and certainly there's a lawyer liability if you were aware of that or should have known about that. There's case after case. The Fifth Circuit stated a great phrase: "It's kind of like what happens to a lemon; the

debtor just squeezed the juice out of it and returned the rind to the estate." And that's sort of how the Fifth Circuit views it.

It's a fine line when you cross asset counseling, protection counseling, bankruptcy protection to what becomes illegal. And as Anton mentioned, there are certainly statutes, bankruptcy statutes in terms of aiding and abetting and sealing assets that come into play here.

Let's go to the next challenge. Here's a criminal defendant charged with a serious felony, seeks advice about avoiding jail time. He knows he's going to get convicted.

"By the way, Tom, what countries don't have extradition with the U.S.?" I can't ask my lawyer that question; right?

MR. FOLEY

Well, they can ask the question.

MR. WICKS

Are you going to answer the question?

MR. FOLEY

Well, I think one of the difficulties that we'd have to explain to the client at that point is that there is a certain thing we've discussed, the attorney/client privilege, and there are certain circumstances where the attorney/client privilege doesn't apply —

MR. WICKS

I just want a simple answer. What countries do we not have extradition with?

MR. FOLEY

Well, as the attorney, depending on where that particular person is in the process, you know, that should be a red flag to you, and hopefully, you are not that stupid, that the guy is just curious. You may want to explore that a little further as a diligent attorney.

MR. CRABTREE

I see zero problem with that.

MR. WICKS

Zero problem. In counseling this felon, okay, in Viet Nam, for example, has no extradition, and you can go there and Judge Pauley can do whatever he wants here.

MR. CRABTREE

But my job is to tell the client what the law is, and I'll counsel him saying, you know, you may face these consequences. There may be loss of bail, there could be warrants, but this is the law and these are the ramifications. That's no different from tax advice to a client, from sophisticated firms. That doesn't trouble me at all.

MR. WICKS

How about this one: "I've committed a crime, it's serious, I've got no defenses, I'm going down. What can I do to avoid jail time?"

MR. CRABTREE

I need more specifics.

MR. WICKS

I don't mention extradition, but sitting in the back of your head, you are saying, extradition. Do you raise it? Not the client, but do you raise it?

"Well, you are going to serve jail time. There are countries that you could go to. You didn't really ask me that, but I know that's what you are thinking."

MR. CRABTREE

I think that's substantively different because you are suggesting to the client that they engage in criminal conduct.

MR. WICKS

What about this, Professor: "I committed a crime, I don't want to go to jail. How about if I go to Viet Nam?"

MS. FORTNEY

Well, once again, it depends on what you know about the client. If you have a client that is in effect seeking advice and it's in connection with illegal conduct, then it's up to you to say "No."

MR. WICKS

Well, here's what the commentators do. They seem make a distinction between the commands that you are giving in terms of directing the client, as opposed to the advice they seek. So if they are asking questions of you, you absolutely should be answering the questions, provided this "Well, maybe you should consider Viet Nam," that crosses the line; it's a command, and that's sort of the distinction, at least, in the commentators' view.

MS. FORTNEY

But I think the point, at least, of the commentators is that you are giving them the advice so that they can understand why they shouldn't engage in this illegal conduct, and hopefully they will heed your advice. That's the point of having confidentiality in the communication.

MR. BOROVINA

But there's an overall assumption that we're making here. The lawyer who has a general practice — myself included — should not, under your hypothetical, Jim, be giving any advice with respect to criminal law where there is a serious charge at stake. The lawyer does not know what the hell he or she is talking about in that area, and should get out and call Tom up, or someone who does criminal practice.

MR. FOLEY

(516) —

MR. BOROVINA

I would not answer the first question you asked me on that subject if I was aware that a crime was being committed.

MR. WICKS

The Rules of Professional Conduct really make us agents of our clients, and for that we look at a number of rules. You, as a lawyer, have to act with diligence and promptness, you have to be responsive to your client, you have to convey settlement offers, and in fact, you have to heed their advice if they want to settle a matter.

Agency principles seems to run counter to this concept of even though I'm your agent, I can act independent and really go against what you want to do.

MR. WICKS

You have a question?

AUDIENCE MEMBER

Yes, I do.

MR. WICKS

Our first question.

AUDIENCE MEMBER

I wanted to know what the panel would say if the client said to you, "I'm thinking of leaving the country. Do you know any non-extradition countries?" At the point you know he's going to leave the country, what is your obligation to the system at that point? You now know he's leaving. What's your obligation to the system?

MR. WICKS

Boy, I'm glad I'm just the moderator.

MR. FOLEY

Well, I think as attorneys, if we have reason to believe that our client is about to commit a crime, we have obligations to report that. And now your client has put you in a position where, not only do you have to report the client, you may in fact have to testify against the client. So, you want to thank the client for putting you in such a situation.

MR. WICKS

All right. We were talking about agency.

Leo, is there some sort of conflict in the concept of lawyerization and your duty to exercise independent judgment?

MR. BARNES

Yeah, I think there is. I think it goes back to what we talked about earlier, about the distinction between 2.1 being applicable as advisor and as advocate. Certainly as advocate, you are the agent of your client, and you have to accede to his goals somewhere within, of course, the ethical bounds.

On the other side of the transaction, if there's a transactional issue, you do have the same agency relationship, but there's a higher ground here, and I think that's what 2.1 gets at.

MR. WICKS

Do you agree with this higher-ground concept?

MR. BOROVINA

Well, I don't see the conflict. Yes, you are the agent and you are charged with certain obligations — I'm reminded that Einstein once said, "You should be able to teach physics to a barmaid." And I use that in my experience to say my mission, as your lawyer, is to put in plain English, if I can, what the law is and what your options are. Now, I will be your agent; I'll be your interface with the legal profession and those that want to do you ill, but I will not, and I trust you will not ask me either, to violate the law.

It's not in your interest if I do that. You are wasting your money, and you are going to get nailed at the end, and I'm not going to put my license at peril. So, I don't see a conflict.

MR. WICKS

Do you agree, Professor, there's conflict in this concept of a lawyer as an agent, which comes up not only in the rules, but in the case, the malpractice case? I am the agent for the client.

MS. FORTNEY

You are the agent for the client.

MR. WICKS

I have loyalty. If I disobey the client, I'm liable.

MS. FORTNEY

But what I appreciate in terms of this counseling exercise you talk about is you communicated to the client what are the limits of that agency relationship. An agency relationship does not require an agent to engage in illegal conduct; in fact, it prohibits it.

MR. WICKS

Let's go to the next one. We're getting close to the end here.

Challenge 5: This is the "I don't care what this costs" client. "I just want to ruin other side. I'd rather put the money in your pocket than my adversary's, even if I lose."

How many have heard that? And, boy, that lasts for about two invoices; doesn't it?

MR. CRABTREE

Well, the response to the client is that you say every litigator's dream client is somebody with big principles, like in this case, or a big ax to grind and a big wallet. I will do as you say, but what I counsel clients — you try to walk them back off the cliff. "This lawsuit that you want me to engage in is going to take seven years. You are going to be paying me thousands and thousands of dollars, and you are going to vent your frustrations, maybe, at a deposition, but it's going to last about two months and two invoices, and at the end of the day, you are not going to be happy with the result, you are not going to be happy with me, and the better choice is to avoid that at the beginning."

Now, I have had clients who say, "Thank you, Andrew, I appreciate that advice, go rip their heads off," and you do it.

MR. WICKS

Rule 3.1 says, though, you can't engage in conduct as a lawyer, right, for purpose to delay or which serves merely to harass or maliciously injure another. Ripping their heads off, I would say, is a severe...

MR. CRABTREE

Well, it certainly is a metaphor, but — and not to disagree with the Rule itself, but does anyone really think that defense attorneys, insurance defense attorneys — not to pick on anybody — don't engage in those kind of tactics? I think it's done every day, and we've all seen discovery demands that were clearly intended just to harass. I mean, there's no other logical purpose to them.

MR. WICKS

Let me turn to the hypothetical here. We have a noncompete situation, former partners, one leaves, and your client says, "I want to go after him. He's staring a competing business. I want to stop him in his tracks before he gets started."

You meet with the client, you go through the documents, and guess what, there's no noncompete. But you may be able to come up with some sort of common law claims to stop him or her.

Leo, what conversation do you have with your client about this?

MR. BARNES

This is an all-too-common scenario.

MR. WICKS

And this is a situation where, you know, client says "I don't care if I lose."

MR. BARNES

You know, in practicing commercial litigations, they call them "business divorces" for a reason, the dissolutions and the breakups, because they are as emotional as a divorce; some would say more so.

And I think the out the attorney has here is there is a slim chance, and as long as the client is aware of that, as long as the goal of the transaction is not simply to delay, harass, annoy, and that there is an element of I've got to save my business, the attorney is okay.

But as Andrew was talking about earlier, that first consult is the emotional two-hour gripe session about how bad the partner was and what problems you went through, and those are emotional times. Hopefully, with the combination of your advice and the passage of time, and you get the client to come back a couple days later, the wound is not as raw and you can talk them down from the fence.

MR. WICKS

Tom, you face situations when — I assume you take a case on contingency —

MR. FOLEY

Yes.

MR. WICKS

You go far along, you are mid-trial and you get a great settlement offer, and the client says "No way, you go all the way." How do you deal with that challenge?

MR. FOLEY

Well, I think the beginning of that challenge is right from the initial intake with the client. And what I try to do, and I think it's important that we all do with our clients, is to manage expectations and explain to clients the process, and explain what your role is as attorney and what their role is as client, and make sure everybody understands the ground rules.

And when you are that far along and you are at trial, hopefully by that point, the client will have a lot of confidence in your advice, and, at that point, you can make the client aware of the risks. If you are in Nassau County, you can give the Nassau County speech that all the judges like to give about how it's Nassau County, and these juries are mean and they don't want to give money to people. So, I can give them the Nassau County speech, but ultimately if they don't want to settle, well, you came to me for a reason because I'm a trial attorney and this is what I do, we'll take our chances.

And I think we can all give stories of where money was on the table, we turned it down, and the jury came back with a fraction of what you could have settled for.

MR. WICKS

Isn't there a bit of a conflict, though, where your fee is at stake here and you are trying to convince the client to take that settlement?

MR. FOLEY

Well, I think at that point you would hope your loyalty is to your client and your client's interest. And I think that goes back to the counseling and the advice part of our responsibilities; that we can advise the client as to similar cases, we can advise the client of the strengths and the weaknesses of the case, and we can also advise the client ultimately that juries are wacky; you never know what they are going to do, and if you want to take your chances, then, I'm here and I will do that with you. But you put it on the client in a lot of ways at the end. You can only take your advice so far.

MR. WICKS

Let's go to our final challenge, and that's the client with the observant lawyer. The client really doesn't say anything about the purpose of the transaction other than basic details. But the lawyer observes certain conduct going on at the closing, or the meeting that gives some pause to the transaction.

It's a little different than what we've talked about, which, in the past hypotheticals or challenges really affirmed affirmative conduct of the client. Here we have the quiet client.

Anton, how do you deal with that? Have you seen that?

MR. BOROVINA

Yes. That's where it's really the obtuse client, particularly one that has a long-term relationship that asks you a direct question, "Please help me commit the crime."

What the real issue is is that you are the unsuspecting lawyer, and you were referred a matter or you attend a matter and there are things that are going on and you have not been told anything, but that invites suspicion.

I've been in that situation, and what the prevailing goal in my mind is, I want my client — you are my client. My mission in life is to tell you that there are grenades in the room. You should know what the grenades are, how they are going to explode, when and where. There may not be grenades, but I want you to be aware of it, and if at such time as I discover the grenades are real, then we get into the earlier hypotheticals, what do we do.

But I go on the assumption my client is acting in good faith, but is just ignorant about the process that is going on. God help it if it turns out that I should discover that the client did know what was going on, was trying to pull something over on me and I discussed this in the midst of the transaction or while dealing with a judge, the client would know.

MR. WICKS

But at what point do you start asking the hard questions, or don't you? Do you keep the blinders on?

MR. BOROVINA

I don't keep the blinders on, no, because that's inconsistent. If I'm representing my client with respect to a matter, be it litigation or whatever, you are just not a mechanic; I'm just going to put a sink in the kitchen and walk out. You notice other things with respect to what the client is doing in the environment that the client presents itself, so you cannot put blinders on.

In the course of you representing your client in that fashion, you may very well come across information that you are not sensitive to initially because you were just not familiar with it at all. When you do, you advise the client — and the key is I want you, my client, to know what's going on. The person across from you is about to do a transaction or something is going on that invites suspicion.

And I go under the assumption that others are going to know about it. A judge, an astute judge is going to pick up on it, and who are we kidding? It's going to come out. You wasn't to

come forward with it now, and modify your conduct today in a legal fashion, in such a way that you accomplish your objectives legally.

MR. WICKS

Anybody have questions? We have about two minutes left. Anybody? In the back?

AUDIENCE MEMBER

Yes, the fellow on the far left mentioned collaborating with a colleague, let's say, early on, you did that in your practice.

I've heard it said many people don't want to collaborate now because of the possibility of malpractice, you know, who is really representing the client, and what if the less knowledgeable attorney commits a malpractice inadvertently, so on and so on.

So I'd like to hear from anybody if they have encountered that, or — because it's great to use colleagues.

MR. FOLEY

Sure.

I think that issue arises in that scenario and in any scenario where you refer a case out to another attorney and you receive a referral fee. The rules are clear. They are in the rules as to the circumstances under which you can receive a fee, and the client is told about that, that there's a division of fee, there's a division of responsibility. You just have to be very careful as to who you refer your cases out to and who you participate on cases with, because you do face malpractice. There's no question about that.

MS. FORTNEY

Part of being careful is to get the declarations page on their insurance policy, which you can do when you are co-counseling matters. Make sure that that person actually carries insurance and the limits of liability provide enough protection in the event that things go wrong.

MR. WICKS

Any other questions? Michael?

MICHAEL S. ROSS
LAW OFFICES OF MICHAEL S. ROSS

I was not quite sure whether you folks were saying there's a duty to inquire or an ethical obligation to inquire, or a risk appetite decision to inquire, because we just heard a lot about that, and I think maybe there's a difference between all of them, and I wasn't quite sure that people who are representing individuals in a business transaction have a duty to inquire.

MR. CRABTREE

Yeah, I would agree with Anton. I don't think there's a duty to inquire in terms of your obligation to ferret out the nefarious deeds. I think your duty to inquire, like Anton said, is to the client.

You have to inquire of this client, do they really know what they are getting into? Is this what they really want to do? If it's criminal or fraudulent, there are consequences, and if they say, "Yes, this is what I want to do, and I want you to help me to accomplish it," then the second duty kicks in, and that's the duty to save your license, and you say, in that case, then you have to be resigned. It's just not worth the headache.

But I don't believe there's a duty to the guy on the other side of the table or to the public at large. I think it's self-regulating that way when you have to look out for your client and then back out.

MR. BOROVINA

I actually do think you have a duty to inquire. I can think of transactions where I represent you, the president of the company. Well, there's only one thing that matters to me, and that is my client.

I happen to know that my client has a relationship with another entity. I don't know if it's a wholly-owned subsidiary, I don't know if it's an independent company, shareholders or directors, and I need to know because the interest of that company may very well, therefore, affect my other corporate client.

I'm going to start asking questions. What's the relationship? And I want to do that for a number of reasons. Number one, I want to help you, the client, that you have an asset; that is, you have an interest in the other entity that potentially is exposure.

Number two, that you may very well have difficulty in succeeding in your objective because there's a relationship between the two that I'm not aware of.

My duty which trumps — to me it's clear. I have a duty to represent my client and to educate my client about potential grenades to the best of my ability. And my problem, by the way, is not identifying enough of the grenades.

MR. WICKS

But I think that goes to Michael's question: Do you have to identify those grenades, and what do you have to do to identify the grenades.

MR. ROSS

And I might add, sometimes, as a litigator, you may not want to be saddled with information because then you may have knowledge of something that would restrict your ability to do something.

MR. BOROVINA

Oh, contraire. If I'm a litigator, I'm having a trial, I want to know more on that subject than what I think the judge or the jury is going to know on the subject. I hope to get to that stage, and I will be disappointed and annoyed at myself if I failed to do so. I want to know.

I often tell my clients, "I want to make your process with me more difficult than what it is outside my office, because if you can — I hope, if you can get past my questions, my inquiry, you are going to have less at stake.

And this is true — this is what athletes do when they train. Their training is actually worse than the actual game they perform, and it's true, I think, in the practice of law, as well.

MR. WICKS

Michael, do you have room on your panel for Anton?

MR. ROSS

I'm impressed how wishy-washy Anton is.

MR. BOROVINA

Well, the devil is in the details.

MR. WICKS

I want to thank our panelists very much. Lunch is across the way, and you can eat even in here, but please, please, please clean up, because otherwise it's me and Paul. And do the evaluations as well.

MR. SAUNDERS

Thank you very much, Jim. Remember, those of you who want CLE credit, fill out the evaluations, leave them at the desk when you leave.

Lunch is outside and across the way. We have about a half hour for lunch, and we will come back here after lunch for our luncheon speaker, Judge Pauley.

* * *

AFTERNOON SESSION

MR. SAUNDERS

It is a personal pleasure for me to introduce for you our luncheon speaker, Judge William Pauley from the United States District Court for the Southern District of New York.

As I mentioned briefly earlier today, Judge Pauley brings an unusual and I guess almost unique perspective to the subject that we have been talking about today. He graduated from Duke University and Duke Law School and then worked in the county attorney's office here in Nassau County I think for a while and then he spent most of his career in private practice in a small firm located in New York City, but a lot of his practice was here on Long Island.

I have had the privilege and pleasure of knowing Judge Pauley for a very long time. We worked on opposite sides of a case together that lasted again a very, very long time, longer than either one of us can remember, so our relationship goes back a very long time and when we thought about who we could ask to be a luncheon speaker who would bring to the exercise the perspective of someone who was on the other side of the bench but who also spent a major part of his life in practice with a small firm, Judge Pauley came immediately to mind, so we were delighted when Judge Pauley agreed and accepted our invitation to become our luncheon speaker.

So without further ado, let me introduce and welcome Judge William Pauley.

HONORABLE WILLIAM H. PAULEY, III

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Thank you very much, Paul, and good afternoon to all of you.

I want to thank the Institute for inviting me to speak on the convocation on lawyer independence for small firms and solo practitioners.

When Paul called me last summer and asked if I would be willing to speak, I was honored by the invitation and gladly accepted and so it's good to be here in the Eastern District of New York because this is where I grew up and I still call Long Island home.

In preparing for this, I was surprised to learn, and Lou Craco confirmed it this morning, how vast the percentage of lawyers are in New York who are small firms or are solo practitioners. It's more than 98 percent. It's a stunning statistic when you think about it and it is therefore this group that is really representative of the overwhelming majority of the Bar in New York and it's my privilege to speak to you today.

Before I get to the subject of my remarks this afternoon which Paul had posed as a question for me, is the playing field level for solo practitioners and small firms in court. That's the question that I will be turning to after a few digressions. I want to begin by first sharing a couple of jurisdictional quirks and a little history about the Eastern District of New York.

On February 22, 1865 as the Union was celebrating the surrender of Charleston, Senator Ira Harris of New York moved that the Senate consider a bill and I quote, to facilitate proceedings in the admiralty and other judicial proceedings in the Port of New York, close quote.

Now there was considerable opposition to Senator Harris's proposal to create a new district for the city of Brooklyn and rural Long Island. Indeed, Connecticut opposed the idea

vigorously because its district judge had very little business in the Nutmeg State and often traveled to the Southern District of New York. There as Eugene Nickerson, a former Nassau County Executive and former great district judge here in the Eastern District of New York observed, the judge from Connecticut tasted the delights of Manhattan and as the Senate debate show received more for his annual expenses in New York than for his salary of $2,000 as a district judge in Connecticut. Nevertheless, the bill became law and the Eastern District was carved out of the Southern District of New York, but not completely so.

What do I mean by that? Well, here's the jurisdictional quirk, while Long Island and Staten Island are firmly in the Eastern District of New York, if you wade into their territorial waters, you are in a unique place from a jurisdictional point of view, that is because the Southern District of New York, jealous of ceding its admiralty jurisdiction, retained concurrent jurisdiction over the waters within the Eastern District of New York pursuant to Title 28 of the United States Code, Section 112.

So matters arising in the waters around Long Island or Staten Island could be filed in either court. There is no other place in the United States where two different judicial districts have concurrent territorial jurisdiction and because the United States Code requires a district judge to reside in the district where he or she sits, you may be scratching your heads about now and wondering whether I live on a houseboat. Let me assure you I do not because on October 19, 1996, Congress created another anomaly in the federal code by amending Title 28, Section 134B, to permit each district judge sitting in the Southern or Eastern Districts of New York to reside within 20 miles of the district to which he or she is appointed. And so by that act of Congress and a vote of the United States Senate two years later, I come to speak to you today both as a Long Islander and a district judge in the Southern District of New York.

Now, enough about jurisdiction, let me turn to the question at hand, can small firm practitioners compete on a level playing field. Well, drawing on my 20 years of experience in a small law firm and 13 years now on the bench, my answer is no. That may startle you, but I answered no because I believe that the playing field favors small firms and solo practitioners in many different ways. This is true even though large law firms can be viewed as forces of nature. They appear invincible like the Spanish Armada; they have innumerable cannon and they have a seemingly inexhaustible reservoir of talent in the large law firms, but what I propose to reveal to you today is why Sir Francis Drake lurks in your midst, while you may think you're ill-equipped and understaffed, nothing could be further from the truth. Your independence makes you nimble when business models for the practice of law are in flux.

Now, in preparing my remarks, I did some research and one of the fun things about doing a little research is that you never know when you're going to stumble across a gem, that is something you were not looking for and never would have expected to find. Well, that happened to me earlier this week. I found an article by A. Harrison Barnes titled, "The Benefits of Avoiding the Large Law Firm."

Now Mr. Barnes graduated at the top of his class from the University of Virginia Law School. He clerked for a federal district judge, worked as an associate at Dewey Ballantine and then lateraled to Quinn Emanuel before deciding to give up the practice of law altogether to become a legal recruiter.

Today, he is the CEO of one of the largest such firms in the United States, but during his second year of law school and also on weekends while he clerked for the federal judge in Detroit,

Mr. Barnes also worked laying asphalt for a highway contractor. In his essay, Mr. Barnes muses about how stark the differences were between the people he met while doing asphalt work and the people he met while practicing law. He also recounts that the people he met laying asphalt were much happier than the lawyers he was meeting today and he depicted that fundamental imbalance by sorting these groups with recognizable traits and so while he found the asphalt contractors to be trusting, attorneys were paranoid. While people in the asphalt business built things, lawyers tended to tear things down and work critiquing things. People in the asphalt business had the ability to stop work daily, while lawyers could never stop work and people working asphalt had a sense of identity and who they were, while attorneys always wanted to be something else. The comparisons could go on and on.

Could similar dichotomies be drawn between solo practitioners and partners at mega-law firms? I will let you fill in the blanks while I talk about the playing field.

First, from the very beginning of the attorney-client relationship, the playing field favors small firms and solo practitioners. For the small firm practitioner, the decision about accepting an engagement is almost organic. The conflict check is intuitive. You know your current stable of clients and you have a very firm handle on the matters and engagements your firm has accepted. You know what is going on in every corner of your offices. In sharp contrast, the conflict check for a large law firm is a major undertaking that involves cross-referencing information from offices around the world and then consulting internally with colleagues about potential conflicts. Often it puts one client against another or one office against another or one partner against another and the result can be unpleasant.

Not too long ago I had a criminal case in which the government moved to disqualify a nationally known law firm from representing a criminal defendant based on that law firm's simultaneous representation of a cooperating witness in the very same criminal case. The motion pitted the Dallas office of this law firm which represented the cooperator against the Chicago office of the firm that sought to represent the defendant. For good measure, the New York office of that same firm was drawn into the government's disqualification motion because the head of the firm's New York white collar group was asked to assess the potential conflict by the firm's general counsel who was in a California office of the firm.

Now, the cooperating witness in Dallas refused to waive the conflict created by the Chicago office's representation of the criminal defendant. While the reasons for that refusal are protected by attorney-client privilege, it suggested to me a level of discomfort with the law firm's duel representation. And here some colloquy that I had with the attorneys in open court is instructive; I asked, "How can you represent someone in any capacity knowing that your law firm represents someone else in the case who's going to testify against your client?" To which the Chicago partner responded, "I agree with you that on the face if one does the analysis superficially, that superficially is a problem. It is a much more conflicted and nuanced problem which we have analyzed from various angles. We have determined that the particular issue does not conflict with the representation of the cooperating witness."

I then posed the following question to the Dallas attorney: "Has your client, the cooperating witness, waived any conflict of interest?" To which he responded, "No, Your Honor."

So I said, "I don't understand, gentlemen, why you want to enter this minefield. The Court's obligation extends not just to the defendant, but to ensure that the proceeding is not in

some way impaired. Why is the cooperating witness not waiving the conflict?" To which the Dallas attorney, who you remember is representing the cooperating witness, responded, "Your Honor, quite frankly, without getting into any specific advice to the cooperating witness, the decision was made that he is a cooperating witness and it is not prudent for him to waive any conflict."

This exchange demonstrates in a nutshell how a very large law firm can tie itself in knots trying to get a paying client while avoiding conflicts of interest.

So after any conflicts are resolved, the next step in the attorney-client relationship is a retainer agreement. Here again, the small firm practitioner is at an advantage.

With the financial meltdown, a Teutonic shift has occurred in the practice of law and the old model that included hefty staffing of the most junior associates where they learned as apprentices may be gone forever. Clients no longer reflexively wire seven or eight figure payments to their lawyers when presented with a single page demanding that sum with the naked and uninformative phrase "for services rendered." Now clients insist on detailed legal bills, spar over duplicative work, and decline to pay for first and second year associates. They don't even want them on their case. They only want the partner or the senior associate.

The small firm with the solo practitioner on the other hand is built to deliver a lean model. To name a few examples, the hourly rates for partners, associates and paralegals are lower in smaller firms. Associates' salaries are lower. Overhead is lower. In the end, there is no phalanx of attorneys to turn loose on the case.

Here again, I resort to my own experience in this matter. I mean one example of big firm excess jumps to mind. Several years ago, an SEC action that included the appointment of a receiver was reassigned to me from another judge. The receiver was a fine lawyer at a major law firm who had promptly retained his law firm to represent him as receiver. While he worked at a modest discount, his law firm billed full freight. Judicial supervision of the case had been relaxed to say the least and the SEC was nothing short of asleep at the switch. The resulting feeding frenzy was the kind of thing that scares general counsel everywhere, even in the corridors of the largest corporations. Because a receiver is an officer of the court, I became the client, even though I was not the judge who appointed him. By the time the case was reassigned to me, the legal fees and expenses exceeded $10 million and that princely sum was growing at the rate of $500,000 a month and included charges for eight partners, 29 associates and 37 paralegals. And all of that had been approved by my colleague while only approximately four million had been dispersed to creditors of the estate. That was not much of a bang for the buck and reveals the challenge of managing a vast law firm's resources.

So if you're following me now, you figured out that you can accept the client and you have got your retainer and a budget. With the client relationship in hand, let's turn to the litigation itself and see how a small firm measures up.

Once a lawsuit is filed, the onslaught of motion practice and discovery begins. Here, depending on the size of the case, the number of witnesses and the universe of the discoverable material, small firm practitioners often believe they're behind the eight ball. While there may be some truth to that, the business model and legal landscape are changing. Within a few years, I predict the small firm practitioner will have an advantage here as well. Let me explain why.

Fifteen years ago, thousands or even hundreds of thousands of paper documents were produced for inspection and copying in dusty warehouses and processing centers in small cities

all over this great land from Overland Park, Kansas to El Segundo, California. Platoons of attorneys and paralegals reviewed and analyzed huge volumes of material. Document indexes and privilege logs grew to enormous lengths and there was a time in my own career when I searched like Don Quixote in the quest for smoking gun documents, if not impossible dreams while accumulating a lot of frequent flyers miles. That kind of document review with the attendant custodial depositions worked a real hardship on small firm practitioners, but transcontinental and even transoceanic document review is precisely the kind of mission that the very large law firms were equipped to handle and they did it very well, while small firm practitioners could not keep up, but when the plague known as electronically stored information infected our profession, the large law firms morphed and adjusted to the challenge. Their yearly crop of tech savvy law school graduates empowered them to deal with the brave new world and they did while the small firm practitioner and his aging associates were still figuring out how to put paper in the fax machine.

Now if only small firms could hire a new group of law school graduates every year, they might have had a chance, but that's not the reality of small firm economics. However, this is another area where a small law firm may have a hidden advantage. While large law firms generally have the advantage in hiring new talent out of law school, they often have a hard time holding on to them. Several years are spent training a young associate and when they finally start to carry their own weight, they lateral somewhere else or decide they want a clerkship and from the associate's perspective, the large law firm does not offer the experience and responsibility that is thrust on young attorneys in smaller firms.

But more recently, the sea change in e-discovery promises to level the playing field for the small practitioner. Some of the greatest minds in the 21st Century are working tirelessly in Palo Alto or Bangor to make all that electronically stored information accessible, searchable and ultimately usable by anyone. Scientists have developed all kinds of new software working with a database of five million e-mails from the Enron prosecution that the government offered for sale on the internet. Enron continues to be the gift that keeps on giving. As the New York Times reported a few months ago, advances in artificial intelligence can analyze documents in a fraction of the time for the fraction of the cost and they go beyond just finding documents with relevant terms.

E-discovery technologies are now both linguistic and sociological. They can extract germane concepts even in the absence of specific search terms and deduce patterns of behavior that would have alluded lawyers examining millions of documents. Thus, as the Times has reported, the word search programs are now so sophisticated that a user who types the word "dog" will also find documents that mention man's best friend and even the notion of a walk and the sociological programs mimic the deductive power of human intelligence to mine documents for the interactions of people, who did what, when and who talks to whom. As the Times described it, it finds the call me moments, those incidents when an employee decides to hide a particular action by having a private conversation that may involve switching media, perhaps from e-mail to instant messaging or the telephone.

So the time is here when even a solo practitioner sitting at home with an iPad can cruise through millions of documents and prepare for trial. Yes, the technology is expensive, but it's also indispensable and as great minds work on the problem, it will become available and affordable for every practitioner.

Of course, this is not all there is to pretrial proceedings. There is motion practice and letter writing and e-mailing about discovery and any number of other things and while a large law firm can operate around the clock and be inexorable as a planet spinning through the solar system, a small firm practitioner does need some sleep and maybe even a little fun. And so here, it's still an uphill trek, but it's not as steep as it used to be. The small firm practitioner can e-file documents and search a court file without having to send a clerk or an associate to the courthouse or hire a service to check whether an order has been signed. The advent of e-filing has taken away the advantage that large law firms with managing clerks offices and dedicated personnel stationed near the courthouse had for years and even the cattle calls of special term are disappearing.

Now, when it comes to motion practice and letter writing, maybe large law firms still have a fleeting advantage, but what does that really do for them: The capability to reproduce a 75-page memorandum of law; the capability to produce a 75,000 line privileged log that may spawn a battery of motions to compel or a summary judgment motion with 250 statements of material fact and eight volumes of exhibits.

I often wonder who believes that any judge is anxious to wade through several thousand pages of exhibits on a summary judgment motion. While I cannot speak for other judges, I can assure you that if I'm in my office at 8:30 in the evening, the choice between going home or dipping into volume six of summary judgment exhibits to review a 50-page servicing agreement in ten point type is clear cut.

It was only after I took the bench that I gained some understanding of the volume of paper that judges receive every day. You really would not believe it. Without knowing anything about any of your practices, I can state unequivocally that I receive more mail than any of you every day. In fact, it arrives in bundles three times a day and that does not include hand deliveries. Not all of it is clear and straightforward. I tell my law clerks that if I read to the bottom of the first page of a five-page letter — and I get many such letters — and I cannot fathom what the lawyer is asking for, the lawyer's client is probably in big trouble. Convoluted letters come from all quarters, big firms in midtown and solos on Court Street.

Take a page from Justice Scalia's book on legal writing titled, *Making Your Case: The Art of Persuading Judges*. Judges can be persuaded only when they have a clear idea of what you're asking the Court to do; they can be assured that its within the Court's power; and after hearing your reasons, they can conclude that what you're asking is best both in your case and in cases that follow. And while I may be digressing, it's important to remember Judge Alex Kozinski's admonition and I quote, When judges see a lot of words, they immediately think loser, loser. You might as well write it in big bold letters, closed quote.

Judges often associate the brevity of the brief or letter with the power of the argument and the quality of the lawyer. Good lawyers frequently come in far below the page limits; bad lawyers almost never do. Make your writing interesting. As Cicero observed, "In everything, monotony is the mother of boredom." And Justice Scalia puts it bluntly, "Brevity requires ruthlessness in wringing out everything that does not substantially further your case."

But to get back on topic because legal writing is a subject that I could talk about for much of the afternoon, the advantage that big law firms currently have in discovery and motion practice often crosses the threshold of diminishing returns. It's amazing how few documents actually trickle into the record of a trial. I'm sure many of you noticed.

Just this past spring, I conducted a three-month jury trial in which 22 million documents were produced by the government, only 3,000 of them, and I don't mean to minimize that number, were received into evidence and the jury requested fewer than 200 of those during its deliberations. It's a Darwinian process, albeit with a far lower survival rate. Many cases turn on a single document or a single page or a single paragraph. Now every lawyer from the largest law firm to the solo practitioner should want to try to get to trial as expeditiously as possible. Trial dates sharpen the lawyer's focus and the client's mind and there are many times when a trial would be less expensive than the cost and delay attendant to summary judgment motions. Most cases that approach trial are like these satellites we have been reading about recently in decaying orbits; they vaporize on the Court's point of view, that is they settle and, after all, isn't that the point of litigation, to resolve the dispute for your client. Of course, that's not to say, and I don't mean to say, that there are not summary judgment motions that need to be made because there really are no material issues of fact in dispute or there are claims that should be winnowed before trial, but what about those cases that don't settle?

Well, then it's a contest between the lawyers representing the parties to win the hearts and minds of the judge and the jury. That contest is all about persuasion. It's about holding the attention of the factfinder and making the important points crisply. Fancy demonstratives or dynamic PowerPoints do not persuade, only lawyers and their witnesses do. And that's all about preparation which depends totally on the lawyer and not the size of the organization behind him or her. It's also about presentation. As I have told many Bar groups, boredom is the enemy of the trial lawyer. The skill set that I'm talking about is as available to a solo practitioner as it is to a senior partner at a major law firm.

Here again, a little trial vignette makes the point. Years ago I tried a large breach of contract case involving a small group of doctors who sued a major pharmaceutical company. The trial spanned four weeks and there were about a dozen witnesses for each side. Each of the defendant's witnesses, including a number of pharmaceutical reps, were cross-examined effectively by plaintiffs' counsel except for one witness who was a former member of the U.S. Olympic team and a totally likable and memorable guy on the stand. During summations, the plaintiffs' lawyer had a few notes but otherwise talked to the jury. During his argument, he anticipated defendant's closing by reminding the jury several times in an entirely conversational manner that they would undoubtedly hear about the former Olympian when defense counsel summed up. He could not undermine that testimony on cross-examination and so he mocked it ever so gently in his summation, even quoting certain passages.

Now defense counsel had a deep bench in the courtroom and huge trial binders with direct examinations and cross-examinations, each of which were well-rehearsed and the summation was going to be the pièce de résistance of that endeavor. Defense counsel delivered a closing argument as planned. It made a magnificent record because it had been perfectly machined. And if one read the transcript, but I don't think anyone ever did because the case settled after the verdict, the reader would have been impressed by the exquisite elegance and structure of each sentence. The problem was that the summation also contained exactly the same quotations and characterizations that plaintiffs' counsel employed so mockingly just an hour and a half earlier. And that was not lost on the jury as they watched defense counsel turn page after page. Such tipping points do not depend on the size of the organization behind the lawyer, they depend on the lawyer, him or herself.

So small firms and solo practitioners today bear many similarities to Sir Francis Drake and his fleet in 1588. The big firm armada is daunting but its size is also its vulnerability. Small firms and solo practitioners possess the independence, flexibility and resourcefulness to prevail in any litigation and indeed the David and Goliath stories are legion.

In 2005, a two-person firm in Kansas City won a multimillion dollar judgment against BP in connection with massive oil spills in a nearby refinery. Those two lawyers subsequently represented many more plaintiffs with similar injuries. They didn't have a team of associates to review documents and draft endless chronologies. Indeed, they didn't have any associates at all, nor did they have any technical support to create world-class demonstratives, but they did have compelling arguments backed up by some key documents and this combined with hard work and determination won the case.

More recently, a Berkley, California law firm consisting of its founder, a single associate and one secretary outmaneuvered a 1500 lawyer megalith and obtained a $213 million judgment in a patent infringement action in Delaware. Not only did that small firm successfully persuade the jury that the plaintiff's patents were valid and infringed by the defendant's products, it seized on the large firm's missteps in failing to call a key witness in its direct case, a witness who had authored a critical piece of prior art could have undermined the investor's testimony, but because the mega-firm's lawyers failed to called the witness earlier, the judge agreed with the plaintiff that the witness could not be offered on rebuttal. Simply put, the small firm outmaneuvered its larger rival.

So small firm practitioners have to be undaunted in getting to trial and these are but two examples of how small firms had used their size and skill to their advantage. On the other side of the vee, it seems inevitable that cost conscious general counsel will overcome their reluctance and seek small firms for defense work. And lawyers in the largest law firms, including one of Paul's colleagues at Cravath are calling for an entirely new fee structure and replacing it with a fixed fee arrangement, negotiated periodically throughout the course of the litigation. Paul's colleague headlined it "kill the billable hour."

In conclusion, I fully expect to see small firms and solo practitioners efficiently defending large institutional clients on multimillion dollar claims. The revolution in e-discovery combined with the trend toward outsourcing makes this development even more likely. There is no reason why a small firm or solo practitioner cannot handle the strategic planning, case management and trial work while outsourcing labor intensive discovery. So the playing field is tilting toward the smaller firms. The forces at work are really akin to plate tectonics, a subject even New Yorkers are reading about after the August earthquake. Now the large law firms, heavy with staff and overhead, are colliding with the thinly staffed and more nimble small firms. As plate tectonics and the laws of nature teach us, the heavier basaltic rock tends to subside while the lighter coarse-like stone is uplifted. So hold on because some day you may find yourself in the Himalayas, perhaps even on Everest.

Thanks very much for the opportunity to speak to you today.

MR. SAUNDERS

Thank you very much, Judge. That was very interesting. When I put that question to you last summer is the playing field even, I didn't have that answer in mind. I could have sworn the

answer would have been the other way and when Judge Pauley and I litigated our long case many years ago and he was with a small firm obviously and I was with a large firm, I always thought he had an advantage and now I know the reasons why.

So thank you very much.

Now let's resume our panel discussions. Let me introduce to you Michael Ross, somebody who probably needs very little introduction to many people in this room. Michael is a solo practitioner. He is a part-time academic. He is a onetime prosecutor and he is a prolific writer on the subject of professional responsibility and ethics.

So let me ask Michael to bring his panel forward. Thank you.

PANEL II – BEST PRACTICES FOR SOLO AND SMALL FIRM PRACTITIONERS

MICHAEL S. ROSS
LAW OFFICES OF MICHAEL S. ROSS

Hello, everybody and I must say that was really a wonderful speech as a small firm practitioner.

Some of you who know me believe I'm not really big on introductions because you're always going to say too much or too little but I'm going to make a brief introduction anyway.

First of all, Cliff Robert is a colleague of mine, excellent civil litigator who teaches a lot and he and I have done about 50 programs in the last five years and I've gotten to know him pretty well. He is a battle-hardened veteran.

To his right is Paul Craco who is a Long Island practitioner who will be talking to us a little bit about his experiences.

Chris Chang typically hears me from another vantage point. Chris was recently designated to the Policy Committee of the Departmental Disciplinary Committee in the First Department. Before that, he served for many years as a Panel Chair conducting many, many hearings. He was a fine, worthy, difficult and challenging Panel Chair and he and I have faced each other many times. Very, very knowledgeable individual.

And Harvey Besunder, as long as I have been in the world of discipline, he has been there years before me. I can't introduce him and say enough nice things about him.

I also think I have to acknowledge the wealth and depth of experience in this audience. I know I'm not going to mention some people that I should but just by way of example, just some of the faces that I see in the audience include Catherine Wolfe who is Clerk of Court in the Second Circuit who plays an important role and was formerly Clerk in the First Department; Bob Guido, a very, very long time veteran in the Second Department who now works in the Second Department; Colette Landers who is in the Second Department as a staff attorney; Sherry Cohen is a former First Deputy Chief Counsel in the First Department; Liz Grabowski in the Second Department; Michael Fuchs, also in the Second Department; and Maria Matos who was formerly a staff attorney in the First Department and is now counsel to the Committee on Character and Fitness and I'm sure there are a lot of other people as well.

To all of you, thank you for being here and if you feel you have something to add and you would like to ask something during the course of the presentation, please do it.

In our planning session, we were asked to talk about the pitfalls that face small firms and solo practitioners and the fact of the matter is that you can speechify about whether it's a level playing field, but the fact of the matter is that the smaller the firm, the smaller the bench. Well, less people that are there to support you and help you make the right decisions, the less people who are there to second and double-check and triple-check the important things that have to be done.

So, collectively, our panel selected the seven deadly pitfalls, the pitfalls that consistently present problems for lawyers and income for me in terms of representing lawyers in law firms that face problems.

So I thought I would begin with our first deadly pitfall, that is the pitfall of my favorite topic which is money.

Ladies and gentlemen, it's a brave new world that we live in. Lawyers have an issue and that is proving that they have earned their fees. So my first question, generally speaking to Cliff is, Cliff, you do contingency fee work; is that right?

CLIFFORD S. ROBERT
ROBERT & ROBERT, PLLC

That's correct.

MR. ROSS

You would agree with me that in a contingency fee case, do you have to keep time records?

MR. ROBERT

The answer is you do.

MR. ROSS

Wait a second. Ladies and gentlemen, we have the good book, the bible, it's our holy bible, and that's the Rules of Professional Conduct. We have a rule called Rule 1.5. The Rule 1.5 dictates the rules governing how we charge but it says nothing about hourly records.

So why do we have to have hourly records?

MR. ROBERT

It's a practical implication because if you're dealing with issues down the road, whether it's the proper relationship you have with the client, whether you're ultimately going to be attempted to be terminated for cause by an incoming lawyer or the outgoing lawyer or in the case of a general negligence case where there is a death action requiring a compromise order, you have to be able to substantiate what you did. The mere fact that your engagement letter may set forth a percentage upon which you should be paid is not necessarily dispositive at the end of the day.

MR. ROSS

Wait a second. Cliff, you have traveled around the state discussing ethics; right?

MR. ROBERT

Yes.

MR. ROSS

We have asked people in the audience to raise their hand and say how many of you are contingency fee lawyers.

How many of you are contingency fee lawyers? Would you raise your hand.

Okay, not that many, five or ten.

How many of you keep records, time records?

Two or three out of that number or four or five.

So you're keeping records because you're afraid somebody is going to make a claim against you?

MR. ROBERT

It's funny, the people that keep records are either ones that have heard that they should or once burned by somebody when they didn't have the adequate records, but without having the adequate records, there is no way to defend yourself and we can have a whole lecture on issues of when you're terminated for cause or not for cause or supporting your fee, but suffice it to say, your billing records are the single most important thing in determining who you spoke to, when you spoke to and how much time you invested in the case.

MR. ROSS

Paul, do you keep computer records?

PAUL V. CRACO
CRACO & ELLSWORTH, LLP

We do.

MR. ROSS

Do you have a situation where you type in this information on a computer?

MR. CRACO

We have that situation.

MR. ROBERT

It's like he is testifying for Congress.

MR. ROSS

Well prepared to the second.

MR. CRACO

Cracos have used up their allotted time today.

CHRISTOPHER E. CHANG
LAW OFFICES OF CHRISTOPHER E. CHANG, ESQ.

Direct the witness not to answer.

MR. ROSS

Where were you on the night of the 15th?
Wrong program. Wait a second.
Do you really think that people are entering their time on their computer programs in realtime, Paul?

MR. CRACO

To the extent that that's possible in our office, absolutely. Any lawyer or paralegal who is entering time is instructed vigorously to enter it contemporaneously to the work that is being done. Recognizing that that is not always possible, there are other ways to capture that information to ensure it's as accurate as possible.

MR. ROSS

Chris, you have sat in judgment on many panels in the First Department; right?

MR. CHANG

I have. Too many.

MR. ROSS

By the way, you all know the system we're talking about, 1.2, capturing the tenths of the hour; right, we're talking about that.
Chris, do you think when somebody or a lawyer or a paralegal or an associate puts down .2, which I think we can agree means 12 minutes, do you think that that lawyer actually has got a stop watch and it's like —

MR. CHANG

No, the practice is to approximate as best as you can the amount of time that was devoted to the matter.
In terms of keeping your billing records — I have been a solo practitioner since 1998. This is I hope my last iteration as a lawyer because before that, I had been a summer associate

when I graduated from law school, came to a big firm, thereafter, the DA's office and two other firms after that.

I got into the habit of keeping billing records on a daily basis. For this reason, as a best practice, apart from billing purposes at the end of the month, I found that at the end of each month when I reviewed my billing record, because I do exclusively litigation, both civil and criminal, particularly where I was doing plaintiff's work, I would be able to look at what I did for that month and say is this case moving forward or what am I doing in the case, is it just wallowing around and so as a practice totally apart from using it as a contemporaneous record to render a bill to a client or keeping a record even if you're in a contingency fee case and you wind up in front of the disciplinary committee on a complaint by the client claiming that the fee is excessive, the recordkeeping process is one that I think forces you as a solo practitioner in particular to keep a monitor on yourself in terms of what is happening in your cases.

MR. ROSS

Harvey, one of the things that people say consistently goes something like this, I either put down too much or too little and in a world where everybody has a timer and, by the way, many clients now speak to you from their cell phones and they can actually tell on their cell phone, you give a bill for .2 and that's 12 minutes and you have spoken to the client for .1 1/2, let's assume it's nine minutes, would you charge them .2; would you feel comfortable?

HARVEY B. BESUNDER
BRACKEN MARGOLIN BESUNDER, LLP

I probably would.

MR. ROSS

How do you think the client would feel about that?

MR. BESUNDER

It's interesting, clients are always complaining anyway, especially when it comes to billing and one of the problems you always have is with travel time. You put your travel time in and they don't want to pay for it. You're going back and forth to court. It may take you an hour, two hours for a ten-minute conference and you have got to use some common sense with that too.

A lot of times I will put down my travel time and say no charge for it. Over the years when I was a solo practitioner, I probably wasn't as good with my billing records as I should have been, but now that I have partners looking over me also, they're looking at my time as well.

I want to say one other thing about the contingency fee if I can, even if you complete the matter and have a contingency fee arrangement, your fees are still subject to review and you have got to establish that they're reasonable. If you read some of the recent cases, you will see that large contingency fees have been challenged and the appellate divisions have said you know

what, you have got to go back and prove that they're reasonable. And I even represented somebody who had that and was suspended for a year for an excessive fee.

MR. ROSS

And of course federal judges do not firmly believe in the one-third New York State traditional contingency fee case.

And in federal court, a contingency lawyer must have contemporaneous time records or there will be an automatic lop off of 25 or 50 percent immediately.

So good point, Harvey.

One of the things we hear again and again is that a client gets a bill. You have a computerized bill or you try to justify what you're doing for a judge later on and the question is how much detail do you do and some people say, look, I'm a small practitioner, a solo practitioner, and the question is how much information do you want to capture on the bill?

MR. ROBERT

I think it depends on the kind of matter and the conversation you have with the client in the beginning. If it's a client that wants to know every detail of what's going on, it's think that's important and it's also a good record for yourself and as Chris said, it's what you're doing on the case. But in some instances you may be representing a corporation or some other entity and they may not want specificity in the bill. That's something you need to talk to the client about so that the client is comfortable and keeping track of what you're doing and at the same time you're not saying too much in your bill because, traditionally, legal invoices are not subject to attorney-client privilege.

MR. ROSS

If a bill is not subject to an attorney-client privilege, but you are putting information in there, what can you do to make sure that the bill communicates your work done but still survives a claim of privilege?

MR. BESUNDER

You can use general terms, motion for summary judgment, discussion, telephone conference and so forth. I think it's good to put down exactly what you're doing. How much detail depends on the particular situation, but you have got to be careful and you have got to discipline yourself because what happens is you will have a ten-minute conversation or a half hour conversation with one client and then you get another call and then you start doing research on something else and you have got to remember to go back and put that time down. A lot of time is lost.

MR. CHANG

I just want to make this observation. I can't tell you the number of cases that my panel heard among others having to do with fee disputes that the client was attempting to transcend or transform into a disciplinary matter and the frequent rejoinder by the client was "I didn't know what was going on," notwithstanding the fact there was an hourly billing and they're getting monthly bills and so on and so forth.

One of the things I have suggested to all attorneys, whether you're at the biggest firm in the world or you're a solo practitioner, if you're doing substantive work in the litigation context, I'm talking about litigation context, your product as an attorney often times is your written product, your motions on summary judgment, your substantive motions to dismiss; if you're in federal court, your Rule 56 statement, things of that nature.

What I recommend that you do as a solo takes a little bit more time, maybe a little bit extra expense to you, but I recommend that you send the client the substantive work, make an extra set of those motion papers, send it to the client with a cover letter, Dear John, here it is, that's it and if you're brought into a fee dispute, I as a Hearing Panel Chair, if I had that in front of me and I heard the client say "I didn't know what was going on" and the attorney puts up his Exhibit A, here's a cover letter, this was sent to the client, memo of law, affidavit, 50 exhibits to it, that claim goes out the door.

MR. ROSS

Paul, let me ask you this question: If a call comes into your office and a secretary takes a message, does that call get logged on the billing system?

MR. CRACO

No, not in my office. Generally speaking, the secretarial staff is not billing as part of — that will not appear on the bill to the client.

MR. ROSS

Will you include the fact that a callback has been made whether by a paralegal and by a lawyer.

MR. CRACO

Whether by a paralegal or a lawyer, yes, we will include that.

MR. ROSS

There are a number of disciplinarians in the audience. The hardest complaints are complaints involving neglect which is "I called my lawyer. My lawyer never called me back," which, by the way, is a major claim that is made when you're trying to share fees.

How many people in this audience have shared fees in their career?

It's a great thing to do. You don't have to be ashamed of it. It's provided for in the Rules of New York.

So, Cliff, we call the defense to share fee plan B, that is you're entitled to share a fee. You have earned your share fee but somebody wants to take that shared fee away from you. What do you do?

MR. ROBERT

The first rule in the playbook is that you're being terminated for cause and usually within plan A, sub 1, you failed to return the client's telephone calls and were not receptive to the client's needs.

MR. ROSS

But what is required in order to share a fee?

MR. ROBERT

Under the old rule it was you had had to have a writing subscribed to where either the lawyers agreed to joint responsibility which then put liability on both lawyers' parts or you could have some sort of specific percentage amount and the client was deemed to have known of both lawyers' involvement and there was even some case law that if you didn't even specifically tell the client that a second lawyer was involved, if they could infer it from the circumstances, it was enough.

When the new rules were put forth under new Section 1.5, and this is especially prevalent in the negligence and medical malpractice world, if you're now bringing in another firm and many general, small practitioners will bring in a med mal or personal injury firm to handle the client, not only does the engagement letter have to set forth the name of the attorney who you will be referring it to, but it also has to break down the specific percentage of fees that is going to be shared between the two lawyers. And this has caused great problems in the negligence world, because if you were a real estate practitioner and your next-door neighbor came and said, "I would like you to handle this auto case," there was never thought about would the fee be a third or not, but now when your neighbor sees that the fee is a third but 22 percent of that is going to a second lawyer and you're keeping the first third for yourself, it's created real issues now of people saying, wait a minute, why are you entitled to money for just referring it to someone else.

MR. ROSS

Bottom line, our first pitfall is back, that even when lawyers try to be good and decent lawyers, they probably could be doing a better job keeping records. When you're a small or solo practitioner, one way to inoculate yourself against problems of billing and client complaints is to have a computerized record showing that you have done work and when you have done it.

So here's the second pitfall, ladies and gentlemen, and I feel a little bad talking about it. I've sent my children to luxurious camps. They drive nice cars because of it. They're simultaneously attending three separate private colleges right now. I want to talk to you about

the things you have done which involve escrow accounts. And I'm reminded if I had goggles on right now, the escrow goggles, I would see the people with the scarlet E on it for escrow, because the fact of the matter is even though you think you're in compliance of the rules, as the disciplinarians in this audience know, most people do not get it right.

So I think it's only fair we turn to Chris Chang to talk first about whether or not a lawyer — you're all good lawyers — a lawyer who doesn't steal, who is a good and decent person and maintains they have in their files their monthly statements, they keep copies of their checks, they've never bounced a check, still they're violating the rules; right?

MR. CHANG

This is how it comes about. The bank dishonors an escrow check by mistake, bank mistake, or what happens is you write a check, the amount is not correct and there is a little bit of an overdraft, check bounces. It's an IOLA account so there is an automatic reporting to the Disciplinary Committee. They have to open a file. They call you up, what happened here. By the way, can we take a look at your escrow bank account and you have a one-write system, meaning you have all the check stubs. You have copies of the checks. You have all the statements. You keep them in order. You are not in compliance.

The rule requires a double ledger system. You have to keep a general ledger indicating by date monies going in, monies coming out, payable to whom or received from whom and then you have to keep a separate ledger by individual client on the monies going in and going out. That's the short answer.

MR. ROSS

Harvey, does this mean that someone is subject to a sanction because they don't have the records; is that something that the committee actually takes seriously?

MR. BESUNDER

I think any escrow issue the committees take seriously, but bearing in mind at least the committees that I have dealt with, most of them anyway, are really not star cavers and you look at what the underlying facts are and generally they're fair and what Chris said about bank error happens quite often and I just had a situation recently where the bank charged for checks and there was $45,000 running through this account every month and everything dealt actually to the penny. Everything was accounted for and there was a $16 overcharge because of checks that the bank charged them for and the accounts were linked and they sent her a bill for it but then took it out of her account and sent the letter to Albany and it resulted in a grievance and ultimately the matter was dismissed with an advisement. But, again, the committee does take it seriously, but they do have a heart except when you steal and then there is no heart at issue.

MR. ROSS

Mike.

MR. CHANG

I have one observation with respect to your escrow accounts and I think this dynamic is particularly true with respect to solo practitioners because you don't have partners that you have to kind of account to or account for. And putting aside the question and the flat out stealing of client monies which obviously is improper, increasingly what I have seen over the last four or five years in Disciplinary Committee is that on solo practitioners is the pressure of cash flow and that's always a problem and now in this climate, bills are slow on the pay and things of that nature, there is a temptation to the solo practitioner, well, I'm just going to borrow a little money. I do a real estate deal on the side. I'm holding $100,000 deposit on a house sale. Nobody is going to know. I'll borrow ten thousand here or five thousand here, pay some expenses, money will go back in. No, no. Because what happens is if the committee does find that out and it is investigated, that is a huge problem for you.

MR. BESUNDER

I think that's one of the problems, Mike. It's probably the borrower that's more prevalent than the thief and the issue is there is really no temptation because it's just not your money. You wouldn't put a stocking over your head and go into a 7-Eleven with a gun and basically it's the same thing. As soon as you take a dime out of that account that doesn't belong to you, you may as well send your license in as well.

MR. ROSS

There are many people that have escrow and IOLA accounts who use what we call the cushion, a term which many of you may know. There are some people in this audience I know with scientific certainty who say, look, I'm going to avoid a bounce. What I'm going to do is keep a legal fee or two in my account, and sometimes it's there for years and years, and that cushion prevents there from being a bounce.

Here's the rhetorical question: Is that good, sound practice? Is that a good way to avoid a problem?

MR. CHANG

It's commingling.

MR. ROSS

I recently had a case in front of Mr. Chang's panel where the client said, "Commingling? I thought that meant stealing."

Why is that commingling?

MR. CHANG

You can't take your monies and throw it in your escrow account. You are an escrow agent. It's client monies. As the cushion or the bump, as they call it, the pillow, you can't do it. You can't say, well, I'm going to throw in $500 to avoid the problem of the bounced check and all of a sudden I get a phone call from the committee.

MR. ROSS

We have a question and I'll repeat it.

AUDIENCE MEMBER

With respect to the commingling of the funds, how do you then get around the problem if you open up an IOLA account and you get charged for bank checks by the bank, how do you have your client pay for the checks? You're commingling.

MR. ROSS

First of all, let me say one thing, the rules now have a provision that a lawyer may keep sufficient funds in his or her account to cover bank charges and so that is something that people recognize.

Some people say does that mean a hundred dollars? I would say sure. One hundred fifty, if you have a big practice, sure. We're talking about thousands. We can all agree that you're not going to have bank charges of thousands of dollars.

That's a good question, but, again, you're allowed to have a certain amount of money.

Let me say one more thing, at the end of the month, the best way to make sure you're in escrow compliance is to do something simple. Chris told you you have to maintain individual records for your individual clients. By the way, you can do that by hand, by computer, Excel, Peachtree, you name it. Even Timeslip, by the way, has a program on it.

You simply add up all your individual accounts and they should equal what Chris was saying which is the total amount of money in your account plus that additional money for the balance of your charges.

Yes, sir.

AUDIENCE MEMBER

I want to say I didn't realize I was in violation when I wasn't keeping track of the data.

MR. CHANG

Do you need a lawyer?

AUDIENCE MEMBER

One dollar because the banks won't —

MR. ROSS

I have to say this: Some of us on this panel know there are some banks that are consistently the ones that make mistakes. There are banks that consistently take a dollar out and that's why lawyers have to keep in mind that if they have a commingling problem, they move their money to another account. That's the way to do things.

AUDIENCE MEMBER

I do have a question. Several years ago we had a CFE at Crest Hollow where I believe it was a $23 issue where the lawyer wrote a check to the client $23 too much, couldn't get the client to give it back, put in the $23 and suffered a discipline.

MR. ROSS

I want to repeat that for everyone. One of the questions is what if there is a mistake. You overpay client number one, right, which is unfortunate. You realize that you have inadvertently — it's the "C" word which is converted money. What do you do and how do you replace the $23.

There is actually a case in the Second Department called Matter of Forman where a lawyer's secretary stole money, so the lawyer took his own money and put it into his account and he was accused of commingling. A concept that alludes my common sense, but that's Matter of Forman.

I invite Harvey, sounds to me that's the right thing to do, put your money in.

MR. BESUNDER

This is why my mother told me to go to medical school.

Sometimes things just happen and when I first went on the Grievance Committee, I sat next to Frank Gulotta whose dad was a judge, like your father and my father told us, you can be careful, but you can never be careful enough and that's the truth. You have to be exceedingly careful because these things can happen. It seems unjust, but there is not much you can do about it.

MR. ROSS

I will tell you that this is a question what happens if you identify a situation where you have to put money in. I still do not understand the Forman decision.

We have a number of disciplinarians in the audience and I don't want to spend too much time on this issue. I think it's a situation where if your escrow records clearly identify the fact that you're transferring money first from your personal account to your operating account and your operating account into your escrow account and it's clearly designated, I still to this day do not know any other way to rectify that. It doesn't seem to me to be commingling. I don't know if we will ever have closure on it.

AUDIENCE MEMBER

First, are you permitted to go back to a question on contingency fee?

MR. ROSS

Sure.

AUDIENCE MEMBER

I want to ask in the federal court, you say they do not honor the contingency fee.

MR. ROSS

They do not honor the presumptive one-third. We have seen that in the Staten Island Ferry case and a number of other cases as well.

AUDIENCE MEMBER

Do they do that on the basis of unconscionability or contract adhesion; how do they come to that conclusion of determining that the contract between the lawyer and the client is not effective?

MR. ROBERT

There are various answers I would give and the one I would give since we're being transcribed and recorded is that the federal bench has a view of looking at contingency fee cases especially in the negligence and medical malpractice world and many of them feel that they have a duty to inquire to see if the value that the lawyer is seeking in the application is truly deserved. That then becomes a very serious problem because most negligent and medical malpractice lawyers do not keep their billing records and as Michael said, you try to reconstruct it the best you can and no matter how great you are, you are going to be cut by 25 to 50 percent.

AUDIENCE MEMBER

This is a contract. You're doing a contract.

MR. ROBERT

But the rules also require that any fee be reasonable so even if there is a contract between the lawyer and the client, the court still has an ability to go in and say is this a reasonable fee no matter what the agreement was between the client and the lawyer.

MR. ROSS

This is perhaps a dialogue for another time. The point is well taken. This is from an economics point of view.

If you're a solo or a small firm practitioner and it's a state court case, you are probably almost to a mathematical certainty going to get a third that you contracted for. If you believe that is true in federal court, then that's important as an economic decision for your law firm. You need to think twice because the federal courts exercise much greater control over what they believe is a fair fee and that's an important consideration for a small firm that has to make a decision as to whether or not they want to get involved in a piece of litigation.

MR. BESUNDER

When it comes to legal fees, the onus is always upon the attorney to prove the fee, so you take that contract law and put it aside and just look at the recent cases that came down on contingency fees and having to establish the reasonableness of it.

MR. ROSS

Yes, sir.

AUDIENCE MEMBER

I have an escrow question. I don't know what the real numbers are, but my perception is that a lot of the time that lawyers get in trouble is because of an escrow problem. I don't know what the percentage really is but the judge I used to work for was an advocate for doing away with attorney escrow accounts and there have been other states, they use escrow companies and lawyers don't get into trouble for dipping into escrow funds and the client's money doesn't get stolen and the insurance industry is happy because now they don't have to worry, what does the panel think about replacing the attorney escrow accounts with escrow companies?

MR. BESUNDER

Can I jump in on this?

MR. ROSS

Sure.

MR. BESUNDER

I'm looking at Bob Guido because he could probably give you the statistics.

The percentage of lawyers who have been disciplined for escrow violation is miniscule. So that to say that you're going to take and change the entire system because of a very small percentage of lawyers have been guilty or have been disciplined for escrow violations I think is foolish.

AUDIENCE MEMBER

But I mean the number of people who get in trouble, what is the percentage of that in escrow problems?

MR. BESUNDER

I'm talking about escrow. The percentage of the total number is very, very small.

MR. ROSS

Across the board, at least in my own experience in the First and Second Department is it's a very small number. Obviously it's a very high profile number because of the victimization of innocent clients, but I think across the board, it's the highest recognition factor for the public but it's not the biggest problem the profession is facing.

It's something that the Bar has been debating. The Committee on Professional Discipline of the New York State Bar Association, every two years we have a debate about it and it's impossible to get common ground on it.

MR. CRACO

Mike, if I can make one quick point on that.

A few years ago Newsday did we'll call it an expose on attorneys who had pilfered their clients' escrow accounts and my recollection of that article was that 99.7 percent of the attorneys in Nassau and Suffolk County were not pilfering their clients' escrow accounts and that seemed to be newsworthy to me. Newsday chose to portray the article the other way.

MR. ROSS

Yes.

AUDIENCE MEMBER

I don't have a small firm. I'm not a solo practitioner but every time I think about going out on my own, I think about these problems because it seems that things can happen that you have no control over and it doesn't seem like there is any place to go; for instance, there is a $16 check fee that you know about and if you're concerned about your license and your reputation, it seems to me there should be someplace you can go for an ethical — in other words, say I did open up a firm and then I see that there is a problem, I should be able to call a professional who may be willing to volunteer in this area and say could you give me guidance before I do anything, would you be able to tell me —

MR. ROBERT

That is Michael S. Ross out of Manhattan.

MR. ROSS

In fairness, we would love to talk about escrow accounts. It's an important topic. It's important that we can change the amount of time we allotted because escrow accounts are toxic. It's worth changing the situation.

First of all, the committees do not spend all day long — Colette Landers and Michael Fuchs, they don't spend all day long reading that there has been an escrow violation and if it's a mistake by a bank or an innocent mistake, you're not going to get knocked over the head; however, let's assume as a lawyer, I'm looking at my account and I can't figure out what to do with $5,000. That often is what happens. I have $5,000 in my account. I have my account open for ten years, what do I do and people say I'm going to get disbarred.

There is a procedure to turn that money over to the state and if you have any questions, these ethics committees have hotlines in every county. The Suffolk County and Nassau County Bar Associations are extremely user-friendly. Manhattan has hotlines and they're professionals like myself and if somebody calls me and says I can't afford a consultation, can you have give me a quick piece of information, I tell people all the time if you have too much money in your escrow account and you can't figure out who it belongs to, here's the provision under the law to send it to Mr. Knight and the Lawyers' Fund for Client Protection, let's get it out of your account and I don't think it's going to set the world on fire. If, however, you don't know who that money belongs to, you have to drill down and figure out who that $5,000 belongs to because if it doesn't belong to you, it has to go into the right client's pocket.

I don't know if you folks have an opinion on it.

MR. BESUNDER

Sometimes it's not the easiest thing in the world either. You can't even turn it over to client security unless you know who that money belongs to, so you may have to have your own accountant do an audit.

In response to the question back there, you can pick up the Bar Association directory for Nassau/Suffolk and call anybody in the Ethics Committee and they're going to give you an answer. You don't have to worry about that.

MR. ROSS

Let's move on to the next issue.

Paul, you're out of your office one day and if you're out of your office and you were a solo or small firm practitioner, how much latitude are you entitled to give to your employees to act in your name.

MR. CRACO

With respect to?

MR. ROSS

Generally, can your paralegal speak to a client?

MR. CRACO

Certainly a paralegal can speak to a client.

MR. ROSS

If a paralegal is asked a question, can they answer the question?

MR. CRACO

A paralegal can answer the question to the limited degree it's not dispensing legal advice to the client. It also depends largely to the degree you trust the paralegal who is in the office while you're out, but the short answer to that is anything that starts to smell like legal advice, the paralegal should be instructed to advise the client that the attorney will get back to the client with the question.

MR. ROSS

Harvey, we know that there is nothing that is more valuable to a practitioner than having an experienced paralegal or secretary. They're more valuable than gold itself.

Is the lawyer okay sending that paralegal to a closing to cover the closing?

MR. BESUNDER

I know it's done. I'm not happy with it. Usually the paralegal has to be supervised by an attorney who is present, I believe.

I have always had difficulty with that, but in the days where there was real estate and when lawyers did practice real estate law, which seems to be a defunct practice right now, and you go to a bank and basically you had paralegals in 18 different rooms, none lawyers, and then the lawyer would come, they bring the papers out, the lawyer would sign them and bring them back and you have your deal.

I've never been comfortable with it. I don't think it's improper, but that's just my feeling.

MR. ROSS

Cliff, do you do any personal injury work?

MR. ROBERT

Yes.

MR. ROSS

Cliff, let's assume you got a call from a medical facility. You have a good friend who somehow has a management role in a medical facility.

Would you assume that for a second?

MR. ROBERT

I'll assume that, sure.

MR. ROSS

Let's assume that your office got a call and you learned that there is a potential client that's got a fractured leg.

Is a fracture a good thing for a patient?

MR. ROBERT

For a patient, no; for some lawyers, yes.

MR. ROSS

Even insurance companies whose names I'll not mention today cannot claim that a fracture is a —

MR. ROBERT

A serious injury.

MR. ROSS

— serious injury, for those of you who know what we're talking about.

Cliff, could you have your paralegal take a retainer agreement and go to the medical facility and sign the client up?

MR. ROBERT

I would say no. Some lawyers would disagree, but I would say no.

MR. ROSS

Why?

MR. ROBERT

If you look at the rules, it's within Section 5, the responsibilities that a lawyer has to oversee the people in their office and 5.1 of this deals with other lawyers and 5.3 is not lawyers and the various responsibilities you have, especially when it comes to issues of the engagement letter. You as the attorney want to make sure that the client understands fully what the terms of the engagement letter is, what exactly you're being retained to do and, in my opinion, that conversation can only happen between an attorney and a client.

MR. ROSS

I think it's a good time to remember that many people who are in the business of attorney discipline, we really don't rely on our memory. We always go back to the good book because there is a rule that covers everything and if there is no rule, there is some case or an opinion.

So Rule 5.1 doesn't speak anything about it. Rule 5.1 which is the supervision rule simply says that a lawyer shall make reasonable efforts to ensure that all lawyers in the firm conform to these rules and there is another rule that governs essentially the same thing with respect to nonlawyers.

So you wouldn't do it?

MR. ROBERT

Correct.

MR. ROSS

Paul, would you do it?

MR. CRACO

I might.

MR. ROSS

Let's assume it's a broken femur. This injury is getting a lot worse.

MR. CRACO

Is the leg coming off eventually?

MR. ROSS

Possibly.

MR. CRACO

The answer is I might, but I think picking up on that theme, you have to be very careful that the lawyer has explained the provisions of the retainer, whether the execution, the actual pen to paper needs to be supervised by the lawyer, as long as the document has been adequately explained, I think I might under certain circumstances permit that.

MR. ROSS

Chris, how do you feel about that?

MR. CHANG

Just as a practice, because in the context of litigation, I have always found, whether I'm representing the client as a plaintiff or a defendant, that you are somewhat joined at the hip for a period of time, whether that time period is two years to trial or the case gets settled in six months, so I have always felt that I want to sit at the table. I want the client to take a look at me and if they're going to retain me, and I generally require a retainer fee in cases where I'm billing by the hour, I have my standard retainer agreement. I sit down with them. I don't bill them for the time that we discuss the retainer agreement. I answer all of their questions. I think as a best practice that that sets the tone of the attorney-client relationship where there are no questions that can be legitimately asked, well, my lawyer never returned my call. He or she was not on top of my case.

I think that as a solo practitioner, I don't care if you have been practicing 50 years or two years, one of the things that is problematic just in general in the legal profession is that you go to a cocktail party and you always hear the bad stories about what happened with an attorney. Very rarely do you hear the good stories. It's something that Lou and I ran into when we were barnstorming the state when we were doing the hearings for the Craco Committee Report. You never heard a good news article about something good a lawyer did. It's changed. There has been a change because the committees work and the institutes work, but I think that as a professional, you're a lawyer. You have a license to practice. You can do things that other people cannot do and if you set that tone right up front that the client calls, you return the call, if they want to consult with you, you call them back.

I think just that's me and that's the way I was trained.

MR. CRACO

Picking up on that, a lot of what is being discussed today seems to revolve around communication, whether it's communication with your client at the point that the individual becomes your client or communication with your client at the time you're billing your client and how those records are reflected or communicating to your subordinates about how they should deal with the client, maintaining open and complete communication with your client, both in terms of independence and the other things we're talking about here is as important a thing as a solo and small firm can do.

MR. BESUNDER

Also, Mike, it's a matter of common sense. You're getting a case like that, why send the paralegal out when down the line your fee may be challenged, as we talked about in contingency fee cases. Now you're going to have to justify your fee and all of a sudden it comes out, well, you weren't there to explain the retainer agreement to your client. Did they have informed consent when they actually signed that retainer agreement. Take the extra time and do it. Don't look at these rules and say let me play it close to the vest. Look at them as a guide and when there is a question, go back and as Mike said read the rule.

MR. ROBERT

On the issue of supervision, just one thing that I learned that I never knew before when I was preparing for today, and there is a lot I didn't know, but under Rule 5.1 when you're talking about the responsibilities that a senior lawyer has to oversee the work of subordinates in their office, in addition to the skill required to do the duty and the type of job it was, at the end of it it said "also in the likelihood that ethical problems might arise in the course of working on the matter." It kind of is intuitive, but it's very interesting at least to me that that is part of the rule and one of the things you need to consider when supervising the other lawyers in your office.

MR. ROSS

One final thing to be said here, most of the time everybody, myself included, not only do we make mistakes, our staff makes mistakes and the Grievance Committee and Disciplinary Committee understand your firm is not perfect; there is, however, what is called the "red flag doctrine."

So in a recent Second Department escrow case, we're going back to escrows where we see a lot of problems, the court imposed a very lengthy suspension on a lawyer who was aware in the words of the court literally of red flags by a partner's activities.

So of course we can delegate responsibilities to an employee, to anyone in the firm, but when you see a red flag, Rule 5.1 and Rule 5.3, which covers supervision of lawyers and nonlawyers, expect you to immediately address a red flag and not just assume a mistake won't be made again.

Well, ladies and gentlemen, it's now time for our fourth pitfall and for those of you who felt that you never mastered conflict of interest in professional responsibility in your second or third year of law school, we can tell you that conflicts never get better. The problems only get worse.

So I want to begin by just having a bit of discussion with some of the panel members and I propose to tell you right now I have not discussed this hypothetical with them, it's coming out of the blue for them.

Panelists, you are lucky enough to represent the Subway Shop on Hempstead Turnpike. You all know the gun shop, you can get a gun, a tattoo, a Chipotle lunch or a five-foot Subway sandwich and a Dunkin' Donuts and a Jamba Juice and Bon Pain. The students know how to shoot I guess. Right over here. You understand that; okay.

You get a knock on the door. I'd like to say two people walk in and these are the two owners, the shareholders, let's make this a straight partnership, I don't know too much about corporate law, these are the two partners in the Hempstead Subway Shop. Got it? Everyone got that? Okay.

They seem very happy with each other. They just opened the shop. Everyone got that, just opened the shop. They don't have a partnership agreement yet, maybe they didn't even get their corporate certificate, but, folks, two people walk into the solo or small firm practitioner and they say, "Can you represent us? We would like you to be our GC counsel, whatever. We don't have any litigation yet, day number one."

Will you represent these two? How does that hand go, ladies and gentlemen, our panel vote; can you represent them?

MR. ROBERT

Depends, maybe.

MR. ROSS

With that definitive, assertive, confident vote, why is it that you have got these two buddies that put together a wonderful Subway shop that looks like it will make a lot of money if you watch all the TV programs, why can't you represent them?

MR. ROBERT

I don't know that we can't, but one of the first things you have to be alert to when multiple clients come in or potential clients come in at the same time is the issue of an actual or potential conflict of interest. We're going to spend 20 minutes talking about it but to fast forward to the end, if at the end of the day you're the attorney, and Michael says a lot of this is economic and money-driven, if it turns out that there is a conflict of interest and it's judicially determined, in addition to having the grievance issue, there is a forfeiture of the fee.

So while you're excited to potentially get the two clients coming in, realize if you call the shot wrong and don't do the right thing, at the end of the day, not only will they not have to pay you, you may actually be disgorged the fee you were already given.

MR. ROSS

So it's never a good program you go to when everybody says it depends. All I learned at the program if something happens, it depends one way or the other.

I will just read to everybody the rule and see if we can arm you with information. I'm going to arm you with Rule 1.7. Well, a conflict of interest, you shouldn't represent somebody if there is a concurrent conflict of interest which involves the lawyer in representing differing interests — "differing interests" and that's not easy to understand — and/or there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the own lawyer's financial property or other financial interest.

Let's take that off. You have no other interests. It's just these two people that walk in.

Why was there uncertainty on your part?

MR. CRACO

First, you want to know who your client is.

MR. ROSS

Bob Jones and Sarah Smith.

MR. CRACO

As individuals?

MR. ROSS

Bob Jones and Sarah Smith. They are not married to each other. They have families. They are nice people. He graduated from Hempstead High and went to Hofstra. They are not lawyers.

MR. BESUNDER

You have to have a really good discussion with them and you take them in and ostensibly at the beginning, they are somewhat united in interests. You discuss that. You discuss what they want. You indicate to them or you discuss with them what it is they want you to do, possibly prepare a partnership agreement, and then tell them go to part B of Rule 1.7 and talk about what has to be done if you are going to represent both of them. If you do draft an agreement, suggest to them they each take the agreement to independent counsel for review and then possibly have them sign a waiver.

I think the issue is at inception, is that a waivable or nonwaivable conflict?

MR. ROSS

First of all, I have been advised because we're being simulcast, we will hold the questions. We will definitely leave time at the end.

I do not believe it's a good idea in theory economically in my first meeting with Bob and Sarah who seem like very nice people, they don't seem to have differing interests to say, you know what, I'll represent you, but you ought to go to another lawyer to see if that's a good idea because it may be the next lawyer they go to says, I don't know what that other lawyer is telling you, I am more than happy to represent the two of you.

So you're going to say to them go to another lawyer? Harvey, small firm. This is not some large firm that can just kick out, who needs another client.

MR. BESUNDER

Also discuss the economics with them of going to two separate lawyers, but talk to them about the waiver and the potential conflict. I think you have to do that.

MR. CHANG

This scenario — again, I don't do commercial work, but I see it all the time when I do farm out commercial work to colleagues of mine. They have a situation. It's a start-up business. Take it out of the context of the Subway shop. Let's assume Mark Zuckerberg came up to you and said, "I have this Facebook thing and I've got five partners," but you will run into it as a solo practitioner or a small firm where there is a unity of interest amongst the two people or the five partners in the company and I think the view of good commercial attorneys is that, yes, you can do the representation just as long as there is disclosure and the way to handle that disclosure in my opinion is to make sure that you recite in the retainer agreement, because you're going to require a retainer agreement, a written retainer agreement, that you have discussed it with them. You don't have to go into the nuts and bolts of what the discussion was but simply that there has been a discussion that there are varying parties and if everybody is on the same side of the fence at that point in time, your retention as counsel to form the company and draft the partnership agreement or shareholders agreement is permissible.

MR. ROSS

Let's do this like the food challenge I love to watch, for those of you who watch The Food Channel, they talk about deconstructing a meal, so let's deconstruct that very, very informative answer.

The first thing that Chris talked about that two people come to you with interests that are either — we use different words for it — the "same," "united," I like to use the word "aligned" because I think that no two clients are ever perfectly equal but their interests are aligned. We have two clients whose interests are perfectly aligned.

Now then you said what are you going to talk to them about, you're going to talk to them about the disadvantages you said?

MR. CHANG

Yes.

MR. ROSS

How many of you use waivers, let's raise your hands, consent waivers?

There will be a lot of business out there.

So those of you who cannot see, I think we have 150 or 160 people in the audience. I only saw about ten hands go up. This is a productive day because what you learned in conflict, you learn for a lifetime. This is very important stuff.

We're going to talk to these clients about stuff. So far they don't seem to have opposing interests. So, first, what are you going to say to them?

Cliff, are you going to say five years from now, you may be enemies? They're there. We just make tuna sandwiches and footlongs and we just want to make money. What is there to talk about?

MR. ROBERT

You're going to do what is necessary in order to have the client's — if you are going to take Harvey's approach and use point fee about a waiver, that they gave the informed consent to a waiver or of a potential problem, and unlike a lot of things in ethics where you have to interpret, this is actually one of the easier ones because in the definition section, there is a definition of what constitutes "informed consent," so you can actually see specifically. It says, "Informed consent denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives."

How you actually make the pitch to the client what may come down the road or not, that's personal preference and your personal style. The rules, however, require that the decision that they make be as informed consent. How you get there is up to you.

MR. ROSS

So we're beginning a situation where like it or not, whether you're a real estate lawyer, a criminal lawyer, a personal injury lawyer, you have to know the field that you're in and understand the material risks which are not yet evident to you. You don't know about them right away but that they may occur later on.

How many people in the audience do personal injury work? Only a few, but you all take professional responsibility. Can you represent a driver and passenger; right? Two people who care for each other but you can see how a driver and passenger would have adverse risks.

So, Cliff, let's assume driver and passenger — I like this. This is very easy to understand. Ladies and gentlemen, can you wrap your mind about a car going down the road and getting T-boned, unfairly struck by a vehicle. It's clear to most people that the driver and the passenger were both victims, can you understand that, because they're T-boned by a car that jumps a red light.

Cliff, sounds to me like these two people have no conflict at all. Are you going to give them a big speech?

MR. ROBERT

The answer is yes and, as a matter of fact, the First Department has flip flopped on that. There was a case that came down that said under no circumstances can you represent driver and passenger. That case later — they had more recent decisions that said, well, that's not really what we meant and you can because what was happening is, notwithstanding that decision, it was happening all the time.

If I may, just by way of how important this issue of conflict and especially in the personal injury context is, there was a case a couple of years ago in Nassau County. In that case, a lawyer was representing various people who were sitting in the back of a stretch limousine on prom night and that limousine was struck by a drunk driver and horrific injuries were sustained by those in the car and the plaintiffs' lawyer did a spectacular job, not because I'm saying it, but in the trial court's decision, the judge said you did a job that nobody else could do. You found witnesses nobody else could find. You proved your case better than anybody could have done and I commend you, but, by the way, you forfeited your fee because at some point in time you should have realized there was limited coverage here and because you didn't properly get waivers from the clients and tell them about it, you now have lost your entire fee. That's how serious this is.

MR. ROSS

What happens here, and I want to talk to Chris a little bit, among lawyers, there are two critical things that get conflated, mixed up, the two terms are "conflict of interest"; right, because Rule 1.7 is a rule that governs your conduct when there is a conflict of interest, but very often, Chris, when I hear even judges, yes, even judges, they don't use the term "conflict of interest," they use the term "potential conflict of interest."

So I guess I have to ask the rhetorical question of everyone, what is the difference between a "conflict of interest" and a "potential conflict of interest"?

MR. CHANG

The actual conflict concretely is the hypothetical of a driver and a passenger. In any criminal case where you have multiple defendants, for example, there could be potential conflicts that could develop down the road, particularly in these racketeering cases. Potential conflicts are not problematic at the time of your retention. You're saying what does that mean then, should I or should I not undertake the representation. The answer to that is what is your appetite for the risk. How much do you want the business. Are you willing down the road if it's found that you should have or should not have undertaken the representation be willing to run the risk of the forfeiture of your fee.

These, ladies and gentlemen, are judgment calls that are made every day of the week whether you're at a thousand person firm or a solo practitioner out in Riverhead.

MR. BESUNDER

It may very well be at inception you've got a mere potential conflict and during the course of litigation, it turns out that that potential ripens into an actual conflict in which case the likelihood is you're going to have to get out from representing both of them.

MR. ROSS

I want to go back and talk about the retainer agreement.

Chris, when you began this discussion, you gave us a lot of information in a single answer. You talked about this issue of conflict or potential conflict being addressed by talking about inoculating yourself against the problem by putting it in the retainer agreement first.

Are you going to put that in the retainer agreement?

MR. CHANG

You don't have to identify and go into pained detail of the discussion that you have with the multiple clients when you're in your office. You can simply have a summary statement that you have been advised in my opinion that potential conflicts may exist going down the road. If that's in your retainer agreement, that kind of — not vaccinates you, but certainly is a basis down the road for if fingers start getting pointed that you have something memorialized to rely upon in defense to a claim that is made in the disciplinary process.

MR. ROSS

One last question about this. People ask what does it mean when you have a waiver of a conflict, right; a waiver of a conflict must be in writing and I'm going to ask Cliff this question.

When the rules say that a waiver must be in writing, does that mean I waive and put that in writing or does it mean that you articulate in a written document the material adverse risk of the engagement; in other words, you put in writing the risks that you have identified?

MR. ROBERT

The answer is that the client has to acknowledge in writing that you have explained and understood — this is something that has troubled me for the last couple of years and Michael and I have lectured on this countless of times.

At the beginning, I was a firm believer that the best course of action for best practices was say we had a discussion and don't list anything about it so if down the road there is an issue, there is much more wiggle room, if you will; however, Michael has persuaded me over time now that I think it's a better course of conduct to list the most reasonable and likely issues and make it clear it's not an exhaustive list but don't have that one sentence and think that's enough. Give some detail as to what it is.

MR. ROSS

Well, you have taken on this case, ladies and gentlemen, we're staying with the Subway shop case.

How many people in this room do some form of litigation?

For those of you who do litigation, ladies and gentlemen, this is our brain trust here and I'm a new practitioner who got the benefit of going to this brain trust because here's the situation, somebody dies and somebody chokes eating a sandwich, a tuna sandwich. Most of you who have been to Subway know the bread is delicious but they take the vegetable and you know how they chop it really thin and the person biting into the Subway sandwich thought it was going to be a very thinly chopped vegetable, instead it was a big carrot, choked. The autopsy shows

that the person, the plaintiff, asphyxiated on a big carrot that wasn't chopped. Wow, how strange was that.

In your initial discussions, they said we have no idea; the two partners say they have no idea. They both happened to be working there the day this happened.

Got that so far?

Now comes times for depositions. Apropos what happens — we heard a discussion this morning about things that happen in litigation. I want to revisit it for a second. One of the defendants — by the way, these two people, let's assume they have no corporate protection or inadequate insurance. Can we represent the two of them now at trial?

What do you think?

MR. BESUNDER

So far.

MR. CHANG

Yes.

MR. ROSS

By the way, we might want to get a new waiver; right, because now we realize that things might develop and something unexpected happens at trial and I want to have a conflict waiver that says two months before trial, you understand that there might be surprises, etcetera, etcetera and if there are questions, we will take it.

One of the owners says to the solo practitioner or small firm practitioner, "Paul, can I ask you something?"

MR. CRACO

No.

MR. ROSS

You say yes.

MR. CRACO

Yes.

MR. ROSS

How about this one, "Can I close the door?" How many of you have heard that?

My experience is that typically is not a good sign for what's to follow. Call me crazy.

"Can I close the door, Paul?"

MR. CRACO

"If you must."

MR. ROSS

Let's play. There might be some people in my position, I never close the door because that might look bad.

I'm serious.

MR. CRACO

I would prefer that you close the door behind your partner in the room.

MR. ROSS

Oh, does the partner have to be there? We haven't even started yet.

MR. CRACO

Well, you know, it depends on the nature — the first thing I would do, you mentioned you might want to get another waiver. This is a new matter. I would want to get another retainer and a waiver. If I represented both parties, I would probably want both parties there.

MR. ROSS

No, no, this is the same thing.

First of all, do both parties have to be there every time you talk to a client?

MR. CRACO

Are we now defending a wrongful death suit?

MR. ROSS

Yes, yes, definitely, wrongful death suit. Everything is peachy creamy. It's the mysterious carrot. We don't know where it came from. It was an immaculate carrot. It just got there.

I'm putting you on the spot, Paul.

MR. CRACO

We have the need for another retainer, first of all.

MR. ROSS

All right, we passed over that. It's the same matter.

Okay, all right, whatever, we got the paperwork, you're there.

You're right, absolutely, it's clearly a new matter. We have to get a new retainer and it's a contingency matter, absolutely, whatever jurisdiction, you have to have a retainer.

Okay, we have a retainer. Can I close the door?

MR. CRACO

Yes.

MR. ROSS

Okay. I'd like to ask you a question. Suppose, suppose the Cuisinart that we had on the food line that day was just broken, suppose. You follow me so far?

MR. CRACO

Yes.

MR. ROSS

Suppose it was broken and suppose we were very busy. Suppose I was chopping by hand.

Would that be good for the case or bad? I'm just asking.

Can you answer that question?

MR. CRACO

Not on those facts I don't think.

MR. ROSS

Wow. Really? Okay.

Harvey, can you answer those questions?

MR. BESUNDER

I think you can. I think this is where the finesse of 44 years of experience comes into play.

MR. ROSS

I like that, "finesse."

MR. BESUNDER

Hypothetically, and probably you could reach back and say there were some cases some years ago in which a similar situation happened and the Cuisinart was found to not be working properly and it was not being operated properly as well and then you may have some what they call product liability, is that what they call that kind of stuff, and there could be some question as to the proper operation of this and then you're going to have to let it flow from there.

Now your antenna is up and now you're thinking maybe I have got a little bit of a problem here because maybe there is a little bit more liability on one of these partners than the other and how far you want to pursue that, I don't know at that point, but I think eventually it's going to come out and you're going to have to be very careful as to how you handle it from that point on.

If that wasn't evasive, I don't know what was.

MR. ROSS

Chris, I want to say something to you.

MR. CHANG

Yes.

MR. ROSS

I have argued so many times in front of Chris.

Chris, if you were on a panel and somehow — there seems to be so many tape recorders in the world — and somehow this information is captured by some surveillance system or something, inadvertently captured, and you heard this sort of can you answer this question and the lawyer goes, sure, if there was a Cuisinart and it was broken, it's going to hurt the case.

I mean I know Harvey would say it with some finesse, but it sounds to me that a lawyer who is answering that kind of a question may, in fact, be influencing his or her client — shall I use the word, the "L" word — to lie. And it sounds to me as if the lawyer — again, to what we heard this morning; right? Is there a duty to inquire? Is there a duty to be suspect or should a lawyer even say, "I'm not answering that question"?

MR. CHANG

The hypothetical poses the issue of, number one, what is your appetite for risk; and, number two, it goes back to a discussion that was had this morning with the first panel of how far of an obligation do you have in terms of candor under Rule 3.3, how much do you want to dig; how many questions do you want to ask; do you really want to know what happened.

In the hypothetical that has just been posed, personally, I would have said we need to terminate this conversation and then decide at that point in time where I go in terms of the continued representation.

I do some criminal defense work as well. I cannot tell you how many times I don't have substantive conversations with the client regarding certain matters that the government is charging. I just don't ask questions. The burden of proof is on the government to prove my client's guilt beyond a reasonable doubt. If I see a hole in the case and I can argue consistently with the evidence a defense, I'm going to do that. I don't need to talk to my client about that.

MR. ROSS

I want to stop for a second and talk about what Chris talked about.

In a rules driven world, we have to look at the American model of litigation, the American model of litigation can be said to be truth driven but it's probably more accurate to say it's burden of proof driven.

Rule 3.3 is a newly configured rule but it basically says a lawyer shall not knowingly offer false testimony; right, we all know that. And it's changed, in what respect?

Cliff, it's changed. Now if you happen to know that a client has given false testimony —

MR. ROBERT

You have a duty to correct.

MR. ROSS

Now, in both situations, if you have knowledge of the carrot, if you have knowledge of the Cuisinart having been broken, that's a bit of a burden; would we agree?

MR. CHANG

Correct.

MR. ROSS

We have to respect people on the panel. We all have our own views in the world.

The question is do you have to ask the question about the Cuisinart? The answer is, I think Chris is right, we don't have to, but there is risk in not doing it. It's all about appetite for risk; right?

MR. CHANG

Correct.

MR. ROSS

It's all about appetite for risk.

MR. BESUNDER

Also, under the circumstances of the hypothetical as you gave it, Mike, one of the questions is can you based upon that conversation make a reasonable inference that the carrot wasn't chopped up because of the Cuisinart merely because that question was asked and you're balancing your obligation to your client on the one hand against that risk on the other and at what point do you cut off that conversation and it was asked to you as a hypothetical and may be perfectly innocuous, you don't know.

MR. ROSS

One of the challenges that a small firm practitioner or a solo practitioner has is they don't have people to talk to.

In this situation, if you were practicing with five other lawyers, you would have a luncheon meeting or five o'clock meeting and say ladies and gents, guys and gals, we need to talk about this. This is the situation we have.

You would review the situation and somebody might take out the ethics books and say I think I'm okay as long as I don't know of a genuine problem of a false statement. Knowledge is a defined term. It's not an inference. It's not even a high level of belief. 1.0(k) says that the word "knows denotes actual knowledge of the fact in question. A person's knowledge may be inferred from all of the circumstances."

So the real question here, and I think that Judge Pauley made a lot of great points, but the truth is there is a certain synergy by putting a lot of people together or four or five people in terms of assessing the pluses and minuses.

So I want to stop us for a second. How many people in this room have represented more than one person in a transaction or a piece of litigation? I'm not going to call on you, I promise.

One of the things, Paul, that you talked about which was a very good point, you're talking to one person; right, and if you're talking to one person and you learn of this question, right, the question about the Cuisinart, do you have an obligation to share that answer with the other client. Do you have an obligation to share information with other clients?

Cliff.

MR. ROBERT

Well, again, starting out with the answer you don't like, it depends. Under the fact pattern, the partnership was your client and then the distinction has to be made what is confidential versus what is privileged because if the partnership itself was your client, the privilege would attach to you as the attorney and the two clients.

MR. ROSS

Let's assume that you're representing the two partners and the client. Let's assume you're representing everybody.

MR. ROBERT

You have a very delicate situation and to use Harvey's phrase, this is where finesse comes in here because you have to figure out what is it that I want to do and where is it I want to be and do you have a duty at that point to maybe step aside because you cannot have information that can be detrimental to one client and not share it with the other.

MR. ROSS

Why? Let's assume the one partner says to you, okay, look, I said that to you in confidence. I don't want to share it. Let's not talk to anybody about it. That's just between you and me and this is a privileged conversation.

MR. ROBERT

Unfortunately, the horse is already out of the barn at that point. What you really want to do is in the beginning when these people come in, make sure that they understand what the difference is between confidential and privileged and if one of them says something to you in private, you are then going to be duty bound to report it to the other so you want to be very proactive about that.

MR. BESUNDER

Then that potential conflict starts looking more and more like an actual conflict, especially when the two of them are not in agreement. One has knowledge and the other one doesn't.

MR. ROSS

Comment 30 to Rule 1.7 states the principle that as between commonly represented clients, there is no privilege. So if one client asks you not to say something to the other client, you can't do that. The same way, if you as an estate lawyer are told by one of the spouses that they have a child out of wedlock or there is some cheating involved, you can't honor the request not to tell the other spouse.

As between commonly represented clients, there is no privilege.

We have talked about candor. This is an issue that I think is very, very challenging for people who litigate by themselves. I think in this situation, you need people to talk to about these issues.

Before we finish, and we get to our last pitfall, I want to talk a little bit about the issue of neglect and malpractice.

Ladies and gentlemen, the disciplinarians in this room know that the major problem that causes lawyers to become the subject of attention in disciplinary committees is the subject of neglect and I guess my question is, first of all, what does the term "neglect" mean and how does it become a problem for small firm practitioners.

Chris, you want to comment on that first.

MR. CHANG

First, let's talk about the difference between "neglect" and "malpractice."

Malpractice is blowing the statute of limitations, assuming you can't establish some sort of reasonable excuse for it. Neglect as viewed by the disciplinary committee is the pattern of conduct where it goes beyond failure to communicate. There is a pattern of conduct of that, together with ignoring the client's matter, not responding to the client. From a disciplinary point of view, it is not an isolated incident if my lawyer didn't return my fifth telephone call, it is a pattern or conduct over a period of time and probably with respect to repeated matters.

MR. ROBERT

I want to add something on the issue of the malpractice portion of it that I think is especially prevalent with small firms and that is when you're aware of the fact that you may have committed malpractice, under your policies of insurance, you are required to notify the carrier of a claim or of a potential claim and that works part and parcel with your obligation to have to advise the client of malpractice and a lot of people make two very significant and what can be life-altering mistakes. The first is to notify the carrier of potential malpractice without notifying the client of it. That can put you into Michael's world and the second part of it is notifying the client and not notifying the carrier which would put you into my world hoping that somehow you're going to get yourself out of this mess later and inevitably that kind of claim will be disclaimed by your insurance company and more and more, at least that I see, it's the small firms that have that problem because they don't have a committee when where there is a problem, you go and at that point a decision is made do we notify the carrier or do we not and do certain steps from there.

MR. CHANG

Also, parenthetically, in this day and age understanding what it is to be a solo practitioner, you have to be in four different places at one time, two different courthouses, you're constantly on the fly during the day, particularly if you do litigation, but the fact of the matter, in this day of an iPhone, a Blackberry, Twitter, Facebook, LinkedIn, Groupon, everything you have, not responding to a client is the most frustrating thing for a client to experience, not getting a returned phone call and not returning a phone call on a repeated basis is almost inexcusable and you're inviting a problem at your doorstep, no matter how unpleasant the conversation may be with the client. You have got to remember, the client is the client.

MR. BESUNDER

Probably the biggest issue with the grievance committees is the failure to communicate and it just blossoms into other problems.

MR. ROSS

You should know, by the way, if you have identified a problem within your firm, if you have identified an act of malpractice or a risk of that within your firm, if you send an e-mail within the firm asking for an explanation or you ask someone, for example, your partner or subordinate, please explain to me what happened, a communication, an intrafirm communication is not privileged.

If your client later sues you and wants you to reveal all of your files, you must turn over your file, even if it includes communications between you as the lawyer who was trying to get at the root of the malpractice or the root of the problem, under the theory that it breaches fiduciary duty, you cannot serve two masters; and, therefore, so long as you're representing client A, if you're talking within your firm about an act of malpractice or a risk of that with a client, the client is entitled to discovery of that. That is one of the things that people don't realize. They say I'm a lawyer and I'm simply acting as my own lawyer for the firm. The courts say you can do that, but only after you have discharged the client.

So long as you're representing the client, all communications that you have about this situation belong to the client.

We're running short on time. I want to leave some time for some questions but I want to say one personal thing about the seventh pitfall: My view of the world when you're a small practitioner is — the big mistake, the seventh deadly pitfall, is seeking advice from the wrong person.

You need to have a support structure to get advice from people that you can rely on and my question to the panel is going to quote the guy down the hallway who has been practicing for 20 years; is that the right person?

MR. ROBERT

No.

MR. BESUNDER

Depends who the guy down the hallway is. If it's you, I'm there.

MR. ROBERT

The answer is generally no; however, the caveat is that may be a good place to start. Start talking to somebody you're comfortable with.

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

MR. ROSS

Any other advice?

MR. BESUNDER

Again, what I said before I think rings true, that if you join a Bar association and you meet other lawyers, you feel a lot more comfortable asking those questions and just pick up the phone and call a lawyer. We would probably rather speak to you to help you get out of a problem than speak to our clients who are causing us the problem.

MR. ROSS

Just a couple of thoughts. Obviously the rules are the first place to go but there are other places to go as well. One of the icons in ethics is Roy Simon who recently retired from the faculty. Roy Simon's 2008 treatise discusses the old rules of professional responsibility and he now has a new text out on the new rules.

There is also a thing called Oceania which is searchable online, searches all the websites for ethics opinions and we have the ABA/BNA Lawyers Manual and LexisNexis.

There were some hands that were raised for questions.

Sir.

AUDIENCE MEMBER

With the choked carrot situation, wouldn't it have been better practice not to hear it at all; there is another potential conflict of interest that you may be sued for malpractice —

MR. CHANG

I think the question was wouldn't it have been better not to speak to them at all; is that —

AUDIENCE MEMBER

Because you may be charged with malpractice because you recommended the partnership instead of a corporation for a food industry.

MR. ROSS

I'm going to repeat the question. The question was: Did you commit malpractice by either recommending or not recommending the form of business for them.

AUDIENCE MEMBER

No, I said the potential.

MR. ROSS

The potential for?

AUDIENCE MEMBER

The potential conflict of interest that you may be sued by them.

MR. ROSS

Well, ladies and gentlemen, you always face the possibility of being sued. Commercial lawyers have very, very significant premiums for malpractice because of that issue.

The question is I think we have advanced waivers. There is a thing called an advanced waiver which is put in your retainer agreement which does what, it hedges against that; right?

MR. CHANG

Correct.

MR. ROSS

So you reduce the ability of someone who will sue you later by saying you realize that by representing the two of you now, had you had separate counsel, you might have a separate business organization, you might have obtained different insurance and I think that's what good lawyers do. You have to have an advanced waiver.

Now I just want to say one thing, there are cases that have been decided particularly in the federal court that take a look at your retainer agreements; they take a look at your retainer agreements and say is this advanced waiver, in other words, what you're putting in your retainer agreement, is it putting somebody on fair notice?

So I'm going to ask, for example, Cliff, if a retainer agreement says you understand that there may be a conflict of interest and you're waiving it and that's literally all you tell the client, does that advise the client of all material risk?

MR. ROBERT

Probably not.

MR. ROSS

On the other hand, are you going to memorialize so this gentleman has a good comprehension of the risk, if you have 20 separate risks, are you going to have a retainer agreement one, two, three, four — 18, 19, 20?

MR. ROBERT

Probably not there either. It's going to be somewhere in the middle.

MR. ROSS

Will you separate and apart from the retainer agreement have notes in your file, for example, where you might have a checklist of things that you review with a client where you identify these are the things that I cover for commercial risk?

MR. ROBERT

Absolutely.

MR. ROSS

There is a risk arbitrage here. I think it's crazy to put all of those things in a document. The client is going to be afraid, but, in fairness, I think the client is entitled to the information so you may want to have some record of it.

MR. ROBERT

I like the idea of it being your custom and practice. You can say this is the sheet I usually use and I checked off the boxes during our discussion.

MR. ROSS

One final thing I do want to ask each of the panelists to do is give us one last nugget of advice for solo and small practitioners.

Harvey.

MR. BESUNDER

I just want to say use common sense and be careful and we're a very self-analytical profession and there probably is, as I said to Mr. Craco before, there is not another profession in this country that does the things that we are doing and look at what we do and constantly revise our rules and adhere to them and look at them as closely as we do.

MR. ROSS

Chris.

MR. CHANG

Enjoy what you're doing because if it stops, do something else.

I have been practicing now 30 some odd years. I enjoy being at a big firm, government, small firm, medium sized firm. I really love what I do.

MR. ROSS

Paul.

MR. CRACO

Overcommunicate with your clients. Always err on the side of telling them more and seek out mentors when you're young to bounce these things off of.

MR. ROSS

Lastly, Cliff.

MR. ROBERT

Realize when you do the right thing and treat people fairly, the right thing usually happens.

MR. ROSS

Thank you very much for coming.

MR. SAUNDERS

Thank you very much, Michael and panelists.

Thank you all for coming. That concludes our program. Once again, in due course, these proceedings will be available on our website and the address of that is at the bottom of the first page of the program.

Once again, thank you all.

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